



# CAPE COD COMMISSION

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

Date: September 19, 1996

Applicant: Daniel J. O'Connor, Trustee,  
41 Taylor Road  
Acton, MA.

Project: O'Connor Lots, 145 Wigwam Road & 146 Tupelo Road  
W. Falmouth, MA

Re: DCPC Hardship Exemption

Land Court  
Certificate: 139381

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## DECISION OF THE CAPE COD COMMISSION

### SUMMARY:

The Cape Cod Commission (Commission) hereby denies the Hardship Exemption application of Daniel J. O'Connor, Trustee for development of two single residential lots (Lots 145 & 146) 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 September 19, 1996 under Section 23 of the Cape Cod Commission Act (Act).

### JURISDICTION:

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."

### LOCATION:

Lots 145 and 146 are located on the southern boundary of the Black Beach/ Great Sippewissett Marsh District of Critical Planning Concern (DCPC). Lot 145 is on the north side of Wigwam Road, Lot 146 is on the north side of Tupelo Road in West Falmouth. Both lots lie within the Saconessett Hills subdivision. Access to the property is off of Route 28A by way of Palmer Ave. Saconessett, Arnold Gifford and Peace Pipe Roads.

**Hardship Exemption Decision    O'Connor (Lots 145 & 146)    September 19, 1996**

**DESCRIPTION:**

The proposal is to build two approximately 3,500 sq.ft., 4 bedroom single family homes. A portion of each of the lots is within the jurisdiction of the Falmouth Conservation Commission under the Wetlands Protection Act and the Falmouth Wetlands By-Law.

**REVIEW CRITERIA:**

Under the Act, the Commission has two overall areas of review in a hardship exemption request. The first is 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. The second finding is 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. In addition the Commission adopted a policy on Hardship Exemption requests dated October 21, 1993. Contained in this policy is the criteria to be used to evaluate whether a hardship exists which states "The basis for a finding of hardship shall be in the land or in the nature of the development rather than the circumstances of the applicant."

**PROCEDURAL HISTORY:**

On June 13, 1995, the Commission received a nomination for the Black Beach/Great Sippewissett Salt Marsh District of Critical Planning Concern from the Falmouth Conservation Commission pursuant to Section 10(d) of the Cape Cod Commission Act. The Commission voted to accept the nomination for further consideration on July 13, 1995. The Commission voted unanimously on November 2, 1995 to propose the area as a DCPC to the Barnstable County Assembly of Delegates. The area was designated as a DCPC by the Barnstable County Assembly of Delegates in January of 1996 by way of County Ordinance 96-1.

The applicant filed for a Jurisdiction Determination (JD) and a Hardship Exemption on June 17, 1996. The Commission issued a decision on the JD on July 12, 1996. The applicant appealed the JD decision on August 13, 1996. The Commission held hearings on August 14th on the hardship exemption request and continued the hearing to September 19, 1996. The subcommittee held a meeting on September 5, 1996.

**MATERIALS SUBMITTED FOR THE RECORD:**From applicant:

1. Hardship Exemption/ JD Application

Date

6/17/96

From the town:

1. Opposition to granting the Hardship App.
2. Strong opposition to granting the Hardship App.
3. Opposition to granting the Hardship App.

Con. Com.	7/8/96
Con. Com.	7/30/96
Con. Com.	8/14/96

From the public:

1. Opposition to granting Hardship App.

A. Fleer	7/9/96
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**TESTIMONY:**

August 14, 1996, 7:00 pm, Public Hearing

Mr. Edward Kirk, attorney for the applicant, introduced Mike McGrath, engineer, and David Newton, builder. Mr. Kirk made a presentation focusing on the staff report. He stated that staff had cited 4 reasons in the staff report why relief could be granted without derogating from the Act and DCPC and read these. He then turned to the issue of hardship. He pointed out that staff had stated that smaller homes could be constructed. He believes that nothing will be gained environmentally by moving the houses back 100' from the salt marsh instead of 65'. He said that the 100' guideline could not be met due to topography (a large hill) and the views of the marsh would be lost with the houses constructed toward the street. He said that this would diminish the value of the houses and cause a financial hardship, while adding nothing environmentally. He asked Mr. McGrath to show the plans.

Ms. Bebout asked the size of the lots. Mr. McGrath said 20,000 sq. ft. and 23,000 sq. ft. approximately.

Mr. McGrath explained the site plan and the location of the salt marsh, floodplain, and coastal bank. He said the houses are being built into the hill and upper floors will have views over the top of the hill to the salt marsh. He noted the elevations on the site plan. He discussed the proposed use of a Ruck System for passive septic denitrification, construction details, and the nitrogen reduction rates that could be achieved. He said that the Ruck filter cannot be closer than 20' to the houses, although he has gone to 10', and 8' in a remediation situation. He showed photos of installation of a Ruck system. He said that deeded architectural restrictions in Saconnet Hills subdivision established a minimum floor area for the houses, but couldn't find his copy and didn't know what the number was. They can't build a smaller house and conform to the architectural requirements. He said he could provide these. He stated that the ridge is a 20' wide esker that skirts the marsh and there are six other houses built on it. There is a small wetland area on the lot that is not large enough to be protected. He noted the height limitations in the Falmouth zoning bylaw and noted that the growth of vegetation could limit views over time. They could not build the houses high enough to obtain views if they moved the houses further back.

Mr. Olsen asked if there are alternatives to use of a Ruck System? Mr. McGrath said there were. In response to a question by Mr. Olsen, Mr. McGrath said that both lots are buildable.

Mr. Olsen said that the real issue is not the design, but why the subcommittee should recommend granting of a hardship exemption prior to the adoption of implementing regulations. Mr. Prince agreed. Mr. Kirk responded that their application had focused on the substantive issues. They are not just looking to get ahead of regulations. He

believes that the subcommittee should view the application as if a 100' buffer requirement was already in place, and they are requesting a variance. Mr. Kirk does not expect that the regulations will be more stringent than this. He doesn't believe that it accomplishes anything to wait until the Implementing Regulations are adopted. He stated that staff had said in the staff report that granting the hardship exemption would not derogate from the DCPC. This is not an environmentally sensitive area. It is a hardship to comply with the 100' buffer requirement.

Mr. Prince asked what would be lost if they wait until the regulations are adopted and then go through the process that will be set up? Why shouldn't we have you do that? He added that there are a whole bunch of people in that area who may want to do something, but are waiting for the process to be completed. Why are these lots different from the rest? He said he hasn't heard a hardship. Mr. Kirk said that should not be the subcommittee's focus. He feels the subcommittee should look at the merits of the development.

Mr. Prince said he has not heard a hardship. Mr. Kirk responded that the hardship is not related to delay. They would like to proceed with development of the lots. He said he wouldn't be able to articulate a hardship based on inability to proceed, or harm might come from a delay. They are basing the hardship on the regulation itself.

Mr. Olsen said that Mr. Kirk has not shown that permit applications were pending at the time the DCPC was nominated. Mr. Kirk responded that this was only one possible way to show a hardship. The hardship is not "time," it is the topography of the lot. Mr. Olsen responded that the subcommittee did not yet know what the implementing regulations would require. It may not be any different at the town level from the RPP.

Mr. Kirk reiterated that staff had said in their report that the relief could be granted without derogating from the Act and DCPC. The subcommittee clarified that the staff report stated that the applicant had presented four reasons why the hardship could be granted. This was not staff's position; it was the applicant's. Mr. Kirk said he saw it as a neutral statement. He believes the hardship could be based on the size, shape and topography of the lot.

Mr. Kirk said they may be able to obtain a variance at a later date, but they should not have to wait. They should be able to go to the merits of the project and look at the substantive issues.

Mr. Prince asked why an exception from the DCPC moratorium should be made for these lots? What does the hill have to do with letting you proceed at this time?

Mr. Olsen asked Mr. McGrath to submit the building size restriction language.

Mr. David Newton stated that [former Conservation Administrator] Pamela Truesdale told them in June '95 that there would be a 90 day moratorium. They believe they were misled and would have submitted an application earlier if they had known. Mr. McGrath noted that Notices of Intent had been filed for these lots and extensions had been granted due to the moratorium. Mr. Newton said that they would not get an offer on these lots until some decision was made. It is a good market and they would like to proceed.

Mr. McGrath added that Ms. Truesdale stated that only a denitrifying septic system would be required.

Ms. Bebout asked if Mr. O'Connor was planning to build on the lots or planning to sell them. Mr. Newton said he would sell the lots. It was noted that the houses shown on the plans were not definitively the ones that would be constructed. Mr. Newton said Mr. O'Connor is paying taxes on the lots as buildable lots.

Mr. Guimond presented the staff report. He noted plans that he had drawn that show that houses can be constructed on the lots and still meet the 100' setback requirement. Lot 145 would require a smaller house to be built (1352 sq. ft. footprint), Lot 146 could fit the same size footprint as originally shown, without the garage. He did not try to fit in the Ruck System and did not look at the view issue. But you can fit a 2 1/2 story house on each of the lots and still meet the 100' setback. He noted that the DCPC guidelines do not require denitrifying septic systems. He added that staff did not find a timing or financial hardship and recommended against granting the hardship exemption.

Ms. Sferra added that given that no argument has been made with regard to a timing hardship and that there are no draft implementing regulations, it seems premature to debate whether or not development on the lots could comply with these nonexistent regulations. She stated that the applicant had focused solely on the 100' buffer issue and ignored that fact that there are likely to be other requirements in the implementing regulations, such as lot clearing. In addition, she noted that she has been advising the buffer subcommittee and that they are considering a buffer formula that would require variable buffers based on site conditions that might be more or less than 100' in width. She said it makes sense to wait for the implementing regulations and have any hardship or variance arguments made to the permit granting authority at that time.

Mr. Guimond stated that a house and septic system could be positioned on each of the lots. On Lot 146, it is possible to fit the same size house proposed by the applicant and still meet a 100' buffer requirement.

Mr. Kirk said he did not have any further comments. Mr. McGrath said he was surprised that no denitrifying septic system was required. He doesn't believe that one would fit on Mr. Guimond's plan. Ms. Sferra said that the DCPC nomination had not

addressed nitrogen as an issue. That was the choice of the town when the nomination was made. Mr. McGrath said he was surprised and disappointed, based on his experience with a project on Black Beach where a denitrifying system was required. He said he is a proponent of denitrifying systems and is surprised the staff is not recommending one. Ms. Bebout clarified that the staff does not oppose the idea, they are just stating that it is not required by the guidelines. Mr. Olsen reiterated that he would like to see the restrictive covenants for Saconessett Hills and the town's height requirements.

**RECORD:**

The application and notice of the public hearing relative thereto, the Commission's staff reports, and exhibits, minutes of all hearings and all submissions received in the course of the proceedings, including materials submitted on file #HDEXDCPC96016 are incorporated into the record by reference.

**FINDINGS:**

The Commission has considered the requested DCPC Hardship Exemption of Daniel J. O'Connor, Trustee. Based on consideration of the information presented, Subcommittee and staff recommendations, the Commission makes the following findings pursuant to Section 23 of the Act:

- 1). The Cape Cod Commission received a nomination for the Black Beach/Great Sippewissett Marsh DCPC from the Falmouth Conservation Commission on June 13, 1995. The Commission voted to accept the nomination for further consideration on July 13, 1995.
- 2). Notice of receipt of the nomination, containing the proposed boundaries, was provided as required by the Cape Cod Commission Act, and in addition, was provided by mail to all property owners within the District, including the applicant at the address of record in the Falmouth Assessors Office.
- 3). The Cape Cod Commission expressly found in its acceptance of the nomination that "there is a need for special planning and regulations in the [District] that will preserve or maintain a value or resource intended to be protected by the [Cape Cod Commission] Act."
- 4). After consideration of the purposes for which the District was nominated, the Cape Cod Commission found in its acceptance of the nomination that "the issuance of development permits. . . for single family houses . . . may be substantially detrimental to the public health, safety and welfare, and would be contrary to the purposes of the Act and District of Critical Planning Concern."

5). The Black Beach/Great Sippewissett Marsh DCPC ordinance was adopted by the Barnstable County Assembly of Delegates on January 3, 1996. Pursuant to this designation and the Cape Cod Commission Act, the Town of Falmouth has twelve months from this date to adopt Implementing Regulations for the DCPC. The Cape Cod Commission may grant a 90 day extension of this time-frame. The Cape Cod Commission Act specifies that the District will expire if implementing regulations have not been adopted within 18 months of enactment of the District. Therefore the temporary moratorium on the issuance of development permits created by the nomination of the district will end when implementing regulations are adopted or at the end of this time-frame specified in the Act.

6). The Cape Cod Commission finds that there is no hardship related to the topography of each lot because each lot could comply with a 100 foot wetland buffer requirement and still have a single family house built on it. Therefore, the Cape Cod Commission finds that there is no hardship created by the size, shape or topography of the lots and the lots are similar to other lots within the district.

7). The Cape Cod Commission finds that the applicant has no hardship on the basis of timing, based upon statements of the applicant's attorney and that there were no permits pending for development of these lots at the time the DCPC was nominated.

8). The Cape Cod Commission finds that the applicant does not plan to build on lots 145 and 146. Since they will be sold, the specific site plans may change.

9). The Cape Cod Commission finds that the applicant would not be prevented from selling the lots due to the limited moratorium instituted under the DCPC.

10). The Cape Cod Commission has not made an examination as to whether approving the hardship exemption would derogate from the intent and purposes of the Act or DCPC as no hardship was found.

11). The Cape Cod Commission has not made any findings with regard to the preferred design of a site plan or the desirability of use of a nitrogen-reducing septic system.

12). The Cape Cod Commission finds that the town is moving forward with development of implementing regulations and the Town's Conservation Commission has submitted letters in opposition to the granting of an exemption stating that approving such exemptions would undermine the DCPC Advisory Committee's efforts.

**CONCLUSION:**

Based on the findings above, the Cape Cod Commission hereby denies the Hardship Exemption application of Daniel J. O'Connor, Trustee for development of two single

family residential lots (Lots 145 & 146) within the Black Beach/ Great Sippewissett Marsh District of Critical Planning Concern.

Greg Silverman

Greg Silverman, Chair

by Vicki Rebou

September 19, 1996

Date

**Commonwealth of Massachusetts**

Barnstable, ss.

Subscribed and sworn to before me this 19<sup>th</sup> day of August, 1996.

Katharine L. Peters

Katharine L. Peters, Notary Public

My commission expires: