

CAPE COD COMMISSION

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Date: August 22, 1996

HDEXDCPC96001

Applicants: J. Peter Quigley and Barbara A. Quigley
15 Gilbert St. 117 Shorewood Road
Garden City, N.Y. E. Falmouth, MA
11530 02536

Project: Lot 91 Arnold Gifford Road
W. Falmouth, MA

Re: DCPC Hardship Exemption

Land Court
Certificate: 122538

Lot 91 Plan 12009T

DECISION OF THE CAPE COD COMMISSION

SUMMARY:

The Cape Cod Commission (Commission) hereby finds pursuant to Section 22 of the Cape Cod Commission Act and under the Cape Cod Commission Regulations of General Application, Chapter E, Barnstable County Ordinance 94-10, that the proposed development of Lot 91 Arnold Gifford Road is not exempt from the Cape Cod Commission Act and/or the Black Beach/Great Sippewissett Marsh DCPC designation under Section 22(e). In addition, the Commission hereby denies the Hardship Exemption application of Barbara A. Quigley and J. Peter Quigley for development of a single residential lot (Lot 91) 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 August 22, 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:

Lot 91 is located on the southern boundary of the Black Beach/ Great Sippewissett Marsh District of Critical Planning Concern (DCPC). The property is on the north side of Arnold Gifford Road in West Falmouth within the Saconessett Hills subdivision. Access to the property is off of Route 28A by way of Saconessett and Indian Ridge Roads.

DESCRIPTION:

The proposal is to build a 3,000 sq.ft. single family home. Currently, the issuance of local permits for construction of new dwellings within the DCPC is suspended while the Town develops local implementing regulations. The majority of the 23,322+ sq.ft. lot is land subject to coastal storm flowage (100 year floodplain). A portion of the property 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 proposed 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.

A subcommittee of the Commission conducted a public hearing on August 31, 1995 in the town of Falmouth at which time testimony was taken regarding the DCPC nomination. The Commission voted on September 7, 1995 to extend by 60 days the review period for the DCPC, allowing the subcommittee to conduct a second public hearing in the town of Falmouth on October 12, 1995, at which time possible land use guidelines and revised boundaries were presented and discussed and further testimony was taken. Hearings were also held before the Cape Cod Commission on October 19, 1995 and November 2, 1995.

After consideration of the nomination, both written and oral testimony, information submitted for the record, and a field trip to the nominated area, the subcommittee voted unanimously (4-0) to recommend to the full Commission that the area be forwarded to the Assembly of Delegates for designation as a DCPC pursuant to the Cape Cod Commission Act and Cape Cod Commission DCPC Regulations. The Commission voted unanimously on November 2, 1995 to propose the area for DCPC designation to the Barnstable County Assembly of Delegates. The Assembly of

Delegates conducted further hearings and enacted Ordinance 96-1, which was signed by the Barnstable County Commissioners.

The applicant filed for a hardship exemption to allow development of the lot to proceed despite the existence of a temporary moratorium on the issuance of development permits. The applicant also requested an informal ruling from the Commission as to whether or not the lot was exempt from the DCPC under Section 22(e) of the Act. Prior to the first public hearing, the application was amended to substitute Mr. And Mrs. Quigley as the applicants.

MATERIALS SUBMITTED FOR THE RECORD:

From applicant:

		<u>Date</u>
1. Hardship Exemption Application for Simpsons Lot 91	P. Butler	4/17/96
2. Filing Fee	P. Butler	4/25/96
3. Additional information/notice of change in counsel	P. Butler	7/3/96
4. Request of change from Simpson to Quigley	A. Koenig	7/8/96
5. Copy of land court plan and MGL Ch. 41, sec. U81FF	W. Hovey	7/9/96
6. Resume of W. Hovey		7/9/96
7. Letter from Att. D. Richman to Att. A. Koenig		7/9/96
8. Financial Information on Quigley Lot 91	Wm. M. Warwick	7/23/96
9. Additional Information on Lot 91	Wm. M. Warwick	7/23/96
10. Photo's of Area	Wm. M. Warwick	7/23/96
11. Original Town DCPC Map	Wm. M. Warwick	7/31/96
12. Additional information	A. Koenig	8/5/96

From the town:

1. Opposition to granting Hardship App.	Conservation Com.	7/8/96
2. Strong opposition to granting Hardship App.	Conservation Com.	7/30/96

From the public:

1. Opposition to granting Hardship App.	A. Fleer	7/9/96
2. Opposition to granting Hardship App.	J. Barnes	7/15/96

TESTIMONY:

June 6, 1996

The June 6, 1996 public hearing was opened and continued without testimony to July 9, 1996 by a hearing officer. The continuance was requested by the original applicant's (Simpsons) attorney Patrick Butler.

July 9, 1996

At 7:00 pm, Ms. Bebout opened the continued public hearing from 6/6/96 for the Simpson property. She introduced the subcommittee and staff and asked the applicant to make a presentation.

Ms. Barbara Frappier, Warwick & Associates, stated that the applicant's attorney was not yet present, so the subcommittee opened the O'Connor hearing.

At 7:59 pm Ms. Bebout opened the continued public hearing on the Simpson/Quigley

Hardship Exemption (Section 23) request. It was noted that the original hearing was opened and continued on June 6, 1996 at 7:05 pm. She introduced the subcommittee and staff.

William D. Hovey appeared on behalf of the applicant. He submitted his resume to the subcommittee. He noted that he was also making a (Section 22(e)) request for an exemption under the Act. He said that he would use the 5/30/96 staff report as a basis for his presentation. Ms. Daley stated that she thought it might be helpful to bring Mr. Hovey up to date on the subcommittee's vote on the previous Jurisdictional Determination for the O'Connor lots. She stated that development of lots was not found to be exempt under Section 22(e) in a similar situation. Section 22(e) only applies to the creation of the lots, laying of roads and utilities, not obtaining subsequent development on those lots. Further permitting would be subject to the moratorium.

Ms. Bebout noted the purpose of the hearing from the hearing notice which is to consider a Hardship Exemption request under Section 23. Mr. Hovey referenced p. 2 of the staff report. He said that Section 2(a) of the Act states that the purpose of the Act is to "further . . . the conservation and protection of natural undeveloped areas." He believes that the Commission has absolutely no jurisdiction over Lot 91 on Arnold Gifford Road because there are only 3 lots remaining to be developed in this subdivision; 90% of the area has been developed with homes over 20 years old. Therefore, the Commission does not have jurisdiction because this is not an undeveloped area.

His next point relates to Section 10 of the Act and "the presence of significant natural, coastal, scientific resources." The State Department of Fisheries and Wildlife has said there are no rare plants or animal or natural communities that would be adversely affected by the building of a house on this lot. Again, there is a jurisdiction issue here with regard to this lot.

Next, if you look at the Town of Falmouth, the Conservation Commission has said that they have no problem with this house being built and that there is no Order of Conditions needed. That determination was made earlier. A septic system can be put in. There is good sand here. So, again, the Town has no problem, and I just don't understand why the Commission has any problems.

Ms. Bebout asked for clarification. The town has ruled on this? Mr. Hovey responded that the Con Com has said no Order of Conditions is necessary. Ms. Bebout asked if he had that in writing. Mr. Hovey said that if we don't, he can get a copy to the subcommittee. She said she would like to see that. We don't have it.

Barbara Frappier clarified that the applicant went before the Conservation Commission for confirmation of the edge of resource areas. The resource areas have been accepted by the Commission. If the house can be constructed in an area on the lot that is outside the Commission's jurisdiction, then no Order of Conditions would be required. There is sufficient area on the lot to do this. Mr. Hovey said he would provide a copy. He said it was dated May 22, 1996.

The subcommittee questioned what the document meant. Mr. Hovey said that it was a determination the no Order of Conditions was required. Mr. Olsen read the language accompanying the box that was checked. He said it is not an approval for anything. Mr. Hovey said that it is a document that every landowner would like to receive. It is very valuable from an owners standpoint. Ms. Bebout said it would be entered into the record. Mr. Hovey said that William Warwick had provided a per test report in detail. Mr. Guimond said that staff had received a copy of this document.

Mr. Hovey addressed the staff report's conclusions on P. 4 with regard to the Section 22(e) exemption request. He noted a letter from Pat Butler which had been submitted which he believes accurately states the law in Massachusetts with regard to grandfathering and citing two cases in support of that. He said that this is a constitutional concept. He summarized a section from the letter. He believes Mr. Butler's points are very well taken. It was noted that the subcommittee has received a copy of this letter. He said that the relevant point in the Subdivision Control Law is Chapter 41, Section 81FF. He sent a copy to Mr. Guimond by fax today. The subcommittee has received copies. It is clear to him and land use author/attorney Mark Bobrowski that these land courted lots are grandfathered forever under this provision. It is state law; it has been in effect since 1953. It is clear that this is a grandfathered subdivision no matter what happens in town. Mr. Hovey said that Patty Daley cited a case from the Martha's Vineyard Commission which she believes is relevant. He believes that case is distinguishable from this situation because it deals with a zoning freeze and what happens when a zoning bylaw changes. This is a subdivision issue not a zoning issue. The exemption must be read as set forth in the statute. On that basis alone, he believes that the exemption request should be granted.

With regard to the question of substantial hardship and the need for a finding, while reserving the right to suggest that none is needed here, Mr. Hovey submitted for the record a letter regarding Mrs. Quigley's financial hardship. Ms. Bebout asked who David Richman is? Mr. Hovey said that he is her New York lawyer in connection with her divorce.

Ms. Bebout said that it is not an official financial statement and accepted the letter for the subcommittee's consideration. Ms. Daley suggested that the subcommittee put off the hardship finding until it has had a chance to review this correspondence.

Mr. Hovey said that the Massachusetts courts have said that a hardship cannot be self created. He believes that the hardship in this case is created by the Act itself, which asserts jurisdiction over this lot. That is a substantial hardship. It is blocking her from selling this property as a buildable lot. Mrs. Quigley did not create it. The staff report states that the DCPC does not prohibit the sale of this lot. That is very misleading. This lot is only saleable if someone can build a house on it. If it can only be a bird sanctuary it is worth substantially less. If she can only sell it as a bird sanctuary the Commission or Act has created a situation tantamount to a taking. They have deprived her of the difference in the fair market value between a buildable lot and one that is not buildable. This is further evidence of a substantial hardship.

He added that he is not convinced from his hurried reading of the record that adequate notice of the DCPC was given to the owners of Lot 91 and would like the opportunity to do further research on that point and supplement his presentation.

Finally p. 5 of the report asks for additional information. He understands that some of it is still lacking. He will supply what is needed, he understands Mr. Butler has supplied some of it. He requested that the Commission find that the lot is both exempt from the Act and that the applicant, Ms. Quigley, can face substantial hardship if she can't construct on the lot at this time. Mr. Hovey said that the timetable is yesterday. The Quigleys have tremendous financial obligations. This is a selling market. There are buyers for the lot in the room. The obstacle is the Cape Cod Commission.

Mr. Prince noted there is a freeze until the town establishes the rules. Mr. Hovey said that he did not understand why a freeze was needed.

Ms. Bebout asked if Mr. Hovey was familiar with the DCPC. Mr. Hovey said not as much as others, but he is familiar with Massachusetts law and what a subdivision is.

Mr. Prince noted that the Cape Cod Commission is governed by Chapter 716 of the Acts of 1989, not zoning laws. Mr. Hovey said he believes that this was passed subsequent to Chapter 41, Section 81FF.

Mr. Olsen said that the issue is that an Ordinance adopted by the Assembly of Delegates created the DCPC. That Act is in effect for this area. The town is developing Implementing Regulations. There is a moratorium on any development until they are in place. He said that he thought the applicant could present a better case for a hardship exemption.

Mr. Hovey said he thinks the courts will find the Commission doesn't have jurisdiction since this is not an undeveloped area. Mr. Olsen encouraged him to expand on the hardship exemption issue. Mr. Hovey added that there is a time hardship. Mrs. Quigley has lost her house to foreclosure. He doesn't believe that would have happened if she had been able to sell this lot. She also lost her job. Mrs. Simpson is 76. Her house is on the market and she wants to move to Sippewissett. He is asking for humane relief. The Board can grant this hardship exemption if they wish. The applicant doesn't want to go to Land Court, but they think they would be victorious. He thinks he has a very good case. That is his opinion after being on this case for two days. He is asking for relief. He doesn't believe that this development will destroy the area.

Ms. Bebout said that foreclosure takes time. Is this hardship a recent or sudden event? Mr. Hovey said that it was a sudden event. Ms. Bebout asked what the date of the DCPC was. Ms. Sferra responded that the Assembly adopted the Ordinance on January 3, 1996, the nomination was submitted in June 1995. Mr. Hovey noted the application for a hardship exemption had been before the Commission since April 1996. Ms. Bebout asked why the process of seeking a hardship exemption was not started sooner. Mr. Hovey said he did not know.

Ms. Daley addressed the taking issue that Atty. Hovey raised. She said that Mr. Prince was correct; no one has said that no single family development can occur on this lot. The DCPC creates a moratorium so that the town has time to develop Implementing Regulations to protect the special resources of the area. There is a taking provision in the Guidelines for the Implementing Regulations, under which the town would develop provisions for variances or transfer of development rights to make sure that a taking does not occur. Based on this, she believes that it is highly unlikely that a single family home couldn't be developed. Second, with respect to the 22(e) exemption, she wanted to make three points: 1) It is our opinion that this subdivision approval isn't the type referenced in Section 22(e) and can't claim this exemption; 2) Even if they could, it is our opinion that Section 22(e) pertains to the lot, not subsequent development; 3) as a matter of statutory construction, the Cape Cod Commission Act was adopted after Chapter 41, Section 81FF and is more specific. If the legislature had intended all lots created prior to a certain date to be exempt, they would have said so. Instead, they have some very specific language about what is exempt.

Mr. Guimond followed up on the Hardship Exemption findings. First, the application was submitted on behalf of the purchasers. They have now addressed that by having the Quigleys submit as the applicant of record. Mr. Hovey interjected that the Quigley's name was included in the original statement in the application, if he reads it correctly. The statement is part of the applications. Mr. Guimond responded that the application form states that the applicants are the Simpsons. Second, Mr. Guimond noted that the DCPC does not prohibit the sale of the lot. The applicant have made their point that it may affect the price. Third, Lot 91 was always included in the DCPC since the time of nomination. Fourth, there were no permit applications pending at the time of the nomination, unlike the previous hardship exemption that was granted for Mary Brunette. Fifth, with regard to the claim that this area is "developed," Mr. Guimond provided the subcommittee with photographs of the lot that show that it is clearly not a developed lot. Staff would disagree with the applicant's assertion that this is developed. He noted that Ms. Sferra had researched the notice that was provided regarding the nomination, and notice was sent to the Quigleys. With regard to the information that had been requested by staff, he noted that perc test information was received. He explained the concern about the wetlands line using the site plan.

Barbara Frappier, Warwick and Associates oriented the subcommittee to the plan. She said that the intent was not to delineate the wetlands line in the whole neighborhood. The plan shows the area of salt marsh closest to the lot. The edge of marsh follows the lot line/stone wall to the northeast. She noted the location of the coastal bank. She said that the Conservation Commission form doesn't have the proper box to check. All they asked the Conservation Commission to do was to confirm the wetland delineation. The only thing they can check is Box #2, but that doesn't really seem appropriate. We showed them a proposed limit of work. She said that if the house is built in the floodplain, the applicant will need to go to the Conservation Commission for a Request for Determination. The proposed septic system is outside their jurisdiction. The development might be totally outside their jurisdiction. She noted all of the surrounding lots that are developed. Arnold Gifford Rd. was just repaved. The Simpsons are interested in leaving the rear of the lot wooded. She feels this is a developed area. This lot is the only source of income that

Mrs. Quigley has, and she needs it now. She is homeless, she has lost her house. Mr. Travelo noted there is dense vegetation across the street from the lot. Ms. Frappier said that someone is clearing across the street. She said that the plan is a conceptual idea of what a proposed dwelling might look like on the lot that was prepared for the Conservation Commission, that's why the Form says what it does.

Mr. Olsen said that he is not sure we have sufficient information to look at the proposed development in terms of its impacts. There are a number of things that are missing.

Mr. Prince clarified that the Commission had not delegated the decision on this application to the subcommittee. Ms. Daley said that was correct. The subcommittee would recommend on both the 22(e) issue and the hardship question.

Ms. Frappier said that the driveway would be constructed of pervious material -- either gravel or pervious macadam with all drainage directed to dry wells and recharged. The goal is to have as little grading as possible. Because of FEMA they would be required to have first floor elevation above the 100 year floodplain without filling. They are not looking to fill this lot at all. Mr. Hovey asked if it would help the application to have these details made part of the application. Mr. Guimond responded that it would be only if the subcommittee was inclined to find a hardship.

Ms. Daley said that there are two findings the subcommittee must make. First, that a hardship exists; and second, that the development can go forward without derogating from the intent and purpose of the DCPC. She suggested that the subcommittee focus on the first question before we ask the applicant to submit detailed information regarding the environmental impacts. She noted that the Commission has some guidelines for determining when a hardship exists or not and would look at things such as financial information and information pertaining to the timing of permits.

Steve Haddad, realtor, said he sold the property or is trying to sell this property to the Simpsons. He has followed the DCPC process closely. It's important to get a sense of what has happened with this zone. The original DCPC map, which Peter Quigley, who spends 90% of his time in Europe, based his decisions on, excluded this lot. He showed the map to the subcommittee. This lot was not originally in this zone. Originally lots were bisected. The line was later moved to encompass whole lots. That brought this lot into the DCPC. Mr. Quigley looked at the map and believed he was out of the zone. Up until 30 days ago, if you went into Town Hall in the meeting room and looked at the map of the DCPC, this is the map you would see. Mrs. Quigley's employer closed its doors, and Mrs. Quigley is now out of a job collecting unemployment compensation. Her house was foreclosed upon; she's in the middle of a divorce and now she's homeless. If this isn't a hardship, what are we looking for? Does she have to be on her deathbed. The Simpsons are out of their minds to spend the money to buy this lot and only come away with a 3 or 4 bedroom home. Ninety percent of the people who spend \$200,000 to \$300,000 for a lot want a 5 bedroom home, pool, tennis court, etc. I will have a very difficult time selling this lot and getting the value that the Simpsons are offering today should regulations come forward next April limiting the size of the house to a 3 or 4 bedroom house. It diminished the value greatly. Most people don't spend \$300,000 for a lot with a small

cottage. This is a significant financial hardship. Have we become that insensitive in society. They're building a small house. Have some compassion. It wasn't in the zone when the original map came out. There was no scientific data for this boundary change. People bitched that half their lot was in and half was out, so they moved the line to the road. That made sense, but it jeopardized Mrs. Quigley.

Ms. Bebout asked was Mrs. Quigley in Europe at the time? Mr. Haddad responded that Mrs. Quigley was here in Falmouth. Ms. Bebout asked if she owns the lot? Mr. Haddad said she is a co-owner of the lot. Ms. Bebout asked if she was unaware of the DCPC process? Mr. Haddad said she had no idea of the process. He said his first question to her was why she didn't get a building permit, and Mrs. Quigley had responded that she had no idea. I didn't know it impacted me. I was letting Peter and his attorney deal with it.

Barbara Quigley stated that she never thought she would find herself in this situation. She is very confused about all of the laws, they are way over her head. She would like to get on with her life. She is going through a divorce, she is homeless, she does not have a job and she will have an operation. She is looking forward to the sale of the property as soon as possible. She didn't expect to be in this situation.

Ms. Bebout read into the record a letter from Alan Flier in opposition to the grant of the hardship exemption. He believes that the town is working to complete the process as quickly as possible. He urged the subcommittee to allow the process to be completed; he believes that it will be fair.

Mr. Guimond noted that a letter is expected from the Conservation Commission.

Ms. Bebout said that all of the information the subcommittee should have has not been obtained. Mr. Prince stated that he would recommend that the Commission does have jurisdiction over this lot for the reasons that were mentioned previously. He added that preliminary information suggests that a hardship does exist. If this can be proven, he feels the subcommittee could go forward with the second step in the process. We need to move forward into the hardship question, because he believes we do have jurisdiction.

Mr. Olsen said we agreed in the previous case that we do have jurisdiction. With regard to the hardship, at the moment he doesn't believe that the subcommittee has enough information. He agrees that on the surface there appears to be a personal financial hardship. If we move to the second issue there will be further cost of obtaining additional information. Mr. Guimond confirmed that some additional work would need to be done on the plan. He feels that the subcommittee should continue the hearing and leave the record open. The subcommittee should meet and determine whether we need additional information and what is needed and ask for it on both issues.

Ms. Bebout said she is concerned that if a hardship exemption is granted, it involves time and financial issues. She asked if more time would be needed afterwards. What needs to be done?

Ms. Frappier said she can get information to the subcommittee quickly. She needs to know what is needed.

Ms. Sferra noted a point of clarification with regard to the map. She said that when the Conservation Commission had its initial meetings on the DCPC they had presented the map noted by Mr. Haddad. As a result of those meetings revisions were made. But from the time the nomination was made until now the map has remained the same. The Act requires notice in the newspaper by publishing the nominated boundary. That description stated that the southern line of the boundary was Arnold Gifford Rd. In addition, the Commission was not required to, but did provide a courtesy notice to all of the residents of the DCPC using a list supplied by the Town. Notice was given to the Quigleys at that time. She also noted that she has had a number of conversations with Mr. Haddad about the nomination going back to the time the DCPC was being considered by the Commission and the Assembly.

Mr. Olsen moved to the continue the public hearing and leave the record open. The next hearing will be in Falmouth Town Hall on July 22nd at 7:00 pm. Mr. Prince seconded the motion and it was approved unanimously. The meeting was adjourned at 9:15 pm.

July 22, 1996

The July 22, 1996 public hearing was opened and continued without testimony to July 30, 1996 by a hearing officer. The hearing was continued to allow the applicant time to file additional information.

July 30, 1996

Ms. Bebout called the continued public hearing to order at 7:08 pm. Ms. Bebout noted the hearing had been continued by a Hearing Officer on July 22, 1996. Ms. Bebout noted that two letters had been received from the Falmouth Conservation Commission as well as a letter from Mr. John E. Barnes. Mr. Guimond also noted that the applicant had submitted additional data on finances as well as site information on July 22, 1996. Ms. Bebout asked if the applicant would like to make any comments.

Ms. Frappier of Warwick and Associates, representing Mrs. Quigley, made a presentation on the project. She noted the Subcommittee had a copy of the site plan which she used to illustrate her points. Ms. Frappier said she wanted to take exception in part to the Falmouth Conservation Commission's depiction of the lot. She said there were developed parcels between the lot in question and any resource areas with the exception of a common point of land at the boundary. Ms. Frappier said she felt a majority of the area was cleared. She said the buffer being proposed was a buffer to a developed lot. Ms. Frappier said the plan called for about 45% of the lot to be left in its natural state. She said Mr. Barnes was removing trees from the rear of Mrs. Quigley's lot.

Mr. Guimond asked Ms. Frappier to indicate which lots Mr. Barnes owned. Ms. Frappier noted on the plans which lots Mr. Barnes owned. Mr. Guimond noted Ms. Frappier indicated that trees were being removed from Lot 386, to the rear of the Quigley lot. Ms. Bebout questioned whether Mr. Barnes was removing trees from Mrs. Quigley's lot. Ms. Frappier said this was correct and noted she would be contacting

Mr. Barnes about this. Ms. Frappier said this was in part why she was taking exception to the Conservation Commission's letter. She said she did not feel the lot bordered on a coastal bank or salt marsh.

Ms. Frappier said she agreed with the Commission that the original nomination of the District of Critical Planning Concern (DCPC) included the Quigley's lot but suggested that the original delineation did not. She felt the lot only got included in the DCPC nomination for ease-of-mapping purposes. She felt including the lot in the DCPC was assist with enforcement of the overlay district. Ms. Frappier noted that when an overlay district like the DCPC includes part of a lot, for ease of regulation, the lots to be included are defined by street rather than by the overlay criteria. Ms. Bebout noted that the lot had been included in the original DCPC nomination to the Cape Cod Commission. Ms. Frappier said that the original mapping did not include Lot #91.

Mr. Olsen said the original nomination to the Cape Cod Commission did include this lot. Ms. Frappier said that the nomination to the Cape Cod Commission did include this lot. Ms. Bebout noted the Cape Cod Commission received the nomination, it included this lot. Ms. Frappier commented that perhaps the original mapping, done prior to the DCPC nomination, did not include the lot.

Ms. Bebout said that the DCPC included this lot and that the Commission considers what was presented to it in the DCPC nomination. Ms. Frappier noted the DCPC had a specific intent and purpose to protect critical habitat and that the mapping for the overlay district which did not come to the Cape Cod Commission did not include Lot #91.

Ms. Frappier noted that a piece of financial information concerning Mrs. Quigley's debt service had been omitted from what had been submitted to the Commission. She said this was because she had neglected to ask Mrs. Quigley about her debt service. Ms. Frappier said that the debt service had been accumulated primarily as a result of legal fees connected with the divorce. She said the divorce papers were filed in 1991 and that Mrs. Quigley had given her attorney a \$5,000.00 retainer. Ms. Frappier said that Mrs. Quigley now estimated her legal fee costs are in the tens of thousands of dollars. She said that Mrs. Quigley estimates that before this is over probably 25-35% of her realized assets will be taken up by legal fee costs.

Ms. Bebout asked if Mrs. Quigley was involved in any other actions at this time. Mrs. Quigley responded that she is being sued. She described it as a nuisance suit. Mr. Olsen noted Mrs. Quigley was involved in civil litigation.

Ms. Frappier questioned whether the lot could be purchased for other purposes. She said this was not credible. She said it had no value other than a lot to be built on. She suggested no one would purchase the lot unless they were able to build. She said the Simpsons had demonstrated an incredible amount of faith in the proceedings and are ready to move. Ms. Frappier felt it would be unreasonable to make them wait until a date uncertain, perhaps March, 1997, is unreasonable. She said that if it is likely that a dwelling would be approvable when the regulations came into effect, she did not see why a postponement would hurt the Cape Cod Commission as opposed to how it would assist the Simpsons and Mrs. Quigley.

Ms. Bebout asked for some background on the lot in question. She noted that Mr. Barnes' letter noted the parcel, Lot #91, had been on the market for four years and had been sold at least once prior to the DCPC. Attorney Hovey noted the word sold in Mr. Barnes' letter was in quotations. Mrs. Quigley responded that she did not know what this meant. She said the Quigley's bought it and that they owned the lot for four years. Ms. Bebout asked for clarification as to when the lot was purchased. She noted the documents submitted to the Commission indicate the lot was purchased some ten to fifteen days after the divorce proceedings began. Mrs. Quigley responded this was correct.

Mr. Bebout then stated she wanted clarification as to whether Mrs. Quigley had contemplated purchase of the lot if she knew a divorce proceeding might be a possibility. Mrs. Quigley responded this was incorrect: she said that the divorce papers were filed after the purchase of the land. Ms. Bebout questioned whether the purchase of land had been contemplated prior to the divorce. Mrs. Quigley responded no.

Attorney William Hovey, representing Mrs. Quigley and the Simpsons, noted he did not represent Mr. Quigley. He said he received a letter from Mr. Quigley's lawyer today informing him that he, Mr. Hovey, was not authorized to represent Mr. Quigley. He noted the letter indicated Mr. Quigley was interested in selling the lot.

Mr. Olsen requested that Attorney Hovey submit a copy of this letter for the record.

Mr. Prince commented that there was no one present representing Mr. Quigley.

Mr. Olsen said in Attorney Hovey's letter of July 8, 1996 he indicated he was representing Mr. Quigley as well. Mr. Olsen noted the letter stated "...this letter is to confirm that this firm has the consent of Peter and Barbara Quigley the owners of the above-captioned lot, to represent their interests before the Commission."

Attorney Hovey said he did at that time represent both Mr. and Mrs. Quigley and that he just received a further letter from Mr. Quigley's lawyer which he would submit for the record.

Attorney Hovey also clarified that when he appeared the first time several weeks ago, he asked the application be broadened. He said it was his opinion that it went beyond a Hardship Exemption. Attorney Hovey said it went to the jurisdiction of the Commission. He noted Ms. Frappier had submitted additional information about the development in the area which was not addressed in the July 30, 1996 Staff Update. He noted that the Commission did not have jurisdiction because this was not an undeveloped area.

Attorney Hovey also questioned the points made in the Staff Update such as the point that the applicant/owners had not provided financial information for Mr. Peter Quigley. He noted this was true but that it was doubtful that this could be provided through his attorney's office in the future. Attorney Hovey noted that Mr. Quigley's stated intent as announced by his New York lawyer is that Mr. Quigley is interested in selling the lot but that he is not interested in providing financial information or otherwise helping this proceeding and Mrs. Quigley. Attorney Hovey suggested this

would cause problems for Mrs. Quigley and this would suffice as a basis for the Hardship Exemption for Mrs. Quigley. He also said that Mr. Quigley's financial information was not necessary to the Subcommittee's recommendations.

Ms. Bebout said that the financial information from Mr. Quigley was relevant to the Hardship Exemption and would help confirm it if it existed. Attorney Hovey stated it was a hardship for Mrs. Quigley if she could not get financial information from Mr. Quigley. Mr. Olsen questioned whether Mr. Quigley was a 50% owner of the property. Attorney Hovey responded that this was correct: Mr. Quigley was a joint-tenant.

Ms. Bebout noted that Mr. Quigley has not provided the Subcommittee with a letter stating his intent to sell the lot. Mr. Prince noted that the court has ordered sale of the lot. Mr. Olsen said the Subcommittee did not have the court order. Ms. Bebout noted the attorney had stated the court had order the property liquidated.

Attorney Hovey suggested he would be willing to provide the Subcommittee with an affidavit to the effect that the court had ordered the property liquidated.

Mr. Olsen responded that the Subcommittee requested financial hardship information and that Item #4 specifically dealt with the divorce proceedings. He noted nothing had been provided in response to this request.

Attorney Hovey said that the application referenced the schedule which said that the hardship was Barbara Quigley's. He also questioned the relevance of the point that a loan was received on the property on January 22, 1991.

Mr. Guimond noted this was part of what had been submitted in the financial information. He said it seemed relevant there had only been 5 days between the time Lot 91 was purchased and the divorce proceedings were filed in New York..

Mrs. Quigley noted a loan was never taken out on the property. She said it had been paid for in cash. She said there was a mortgage on the house at 197 Walker Street. Mr. Guimond stated this point in the Staff Update came from the financial data, page 5A of the New York State Supreme Court document, where it was noted "1/22/91, 275, source of funds, loan." Mrs. Quigley said this was not a loan, this was what had been paid for the lot. She said there was no loan.

Mr. Olsen said this was part of the court document. Ms. Bebout suggested Mrs. Quigley should inform the New York court that no loan was involved.

Attorney Hovey asked what the next stage would be and when the site issues would be discussed. Mr. Guimond said that his understanding of why site issues were not addressed in the Staff Update was because the Subcommittee wanted to take up the issue of the Hardship Exemption first. He noted the Subcommittee's direction to staff was that they would not discuss site issues unless a hardship was discovered. If a hardship was discovered, site issues would then be discussed by the Subcommittee.

Mr. Prince questioned whether the applicant had filed a Jurisdictional Determination application with the Commission. He noted this had been discussed with respect to the O'Connor lots.

Mr. Guimond the applicant had not filed a Jurisdictional Determination (JD) application. Mr. Prince noted the O'Connor project included a formal JD application.

Attorney Hovey stated he would be willing to amend the application to include a JD application.

Mr. Prince noted this was possible, but that a formal JD decision would take time to resolve. He suggested it was an avenue for the applicant to pursue and that the jurisdictional issue should be resolved first. Ms. Bebout said she felt the jurisdictional question had been clearly resolved. Mr. Hovey said it was important to get before the full Commission by August 8, 1996 otherwise it was likely the applicants would loose another year and possibly a buyer for the property. He also questioned whether the Commission meeting was open to the public and press.

Ms. Bebout said that Commission meetings are public meetings and are often covered by media. She asked if Subcommittee members had any other questions.

Mr. Olsen asked if any steps were being taken to sell the Quigley's property in Garden City, New York. Mrs. Quigley responded that the property was being rented. She said she also understood that there are appraisals on the property. She said she really did not know if it was on the market and commented that it would not be sold.

Mr. Prince noted the Garden City, New York property was also under court order to be liquidated. He noted it was more valuable than Lot #91 in Falmouth. Mr. Olsen questioned whether Mrs. Quigley was aware of steps to liquidate the Garden City property. Mr. Hovey responded this was correct.

Ms. Bebout questioned Mrs. Quigley's comment that the property would not be sold since Mrs. Quigley was half-owner of the Garden City property and given the court order to sell this property. Mrs. Quigley responded that Mr. Quigley might "pull something out of the bag" regarding the Garden City property since he had done this so many times before over the last six years. Ms. Bebout commented that Mrs. Quigley owned half of the Garden City property and questioned whether she could take action to see the property sold.

Mr. Olsen commented the Quigleys' attorneys should work together to see the court's settlement was enacted. He said he understood from Attorney Butler's initial application that the judgement had already been rendered and from Mr. Richmond's letter that the case was going to be settled by the end of 1996 presumably per court order. He felt the Subcommittee needed to know when determining whether or not there was a Hardship Exemption what is being done to sell the Garden City, New York property. Mr. Olsen noted that Mrs. Quigley did know something about the property: that it was being rented out. He also noted that proceeds from the sale of 197 Walker Street, Falmouth, according to Exhibit B in the financial data, has been put in escrow. Mr. Olsen noted that Clause B notes the escrow agent will deliver the net proceeds to Peter and/or Barbara Quigley in accordance with either a court order directing distribution of net proceeds or a written agreement executed by Peter and Barbara Quigley that is satisfactory to their respective counsels. Mr. Olsen noted the sale of 97 Walker Street netted over \$61,000.00. He questioned whether the

Quigleys had agreed to distribute these funds.

Mrs. Quigley responded she has tried to get these funds. She said the judge would only award her, at this time, \$5,000.00 from the sale of 197 Walker Street in Falmouth.

Mr. Olsen commented the judge did award Mrs. Quigley some part of those proceeds. He questioned when the order awarding the \$5,000 was issued. Mrs. Quigley responded the order was signed today (7/30/96). Mr. Olsen said the Subcommittee should be provided a copy of the order or a statement by Mrs. Quigley to that effect.

Ms. Bebout asked if Mr. Prince had any questions. Mr. Prince questioned if the proceeds from the sale of Lot #91 in Falmouth would also go into the escrow account. Mrs. Quigley responded money from sale of Lot #91 would go into escrow until the divorce was final.

Mr. Olsen said this was in conflict with Exhibit B which indicated that the Quigleys have some discretion with what they do with the proceeds from sale of real property in the interim. Mr. Olsen commented that Item 2 in the financial data represented Mrs. Quigley's current monthly expenses. He noted this was quite different from a statement filed by Mrs. Quigley on December 3, 1995. Mrs. Quigley commented that her situation has changed since then. She noted she had a job then and did not have one now.

Mr. Olsen said he wanted to confirm that what Mrs. Quigley provided in Item 2 was her current income and expenses. Mrs. Quigley responded this was the case. Mr. Olsen said he also wanted to understand what Mrs. Quigley filed with the New York court because it noted in the item as of 12/3/95 that the figures were monthly figures for both expenses and income. He noted Mrs. Quigley's expense figure given in the court documents was approximately \$2,629 per month and Mrs. Quigley's income was noted at \$910 per month. Mr. Olsen said it was hard to understand this because such an expense-to-income difference would result in a significant debt. Mrs. Quigley responded at the time she was living at the Walker Street house. She said she was not owing a mortgage. She noted she had expenses that have not even been touched. Mrs. Quigley said she had a job at that time. She said she did not have the information in front of her concerning the financial report she gave in December, 1995.

Mr. Olsen asked for clarification on Exhibit E of the financial data. He questioned if the CHASE Bank of Boston bill in excess of \$9,000 was a credit card bill. Mrs. Quigley responded this was a credit card bill. Mr. Olsen noted the principle debt was \$6,500 and the interest was \$2,700. He questioned how the additional \$3,000 of debt was accrued just three months later. Mrs. Quigley said she had not yet been served with the notice at the time. She said it had not gone to a collection agency and she just got the notice recently. She said the debt was a combined marital debt. She said this was another issue for the court to decide. Mr. Olsen said the debt was billed to Mrs. Quigley. Mr. Quigley said it was under her name but that she was with Mr. Quigley when the debts occurred. She said there was some question as to whether they were marital debts because things purchased on the card were for both herself and Mr. Quigley. She said she believed the \$3,000 was another credit card.

Ms. Bebout asked if Attorney Hovey had any questions. Attorney Hovey responded he felt the applicants have tried their best to give the Subcommittee what information they had. He said the Subcommittee seemed to be asking for more substantiation than was possible. Attorney Hovey said he felt the applicants had submitted sufficient evidence to warrant a Hardship Exemption.

Mr. Prince said he felt the hardship was self-created and had only a minor connection to Lot #91 in Falmouth. He questioned how the granting of a Hardship Exemption from the Cape Cod Commission would solve any problems from the standpoint that proceeds from the sale of this lot would go into escrow.

Attorney Hovey said he felt a Hardship Exemption would solve several problems. He said it would allow Lot #91 to be sold; allow the Simpsons, his personal clients, to purchase the property at a decent price and it would allow the further development of a lot.

Mr. Prince questioned whether the Simpsons were now back in as applicants. Attorney Hovey said he was asking the Subcommittee for help on behalf of an applicant. He hoped the Subcommittee would see fit to grant relief where they could. Attorney Hovey said there was enough evidence to grant a Hardship Exemption so the Simpsons could buy the property and Mrs. Quigley could sell it. He noted Mrs. Quigley had problems with the divorce and realizing any of the sale's proceeds. Attorney Hovey said he felt the applicants had proved a hardship, perhaps not to the Subcommittee's satisfaction, but that there was proof of a hardship.

Ms. Bebout asked for comments from the public.

Ms. Frappier said she noted her cover letter included a comment on behalf of Mrs. Simpson. She said the hardship was primarily Mrs. Quigley's and whether she brought it on herself or not was not the issue. She said that a party in a divorce might be more attached to a particular home or piece of property. She said deviousness, cruelty and hatred were part of a divorce. Ms. Frappier said it was sad and particularly so for Barbara Quigley who had spent a lot of time in the marriage to find the person she had been living with for some time would want to see her "hung out to dry," bury any money or give it all to an attorney to keep her from getting any funds. Ms. Frappier said the best scenario Mrs. Quigley had was to accumulate something in the escrow account so that the court would meter out some of it. Ms. Frappier noted the court had only provided for \$5,000 but that Mrs. Quigley had asked for more money. She said the Simpsons were good buyers. Ms. Frappier noted they were not a formal part of the Hardship Exemption but they are rare buyers. She noted the mortgage rate were going up and might continue to do so with the November, 1996 elections and that this decreased the potential for buyers. She said the lot had been on the market for a while and they could not afford to lose a good buyer. She noted the Simpsons had fronted all these expenses for Mrs. Quigley and that no other buyer would do that because a buildable lot could not be provided by Mrs. Quigley.

Ms. Bebout commented the Simpsons could still purchase the lot. She felt there was every expectation that they would be able to build, but that the Cape Cod Commission was not the body to make this determination.

Mr. Olsen asked what the date of the purchase and sales agreement was. Ms. Bebout said she was under the impression it had not been executed.

Attorney Hovey said the purchase and sales agreement had not been executed but that this did not mean there was no agreement.

Mr. Olsen asked if there was a contingent purchase and sales agreement. Ms. Frappier responded she thought this was demonstrated by the amount of money that the Simpsons had paid out on the project to date.

Mr. Olsen asked if there was a legal, binding purchase and sales agreement. Attorney Hovey said he did not know.

Mr. Olsen asked Mrs. Simpson if there was or was not a purchase and sales agreement. Mrs. Simpson responded there is no purchase and sales agreement. She said she signed an offer to purchase at the very beginning. Mrs. Simpson said the reason why the document submitted to the Commission was not signed was because Mrs. Simpson was going to make a very large down payment and she could not tie up that much money for a year and only receive half interest back on the likelihood that in another year she might be able to build.

Mr. Olsen questioned whether Mrs. Simpson had something different by way of an agreement relating to this property than what was submitted to the Commission. Mr. Guimond commented that it sounded like an offer to purchase had been executed. Mrs. Simpson responded this was the case originally. Attorney Hovey said there may well be an enforceable purchase and sales agreement now by Mrs. Simpson by virtue of her actions.

Mr. Olsen commented that the purchase and sales agreement submitted to the Commission is not valid; it did not exist. Attorney Hovey said the document submitted to the Commission was never signed.

Ms. Bebout noted the income tax returns submitted to the Commission were not signed by the Quigleys. Mrs. Quigley said the originals were signed and what had been submitted to the Commission were copies. Attorney Hovey stated that tax returns submitted with a mortgage application are signed copies. He said this had not been done but that signed copies could be provided to the Commission if this was important. Ms. Bebout noted she typically kept signed copies of her returns for her files.

Mr. Olsen asked when the offer to purchase expired. Mr. Hovey said he did not believe it had expired. He said he believed there was a there is a binding agreement now by virtue of what had transpired and the fact that the Simpsons have given a substantial deposit to the Quigleys.

Mr. Olsen asked that a copy of the offer to purchase be submitted to the Commission. Mrs. Simpson commented that it expired thirty days after signing.

Mrs. Quigley commented she did not know what was meant by a self-imposed

hardship. Mr. Prince commented that a hardship relating to the land is what he was referring to.

Mrs. Quigley noted they had paid a lot of money for the property and had originally agreed to build on the lot themselves. She said she did not serve divorce papers on Mr. Quigley but that he served divorce papers on her. She said it came as a complete shock. Mrs. Quigley said that at the last minute, they thought about pulling out of the land deal but it was too late so they went ahead with it. She noted Mr. Quigley has gone to great lengths to make sure she has not received a nickel. She said he had the house ready to go for foreclosure and that neither she nor his lawyer knew this. Mrs. Quigley said Mr. Quigley was ready to sell the house just so she would not receive any financial gain from the house. She said the court order to sell the house was the only way she would receive any funds. Mrs. Quigley noted she did not have a job and needed funds. She noted she had an upcoming operation. She said she was homeless and that her situation was grim.

Ms. Bebout asked Mr. Hovey to confirm if Mrs. Quigley would receive half of the proceeds of the sale of Lot #91. Attorney Hovey said he felt the money would go to her attorneys. Mrs. Quigley said she was prepared to go to court again to get this settled, hopefully through a deposition and another court appearance on August 19, 1996.

Ms. Bebout noted action by the Commission could not solve Mrs. Quigley's immediate problems. She noted that virtually nothing could solve the problem of Mr. Quigley taking steps to prevent her getting funds. Attorney Hovey noted the question was a financial hardship, not the sale of the lot. He noted it was not a self-imposed hardship.

Mr. Olsen emphasized the Subcommittee needed the offer to purchase, the court order granting Mrs. Quigley \$5,000 as well as the letter stating Attorney Hovey was not representing Mr. Quigley.

Attorney Hovey asked that Mr. Guimond provide him with a memorandum requesting this information. Ms. Bebout directed staff to provide such a memo.

Ms. Bebout asked what the next step was given the time frame. Mr. Guimond suggested the Subcommittee could vote to close the public hearing and schedule a Subcommittee meeting to discuss the project. Mr. Guimond noted the Subcommittee wanted the court order awarding Mrs. Quigley \$5,000 as well as a copy of the offer to purchase. He noted the Subcommittee also questioned whether there was a valid purchase and sales agreement and the response by Mrs. Simpson was no. Mr. Prince noted that it was said the offer to purchase was still valid and that money had changed hands to make it valid. Ms. Bebout said the Subcommittee had also asked for the letter noting Attorney Hovey did not represent Mr. Quigley, the half-owner of the lot.

Mr. Prince said he was still unclear on the jurisdictional issue. Mr. Olsen noted there was no formal jurisdictional request but he read the Minutes of the July 9, 1996 hearing, on page 11 into the record: "Mr. Prince stated that he would recommend that Commission does have jurisdiction over this lot for the reasons that were mentioned

previously...”, that is in the O’Connor hearing that same night. Ms. Bebout noted that Patty Daley, Commission staff legal counsel, confirmed the Commission had jurisdiction. Mr. Olsen noted the Minutes of July 9, 1996 note he had said “we agreed in the previous case [O’Connor] that the Commission does have jurisdiction.” He noted this indicated his support for saying that the Commission had jurisdiction in the Quigley/Simpson project. Mr. Olsen noted the Subcommittee could also respond in its recommendations to the full Commission on the matter of jurisdiction if a formal jurisdictional determination application was made in the Quigley/Simpson project. Mr. Prince noted the Subcommittee had a formal delegation of authority from the full Commission to make a jurisdictional determination in the O’Connor project. Mr. Olsen noted the Subcommittee did not have a delegation to make a recommendation on a jurisdictional determination in the Quigley/Simpson project. Mr. Prince noted a formal jurisdictional determination in the Quigley/Simpson project would go before the full Commission. He noted that it had been pointed out that Section 22(e) of the Cape Cod Commission Act relates to only to subdivision of a lot. He also said it had been determined that development of a lot exempted under Section 22(e) of the Act is subject to the Cape Cod Commission’s jurisdiction. Mr. Guimond noted that the O’Connors filed both a jurisdictional determination (JD) application and a Hardship Exemption application. He noted the Quigley/Simpson applicants did not file a JD application, and staff did not see it a necessary because it seemed to continue the argument under Section 22(e) of the Act which had already been answered by a previous project. Mr. Guimond noted the applicants in the Brunette project did not file a JD, just a Hardship Exemption application. Mr. Guimond said it was the applicant’s decision in the Quigley/Simpson project if they wanted to file an additional JD application. Mr. Prince noted in Mr. Butler’s original letter in the Quigley/Simpson project set out the same arguments under Section 22(e) of the Act as were discussed with regard to the O’Connor project. He noted the Subcommittee found in the O’Connor project there was Commission jurisdiction.

Ms. Bebout questioned how many bedrooms were proposed for the dwelling. Ms. Quigley responded four bedrooms. Ms. Bebout asked for final comments from the applicants, Attorney Hovey and the staff. There were none.

Mr. Guimond suggested the public hearing be continued to a Commission meeting and that the Subcommittee could have a meeting as needed. Ms. Bebout suggested the hearing could be continued to the August 22, 1996 Commission meeting. She asked what the time frame was. Mr. Guimond said a decision had to be rendered by September 3, 1996 on this project.

Mr. Guimond asked for Subcommittee direction on the 22(e) question. He noted that filing a JD would take time. Mr. Olsen noted that the three present Subcommittee members had heard all the testimony. He noted both himself and Mr. Prince agreed at the July 9, 1996 hearing with the determination on the O’Connor project of jurisdiction with regard to the JD issue as it related to Section 22(e) of the Act. Mr. Guimond said he believed the 22(e) question had been raised on the Brunette project as well. He noted the Subcommittee had answered that question on that project as well. Ms. Bebout noted she had voted with Mr. Prince and Mr. Olsen that the Commission had jurisdiction relating to the JD/Section 22(e) question in the O’Connor project and that Mr. Travelo had been the dissenting vote. Mr. Olsen said, based on this, he felt the Subcommittee would recommend the to the Commission that it had

jurisdiction in the Quigley/Simpson project as well.

Mr. Prince said the Quigleys could file a formal JD application if they wished. Attorney Hovey suggested the applicants would accept the Subcommittee's finding of Commission jurisdiction to speed up the process. Mr. Prince said a JD would still need a hearing before the Commission which he did not think could be waived.

Mr. Guimond asked the Subcommittee for direction concerning advice from staff counsel about waiving the public hearing requirement on a JD application. Mr. Prince noted the original request from the applicant was for an informal JD to which the Subcommittee has now provided an answer. He questioned whether the applicant wanted to file a formal JD application. Attorney Hovey said he would withdraw that request to waive the public hearing.

Mr. Prince questioned how long would it take to get the additional submissions requested by the Subcommittee from the applicants. Attorney Hovey provided staff with his fax number. He said he felt it would take about seven days to gather and provide the supplemental information.

Mr. Prince said he was confused as to whether the Simpsons as well as the Quigleys were seeking to show a hardship.

Mr. Olsen moved the public hearing be continued to Thursday, August 22, 1996 at the full Commission meeting beginning at 3:00 pm at the Assembly of Delegates chambers in Barnstable, MA and that the record be left open. Mr. Prince seconded the motion. The Subcommittee voted all in favor of the motion.

Ms. Bebout moved a Subcommittee meeting be held on this project on Thursday, August 8, 1996 at the Cape Cod Commission office. Mr. Olsen seconded the motion. The Subcommittee noted all in favor of the motion. Ms. Bebout noted that this was a Subcommittee meeting and the public was welcome to attend, but that meetings differed from public hearings in that the purpose of meetings was not to take testimony. Ms. Frappier questioned if additional information could be submitted. Ms. Bebout said this was acceptable since the record was still open on this project. Mr. Olsen requested that any information be provided to Commission staff in a timely manner to allow time for distribution to and review by the Subcommittee. The Meeting ended at 8:30 pm.

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Ms. Bebout called the Subcommittee meeting to order at 1:10 pm. She noted the Subcommittee had received new information from the applicant through Commission staff including the letter from Attorney Hovey stating that he no longer represented Mr. Quigley.

Mr. Guimond noted staff had provided the Subcommittee with information addressing the point raised by Attorney Hovey at the July 30, 1996 public hearing about the site being an undeveloped area and so not under the Commission's jurisdiction.

Ms. Bebout asked if the Subcommittee members had any comments.

Mr. Olsen commented that the Subcommittee had focused on the issue of Mrs. Quigley's "financial" hardship. He said he felt this was not the real basis for a Hardship Exemption based on the Commission policy on Hardship Exemptions. Mr. Olsen said the latest information provided by the applicant to the Subcommittee indicates a judge did award \$5,000 to each of the parties in the divorce. He also noted the offer to purchase with the Simpsons had expired shortly after it was executed by the Simpsons. He said the offer to purchase stated it was valid until 5:00 pm October 31, 1995.

Ms. Bebout questioned why the offer to purchase was only signed by one party. Ms. Frappier submitted for the record a new purchase and sales agreement which she said was executed with the exception of Mr. Quigley's signature who signed it yesterday. Ms. Frappier said the original agreement had been re-written by Attorney Hovey.

Mr. Olsen noted there was no binding purchase and sales agreement in effect when the Hardship Exemption process started. Ms. Frappier said that was correct.

Mr. Prince asked if the staff had information regarding how, if at all, the lack of information from Mr. Quigley would affect the Subcommittee's review of the project. Commission staff counsel Patty Daley responded that married persons own property as "tenants in common" which means that each person owns a one-half, undivided interest in the property. Ms. Daley said that this meant that Mrs. Quigley could not convey the property without Mr. Quigley's signature prior to the divorce. Ms. Daley said she did not think Mr. Quigley's not being represented by Attorney Hovey was a problem. She said she felt the Subcommittee had two options related to Mr. Quigley:

- 1.) ask him or through his attorney to write a letter to the Commission assenting to the Hardship Exemption request, or
- 2.) issue a recommendation for a decision and note in the Findings of the decision find that all owners in title to the lot would have to sign off for the property to be conveyed.

Ms. Daley said she did not think that Mr. Quigley not currently a formal party to the Hardship Exemption application was an impediment to the Subcommittee moving ahead. She noted staff had received a letter from Mr. Quigley's attorney stating he would do whatever was necessary to facilitate the sale of the lot.

Mr. Prince noted that Mrs. Quigley had just signed a purchase and sales agreement. Ms. Frappier said Mr. Quigley had not signed it.

Mr. Prince noted he was concerned with the lack financial information on Mr. Quigley. Ms. Daley said it did not really matter what Mr. Quigley's financial position was because all the assets were tied up by court proceedings and that the court would decide how the assets would be distributed.

Ms. Bebout noted that the Quigley's owned another piece of property of more value than Lot #91.

Mr. Olsen noted he had referred to the policy on Hardship Exemptions and the fact

that the Subcommittee had been focusing on the issue of a "personal financial hardship." Mr. Olsen noted that in the interim, Mrs. Quigley had filed for release of \$5,000 from escrow funds and that the attorneys had consented to this. He felt this was a substantial sum of money. Mr. Olsen suggested the Subcommittee needed to look more at the issues in line with the Brunette project: whether any applications or permits had been filed with the Town to construct. Mr. Olsen noted this had not happened in the Quigley/Simpson project prior to the Cape Cod Commission's acceptance of the District of Critical Planning Concern (DCPC) nomination. He said there are no permit applications with regard to the Quigley/Simpson project before the Town. Mr. Olsen noted that a reason why a hardship was found in the Brunette project was because a permit with the Town had been filed and was in process prior to Commission acceptance of the DCPC. Mr. Olsen noted Ms. Brunette had expended a substantial sum of money on permitting and engineering related to her lot. Ms. Daley noted that the Commission typically considers financial hardship in connection with the lot itself, as was the case in the Brunette project, as opposed to a personal financial situation.

Mr. Prince noted he thought Mrs. Quigley had serious problems, but he did not see them directly related to Lot #91. He felt granting a Hardship Exemption on Lot #91 would not solve Mrs. Quigley's problems in the time frame for the DCPC implementing regulations to be finalized. He felt the hardship was not directly related to the land.

Mr. Olsen noted either of the Quigleys could petition the court for release of additional funds.

Ms. Bebout said that the Subcommittee sympathized with the emotion expressed at the two public hearings. She also noted that neither the Town nor the Cape Cod Commission had said that Lot #91 could not be built upon. She noted the lot had been for sale for some time. She noted the Quigleys had considered not going forward with purchasing Lot #91. Ms. Bebout said the anticipated time frame for the Town to finish the DCPC implementing regulations was three to six months. She noted the Simpsons should be in a good position to purchase the land since they had conceptual plans ready.

Mr. Olsen questioned whether Ms. Frappier had gone to the Falmouth Commission for a wetland delineation on the Lot #91. Ms. Frappier said that provided the DCPC implementing regulations were ready, they might address the amount of clearing or square footage of a house. She said it may be possible to build some type of house on Lot #91, but that the Simpsons might not be interested in purchasing the lot if they could not build the particular house they wanted. Ms. Frappier said Lot #91 had been on the market since 1991 and that the Simpsons were the first viable buyer.

Ms. Bebout asked for clarification regarding the property's sale date. She noted that information submitted to the Subcommittee indicated that the property had been sold before. Ms. Frappier said this was incorrect: there was no offer to purchase.

Ms. Bebout noted that once the DCPC regulations were in place, the area was likely to become more valuable. She felt Lot #91 would increase in value. Ms. Frappier noted that a house could probably be built on the lot.

Mr. Olsen said the intent of a DCPC is to give the Town the opportunity to create implementing regulations before any further development takes place in the area. He felt it was important to allow the Town to proceed with its efforts.

Mr. Prince said he felt it would be detrimental to the DCPC process to find a hardship. He also noted the information submitted did not show a hardship tied to the land.

Ms. Bebout asked if there were any comments from staff.

Mr. Guimond noted issues raised by the applicant or her representatives during this process were:

- 1.) an exemption under Section 22(e) of the Act,
- 2.) financial or timing hardships to the Quigleys,
- 3.) a financial hardship to the Simpsons,
- 4.) the lot not being developed under the Act,
- 5.) the delineation of the lot, and
- 6.) the property was not originally in the DCPC or the applicant was not properly noticed.

In reference to these points, Mr. Guimond recommended that the Subcommittee could find that Lot #91 was not exempt from the Act or the DCPC as was the case in the O'Connor jurisdictional determination (JD) decision.

Mr. Guimond further recommended the Subcommittee could find no financial or timing hardship caused by the lot, the development, the Cape Cod Commission Act or the DCPC ordinance. He noted the last points should be included in a finding because the attorney had stated he felt it was the Commission Act which had created the hardship.

In connection with the Simpson's possible financial hardship, Mr. Guimond noted they were originally part of the application, but that they were no longer part of the application. He noted that even when they were no longer part of the Hardship Exemption application, references to their expenses had been made in correspondence or at public hearings. Mr. Guimond recommended that the Subcommittee could find that Simpsons do not have standing in the Hardship Exemption application any more.

Mr. Guimond said staff disagree with the applicant's representatives in the reading of Section 1(c) of the Act. He noted that staff felt that Lot #91 is undeveloped.

With regard to the delineation of the lot, Mr. Guimond noted Lot #91 was clearly within the DCPC boundaries as proposed by Falmouth on the May, 30, 1995 map. He noted the Cape Cod Commission had considered the boundary issue during the nomination process. Mr. Guimond noted the Commission ended up agreeing with the Town on the DCPC's boundary. He also noted the lot is on the boundary of the state-listed rare species habitat for both wildlife and plants. Mr. Guimond further stated the lot abuts a salt marsh.

Regarding the last point, Mr. Guimond noted the map included with the DCPC

nomination to the Commission dated May 30, 1995 included Lot #91. He noted Mr. Quigley was noticed by the Commission during the DCPC process.

Ms. Bebout suggested these points be clearly articulated in both the minutes and the decision.

Mr. Prince suggested the items in the Hardship Exemption policy and Section 1(c) Commission Act should be incorporated into the decision. He said the policy read "...basis for finding a hardship shall be in the land or in the nature of the development rather than the circumstances of the applicant."

Ms. Bebout noted the Subcommittee did express concern about Mrs. Quigley's situation.

Mr. Olsen moved the Subcommittee find that Section 22(e) of the Act does not exempt Lot #91 from the Commission's review. Mr. Prince seconded the motion. The Subcommittee voted all in favor of the motion.

Mr. Prince moved the Subcommittee recommend to the full Commission that the Hardship Exemption application be denied on the basis that the hardship is in the circumstances of the applicant and not in the land or in the nature of the development. He also moved that granting a Hardship Exemption based on the circumstances of the applicant could be detrimental to the DCPC process underway in the Town of Falmouth. Mr. Olsen seconded both motions. The Subcommittee voted in favor of both motions.

Ms. Bebout noted the draft Decision for the Quigley/Simpson project was scheduled to come before the full Commission on Thursday, August 22, 1996. The Subcommittee directed staff to prepare a draft Decision on this project for the continued hearing at the August 22, 1996 Commission meeting.

Ms. Frappier requested that a portion of her letter of July 31, 1996 letter to the Subcommittee be read into the record. Mr. Guimond read the following into the record: "On another matter, I inquired into the information I received yesterday about the removal of trees/shrubs from the Quigley lot by Mr. Barnes, a direct abutter. I could not find any evidence to support such activity. In fairness to Mr. Barnes, I would like this letter to be included as part of the record. Thank you."

Ms. Bebout thanked Ms. Frappier for her diligence.

Mr. Olsen said the Subcommittee sympathized with Mrs. Quigley's situation. Mr. Olsen moved to close the Subcommittee meeting. Mr. Prince seconded the motion. The Subcommittee voted all in favor of the motion.

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 HDEXDCPC96001 are incorporated into the record by reference.

FINDINGS:

The Commission has considered the requested DCPC Hardship Exemption of Barbara A. Quigley and J. Peter Quigley. Based on consideration of the information presented, Subcommittee and staff recommendations, the Commission makes the following findings pursuant to Sections 12, 13, 22 and 23 of the Act:

1). The Section 22(e) exemption pertains to the creation of lots and roads under Chapter 41 (the Subdivision Control Law), it does not exempt subsequent development within those lots. Therefore, the Black Beach/Great Sippewissett Salt Marsh District of Critical Planning Concern Ordinance does not affect the layout of lots and roads, but does apply to subsequent permits such as building permits, orders of conditions, etc. on the lots.

2). 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.

3). 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.

4). 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."

5). 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."

6). 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.

7). The boundary of the DCPC contained in Ordinance 96-1 is the same as the boundary that was originally nominated by the Falmouth Conservation Commission. No changes were made to the boundary during consideration of the nomination by the Cape Cod Commission or the Assembly of Delegates.

8). The Cape Cod Commission received a letter from Mr. Quigley's counsel (Arthur S. Olick) indicating Attorney Hovey was not authorized to represent Mr. Quigley's interests on this matter. It also noted that Mr. Quigley is interested in facilitating the sale of the property, and asked to be advised of any cooperation required.

9). The Cape Cod Commission could not find a financial hardship for the prospective buyers of the property (Mr. And Mrs. Simpson).

10). The Cape Cod Commission expressly found the lot is undeveloped.

11). The Cape Cod Commission expressly disagrees with the applicant's representatives position *that the area is not an "undeveloped area"* under Section 1(c) of the Commission Act.

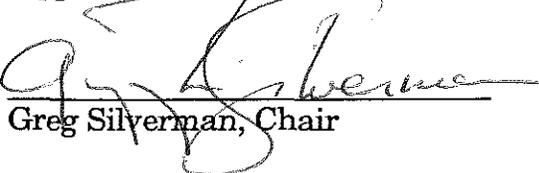
12). The Cape Cod Commission expressly found the area is important to the interests and purposes identified in Section 1 of the Act as well as the DCPC and that development of this lot prior to the adoption of implementing regulations could derogate from the intent and purposes of the Act and the DCPC.

13). The Cape Cod Commission could not find a basis for a financial or timing hardship in the land or in the nature of the development rather than the circumstances of the applicant.

CONCLUSION:

Based on the findings above, the Commission concludes that the proposed development of Lot 91 Arnold Gifford Road is not exempt from review under Section 22(e) of the Act, the Cape Cod Commission Regulations of General Application, Chapter A, Section 3(c), Barnstable County Ordinance 94-10 and the Black Beach/Great Sippewissett Marsh DCPC designation.

Also, based on the findings above, the Cape Cod Commission hereby denies the Hardship Exemption application of Barbara A. Quigley and J. Peter Quigley for development of a single residential lot (Lot 91) within the Black Beach/ Great Sippewissett Marsh District of Critical Planning Concern.

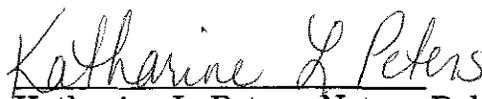

Greg Silverman, Chair

8/22/96
Date

Commonwealth of Massachusetts

Barnstable, ss.

Subscribed and sworn to before me this 22 day of August, 1996.


Katharine L. Peters, Notary Public

My commission expires: