



CAPE COD COMMISSION

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DATE: January 4, 1996 HDEXDCPC9501

TO: Ms. Mary E. Brunette
366 West Falmouth Highway
P.O. Box 839
West Falmouth, MA 02574

FROM: Cape Cod Commission

RE: Hardship Exemption District of Critical Planning Concern
Section 23, Cape Cod Commission Act.

PROJECT: Brunette Property - Lot E
360 Route 28A - W. Falmouth, MA

BOOK/PAGE: 4576 / 275

DECISION OF THE CAPE COD COMMISSION

SUMMARY:

The Cape Cod Commission (the Commission) hereby approves with conditions the Hardship exemption application of Mary Brunette for development of a single residential lot (Lot E) within the proposed Black Beach/ Great Sippewissett Marsh District of Critical Planning Concern. The decision is rendered pursuant to the vote of the Commission on January 4, 1996 under Section 23 of the Cape Cod Commission Act (Act).

LOCATION:

The property (Lot E) is a 67,000+ sq.ft. lot, located on the west side of Route 28A in West Falmouth. The Massachusetts EOTC owns the former New Haven /Penn Central Railroad tracks to the west of the property. Lots A and B to the north and lot D to the south are owned by Ms. Brunette. Lot A contains Ms. Brunette's house and an office/cottage outbuilding. Lots B and D are presently undeveloped.

DESCRIPTION:

The shape of the property (Lot E) is commonly referred to as a flag or pork chop lot. It has the minimum required frontage (50 feet) on Route 28A and a long narrow neck almost 300 feet long before it becomes a rectangular area of approximately 360' x 150' in size. The lot is mostly surrounded by the following wetlands: Area 1 to the west of the railroad tracks is the Great Sippewissett Marsh; Area 2 includes a portion of the lot on the northern side and flows directly into the Great Sippewissett Marsh by way of two culverts under the railroad

tracks; Areas 3 and 3A are isolated wetlands on the east side with the proposed crushed stone driveway in between; Area 4 is on Lot D is also an isolated wetland. Lot E is located within the FEMA A12 Zone with a flood elevation of 14 feet above sea level. The topography of the site is fairly level with elevations between 5 to 10 feet above sea level. The high point is toward the southwestern side of the rectangular area of the lot. The applicant has proposed a 3 bedroom house which has a 2,816 sq.ft. first floor. The proposed first floor elevation of the house is 15.10 feet above sea level. There is also a 576 sq.ft. first floor attached garage. Local review of Ms. Brunette's application for an Order of Conditions before the Falmouth Conservation Commission has been suspended while the DCPC designation is pending approval by the Assembly of Delegates and while the Town develops local implementing regulations.

JURISDICTION:

The hardship exemption request is for development of a single residential lot (Lot E) within the Black Beach/ Great Sippewissett Marsh District of Critical Planning Concern (DCPC). The hardship exemption request is being heard under Section 23 of the Cape Cod Commission Act.

Section 23 of the Act states..." The commission shall have the power after holding a public hearing pursuant to section five to grant an exemption, in whole or in part and with appropriate conditions, to any applicant from the terms and provisions of this act where the commission specifically finds that a literal enforcement of the provisions of the act would involve substantial hardship, financial or otherwise, to the applicant and that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the act."

PROCEDURAL HISTORY:

The following chronology describes the history of the hardship application by the Cape Cod Commission to date:

- 10/18/95 The Hardship Exemption application was submitted to the Commission.
- 11/28/95 The public hearing opened and closed in Falmouth. The record remained open.
- 12/6/95 The subcommittee held a meeting and received additional information from Ms. Brunette regarding financial hardship.
- 12/14/94 The subcommittee held a second meeting and voted 5 to 0 to recommend to the full Commission to grant a DCPC Hardship Exemption with conditions to Ms. Brunette for Lot E.
- 1/4/96 The full Commission reopened the public hearing took additional testimony and closed the public hearing.

MATERIALS SUBMITTED FOR THE RECORD:

The following materials have been submitted to the Commission as part of the record:

1). Hardship Exemption Application	M. Brunette	10/18/95
2). Additional Information (plot plan)	M. Brunette	11/9/95
3). Additional Information (timing)	M. Brunette	11/21/95
4). Letter in support of Hardship Ex.	E. Fachon	11/24/95
5). Response to Staff Report 11/24/95	M. Brunette	11/27/95
6). Letter on the property	B. Krance	11/27/95
7). Response to Staff Report 11/24/95	M. Brunette	11/28/95
8). Memo against Hardship Ex.	Falmouth Con. Com.	11/28/95
9). Additional Information	M. Brunette	12/5/95
10). Requested Assessor Information	Falmouth Con. Com.	12/5/95
11). Information on Lot D	M. Brunette	12/6/95
12). Response to Staff Report 11/24/95	LEC	12/6/95
13). Letter against Hardship Ex.	A. Lancaster	12/8/95
14). Information on Form A	Falmouth Planning B.	12/13/95
15). Response to Staff Report 11/24/95	Fasanella, Johnson & Wood	12/13/95
16). Response to Staff Report 12/11/95	Fasanella, Johnson & Wood	12/13/95
17). Information request	M. Brunette	12/14/95
18). Information request	M. Brunette	12/21/95
19). Letter on Hardship Ex.	P. Tancredi	1/3/96
20). Information on Hardship Ex.	Falmouth Con. Com.	1/4/96
21). Letter on Hardship Ex.	A. Fleer	1/4/96

The application and notice of the public hearing relative thereto, the Commission's staff reports, and exhibits, minutes of the hearings and all submissions received in the course of the proceedings, including materials submitted on file HDEXDCPC # 9501 are incorporated into the record by reference.

TESTIMONY:

The following summarizes the testimony regarding the DCPC Hardship application received at the November 28, 1995 public hearing:

Mary Brunette presented the project. She stated that she had received the staff report yesterday and submitted a letter for the record. She said that she had wanted to meet with the subcommittee prior to the hearing and was told that it was not possible. She said that she does not accept the conclusions in the staff report as reasonable and fair. Staff does not recognize the impact on her financially or emotionally from this. The buffer restrictions discussed in the staff report are not in any existing law or ordinance. She said that 13,176 sq. ft. would be altered for the dwelling, not 33,000 sq. ft. There is little clearing; the house will be built in a field. She said that Lot D is under agreement and this agreement would preclude using a common driveway for access. There is a utility easement on Lot D which would limit disturbance to surfacing for the Lot E driveway.

She said that the proposed septic system is currently in the best location. Her house had been designed for retirement living with a large first floor and a 1/2 second story. She said that the lot is 1.54 acres and the house is 2912 sq. ft. plus a workshop and a 2 car garage. She has met all local regulations for construction.

No evidence of adverse effect on surrounding areas has been submitted. She presented the history of permitting for the lot as evidence that the lot should not be under the Commission's jurisdiction and said that any revisions being proposed are being done out of a desire to seek compromise from her. She should not be held to nonexistent regulations. Staff's desire to do so represents arbitrary and prejudicial enforcement efforts. Revisions would add to financial hardship. She said that either there is a financial hardship and she should get an exemption or there isn't. She believes that she has demonstrated a hardship. She added that when she planned the house she wanted a home that would meet her retirement needs including the workshop.

Mr. Wightman asked how much money has been spent so far on permitting. Ms. Brunette responded that she estimates that she has spent \$15,000 on this lot.

Mr. Prince asked Mr. Guimond about the flood zone. Mr. Guimond responded that the property is in the FEMA A zone. The required elevation is 15' according to FEMA and the house has been designed at 15.1'. It is not 1' above base flood elevation.

JoAnn Muramoto noted submission of a letter from Cameron Gifford, chair of the Conservation Commission, which summarizes the points they would like to make. They are opposed to a hardship exemption for Lot E. She read the letter. The primary reasons are that the moratorium is temporary, Ms. Brunette holds other properties which she can build on (Lot D), Lot E has been demonstrated to be a buildable lot even with a 100' buffer to the salt marsh, and they feel they have treated Ms. Brunette fairly with delays in local permitting due to insufficient information, specifically a disagreement about wetland boundaries. She also noted that the applicant has been mowing wetlands on her lot for many years and said that now that the boundaries have been established, this practice should end.

Jeffrey Ryther, a civil engineer who developed the original plan, said that he designed the septic system in the fall of 1994 prior to the new septic regulations. They have a 4.1' separation to high adjusted groundwater. An additional foot can be designed into the system, but would result in a mounded system. The plans have been filed with the Board of Health and meet their requirements. They have not acted since the Order of Conditions has not been issued. He added that designing the building to base flood elevation meets FEMA and the building code requirements. He showed elevations of the house and said that the house is a shingle style bungalow and questioned the regulations that the Commission and staff were talking about.

Don LeBlanc explained that these were standards in the Regional Policy Plan that had been adopted by the county Assembly of Delegates. They are being applied to a single family house through the DCPC.

Gary Raymond, Ms. Brunette's son-in-law, said that he is an assistant vice president for Cape Cod Bank & Trust. He said that he is aware of her financial situation. He said that Ms. Brunette's debt level is well beyond her ability to repay based on income level. She has borrowed on the equity of the property to service the outstanding loans and this cannot continue. Her only way out is to liquidate her

assets to reduce her debt. Freezing the lot or limiting the market value severely limits her options and results in a financial hardship. He added that there is no financial conclusion in the staff report. He submitted a copy of his remarks for the record.

Ms. Bebout noted that to date the subcommittee has only received income tax returns and a list of expenses from these lots. They have not received a financial statement of any kind.

Sandra Faiman-Silva said that she is Mary's friend. She has been at all the hearings with Mary. Mary is not cutting wet meadows, there are no designated wet meadows on her property. She can attest to Mary's excessive debt load, she recently refinanced her home and is paying \$6000/ month in mortgage payments. She has astronomical rates of interest due to her very bad credit. Her next step is bankruptcy court. She has about 2 months worth of cash for payments in the bank. She purchased the property when the market was doing well. She used to be an X-ray technician and began selling real estate 24 years ago. She is 55 years old and won't be retrained. Her assets are in the land and she is trying to liquidate it. She has been trying to do that for the last 2-3 years.

Lisa Raymond, Mary's daughter, said that Mary has a legitimate need for a hardship. This is due to unreasonable delays by the Falmouth Conservation Commission and a frivolous appeal on Lot D. The two lots cannot be separated for discussing the hardship. She concluded by stating that the financial and emotional hardship that has been suffered by her mother has been exacerbated by the Falmouth Conservation Commission, Attorney. Silverman and now the regulations imposed in this area. Lot E has met every requirement and more than \$15,000 has been spent. The permit should have been approved. Politics and personal ambition should never have reached the level they did in this case. She closed by asking the subcommittee to recommend in favor of the exemption.

Dan Scherer, a resident of the DCPC said that many people in the area have financial difficulties. He will file for a hardship, and he said that a lot of people will because of this. He said they all have plans for the future that the regulations will not permit. He said that if the subcommittee makes an exception for one person they should do so for everybody or start over with a better area. He said that the DCPC boundary is improper, it won't solve the problem and he hopes the whole plan will be canned. He thinks the town should buy the land if they are planning to subject it to these problems.

Vicky Bebout asked about the town's time frame for developing regulations. Mr. Guimond noted they expect to bring local regulations to town meeting next November. Ms. Bebout pointed out to Mr. Scherer that the moratorium is not permanent. Mr. Scherer responded that the new rules will be permanent. Mr. Wightman added that the new rules will need to be adopted by the citizens of the town through the town meeting process.

Paul Lelito asked if this was a hearing or a meeting. Ms. Bebout responded that it was a hearing. He asked when the hearing would be closed. Ms. Bebout said that would be determined tonight. He asked about the time frame for submission of

information. Ms. Bebout said that the record would not be closed tonight.

Mr. Lelito said that he is an environmental consultant with LEC, Inc. He was retained by Mary Brunette after her first hearing with the Falmouth Conservation Commission. He looked at lots D and E and made a recommendation regarding how to proceed with permitting. He noted that she had been delayed for 6 months because of the inability to make a wetland delineation because the area had been mowed. He suggested pursuing 1 lot as the path of least resistance. The Conservation Commission did not agree with his wetland delineation and hired Fugro, East. Fugro agreed with him. DEP issued a superseding order of conditions with no significant changes with regard to the delineation. He said that he had done soil boring to determine the history of the area. It was used as pasture in the past so the buffer zones can be modified. He noted that no trees will be cut. The vegetation that will be removed is a mowed lawn. A portion of the hedgerow will be temporarily disturbed for the septic system. He said that he felt that the buffers were not as significant as they would be if there was steep topography. One of the wetlands (3A) is a direct result of the discharge pipe from the roadway. He said that Mary's cutting circumvented the wetlands. She did that intentionally. He urged the subcommittee to look at this site specifically. This is by no means a pristine site. The proposed construction footprint is unobtrusive to the wetland resource.

Mary Brunette said that she wanted to correct Ms. Silva's testimony and said that she doesn't have bad credit, but that she has no borrowing power.

Ms. Brunette said that she was appalled the Conservation Commission's letter and asked if they had voted on it. Ms. Muramoto responded that the letter was prepared by she and Mr. Gifford and that it will be presented to the Board tomorrow.

Ms. Brunette said that she had never cut the wetlands. She added that the vegetation has come back significantly in the time that she has lived there because there used to be horses there.

Paul Lelito asked for an informal meeting with the subcommittee. The subcommittee responded that such a meeting was not possible or legal. They are required to have public meetings. Mr. Olsen said that the applicant could meet with staff. Ms. Brunette said that it was her understanding that the regulations provided for such meetings. She read language from the hardship exemption policy that states should an applicant disagree with staff, he or she may request a meeting with the subcommittee to discuss submittals. Ms. Brunette noted there was uncertainty about what information needed to be submitted. She said if the subcommittee wanted a financial statement she could provide one.

Paul Wightman asked Mr. Raymond to be more specific about what he was referring to with regard to Ms. Brunette's financial situation. He said that a letter on that subject would be helpful to him -- particularly with regard to the statement that her debt level was beyond her ability to repay. Ms. Brunette said that she would work with Mr. Raymond to prepare a statement.

Mr. Raymond responded that if you look at her income figures and level mortgage she could qualify for, it is clear that they are overextended.

Ms. Bebout said that it appears the problem is sudden and arose in December 1994, based on the testimony. Ms. Brunette said this was not true. Three years of tax returns have been submitted. She has less than \$50,000 per year. She has borrowed on the equity in her house to pay the bills so she didn't need to apply sooner. Now she has reached the maximum. Ms. Brunette said that she has a \$286,000 mortgage on the house she is living in and another \$100,000 and \$60,000 in mortgages. She is paying \$6000/month.

Ms. Bebout asked if she had financial problems why she hadn't started the process three years ago. Ms. Brunette responded that she was hoping that things would change and that she was praying for a miracle.

Mr. Wightman stated that the subcommittee does not have a breakdown of information on her financial situation. He said that they need to have information on the record to document her hardship request. Ms. Brunette said that no one had asked her. Ms. Brunette said that the money that she borrowed from the bank needs to be repaid and all of the properties are interrelated. On this lot she has a \$60,000 mortgage and pays \$1100 per month.

Paul Lelito asked if the Commission can accept information after the hearing has closed. The subcommittee responded that they would close the hearing and leave the record open.

Ms. Brunette said that she had offered to eliminate a lot from development by combining lots A and B in exchange for grandfathering of Lot E and that she had never gotten any response from anyone. She doesn't know why the Commission is not interested. She said that she had been planning to do this anyway, but if she cannot build on Lot E, she'll sell Lots A and B and let the next guy deal with getting permits to build. Mr. LeBlanc responded that it was a nice offer, but the subcommittee cannot trade for Lot E. They must look at the hardship exemption on its merits and can only look at Lot E. Ms. Brunette pointed out that the staff's presentation had included a lot of information on Lot D. She doesn't know why that would be the case. Mr. Guimond responded that Lot D was mentioned because the applicant had included a discussion of it in her submittal.

FINDINGS:

- 1). The Black Beach/Great Sippewissett Marsh area was nominated as a District of Critical Planning Concern because it contains significant natural, coastal, and scientific resources. The proposed district also contains substantial areas of sensitive ecological conditions which render the area unsuitable for development.
- 2). The interest to be protected by the proposed Black Beach/ Great Sippewissett Marsh District of Critical Planning Concern include:
 - To improve water quality by preventing new sources of pollution and remediating existing pollution sources;
 - To protect and enhance existing vegetative cover in order to

maintain water quality and wildlife habitats;

- To protect wildlife, waterfowl, and plant habitat and to maintain existing populations and species diversity;
- To prevent loss or degradation of critical wildlife and plant habitat;
- To prevent new stormwater runoff discharges and to improve existing stormwater runoff discharges;
- To protect coastal ecosystems which support the continued viability of harvestable shellfish and finfish habitat;
- To improve groundwater recharge;
- To minimize the impact of new development, reconstruction and/or expansion on the interests listed above.

3). The Commission found that there is a substantial hardship created by the timing of the permitting process. Specifically, it found that the applicant had submitted a notice of intent for the proposed development to the Falmouth Conservation Commission and had a public hearing prior to any public hearing on the proposed DCPC. In addition, an Order of Conditions would have been issued prior to the nomination and the applicant would have been able to proceed had there not been issues relating to wetland delineation which required several months to resolve. This delay caused the application to be subject to the DCPC moratorium. This hardship was found based on the following dates:

- December 6, 1994: A Notice of Intent was filed by Mary Brunette with the Falmouth Conservation Commission for lots D and E;
- December 30, 1994: First date of public notice stating the Falmouth Conservation Commission's intention of nominating a Black Beach/Great Sippewissett Marsh DCPC;
- January 25, 1995: The Falmouth Conservation Commission holds a public hearing on lots D and E. The hearing is continued to June 14, 1995, in order to address wetland delineation issues;
- June 13, 1995: The Falmouth Conservation Commission files the DCPC nomination with the Cape Cod Commission;
- June 14, 1995: The Falmouth Conservation Commission holds the continued public hearing on lot E. The hearing is continued to July 12, 1995;
- July 12, 1995: The Falmouth Conservation Commission holds the continued public hearing on lot E. The Falmouth Conservation Commission did not vote on an Order of Conditions due to the DCPC moratorium on the issuance of permits.
- July 13, 1995: The Cape Cod Commission votes to accept the DCPC nomination for consideration with a specific finding regarding the prohibition of single family homes;
- August 31, 1995: A subcommittee of the Cape Cod Commission holds a public hearing in Falmouth on the proposed DCPC.

- September 7, 1995: The Cape Cod Commission votes to extend by 60 days the DCPC nomination review period.
- October 19, 1995: The Cape Cod Commission holds the continued public hearing, on the proposed DCPC. The hearing is continued to November 2, 1995;
- November 2, 1995: The Cape Cod Commission holds the continued public hearing, on the proposed DCPC. The Cape Cod Commission votes to approve the Black Beach/ Great Sippewissett Marsh DCPC and forward proposed ordinance to the Assembly of Delegates.

4). The Commission found that existing natural features on Lot E, specifically the four surrounding wetlands is a specific hardship for it will limit the applicant's ability to undertake development on the lot in a manner that conformed to the DCPC guidelines.

CONDITIONS:

The Commission finds that desirable relief could be provided without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purposes of the Act, the Regional Policy Plan or the proposed Black Beach/ Great Sippewissett Marsh District of Critical Planning Concern County Ordinance if the project is modified to comply with the following conditions:

1. All structures (including septic system, dwelling, outbuilding, sheds, attached porches, decks and/or patios) shall be constructed a minimum of 50' from all wetlands. As an exception, the applicant may construct a crushed stone driveway on Lot E in the location shown on the Plot Plan - Proposed House, dated December 1, 1994.
2. The septic system shall be designed and constructed to provide a minimum five foot vertical separation to groundwater.
3. The single family residence shall be elevated an additional foot above the existing FEMA base flood elevation and state building code construction standards.
4. The applicant shall allow the land areas within 50' of the wetlands on Lot E to revegetate into low shrub vegetation. Native vegetation may be planted to encourage revegetation of this area. No future activities, with the exception of vista pruning and a pedestrian access path (with approval of the Falmouth Conservation Commission) may occur within these undisturbed buffer areas.
5. The applicant shall submit one copy of a revised site plan showing compliance with these conditions to the Cape Cod Commission for review and approval prior to the issuance of a building permit.

6. The applicant shall obtain all applicable local and state permits prior to development.

7. This decision shall be valid for a period of three (3) years from the filing of this decision with the Falmouth Town Clerk.

Nothing in this decision shall restrict any Federal, State or local permitting body from imposing conditions that are more restrictive than the conditions that are contained in this decision.

CONCLUSION:

Based on the findings and conditions above, the Cape Cod Commission hereby specifically finds that a literal enforcement of the provisions of the act would involve substantial hardship to the applicant and that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the act. Therefore the Commission approves with conditions the Hardship Exemption application of Mary Brunette for development of a single residential lot (Lot E) within the Black Beach/ Great Sippewissett Marsh District of Critical Planning Concern. This Hardship Exemption is granted pursuant to Section 23, of the Act, as amended. This decision exempts Ms. Brunette's Lot E from the implementing regulations which may be adopted by the Town of Falmouth pursuant to this DCPC.

Sumner Kaufman
Sumner Kaufman, Chairman

1/4/96
Date

COMMONWEALTH OF MASSACHUSETTS

Barnstable, ss.

Subscribed and sworn to before me this 4th day of Jan 1996

Katharine K Peters

NAME, Notary

My Commission expires: 1/1/2000