



CAPE COD COMMISSION

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December 3, 1998

Applicant: Estate of Georgia Cook Ferguson
c/o Daniel J. Mullen, Esq.
Goodwin, Procter & Hoar, LLP
Exchange Place
Boston, MA 02109-2881

Georgia C. Ferguson

Project #: DRI Referral TR98038

Project: Audubon/Ferguson Subdivision
Route 6A, Barnstable

RE: Development of Regional Impact Referral

*Lots 1-5
CTF 34629
152621
152622
152623*

Land Court 34629 LCC 29726A
Certificate: 69906 LCC 35874-B

DECISION OF THE CAPE COD COMMISSION

SUMMARY:

The Cape Cod Commission hereby **approves with Conditions** the application of the Estate of Georgia Cook Ferguson, represented by Daniel J. Mullen, Esq. of Goodwin, Procter & Hoar LLP of Boston, as a Development of Regional Impact. The project came before the Commission under the threshold, "any development which proposes to divide, combine or develop any parcel(s) of land totaling 30 acres or more."

PROJECT DESCRIPTION:

The project is located in the Town of Barnstable off of Route 6A on Barnstable Harbor in the area of Jules Island Creek and is located within a Significant Natural Resource Area as well as within the Sandy Neck/Barnstable Harbor Area of Critical Environmental Concern. It is located within estimated habitats of rare wildlife and priority sites of rare species habitats and exemplary natural communities, as mapped by the Natural Heritage and Endangered Species Program. Due to these area characteristics, the site is a regionally significant natural resource.



The Ferguson family proposes to subdivide approximately 103 acres to create a total number of five lots. Lot 1 contains the original home and will remain with the family. Lots 2 and 4 will be donated to provide a gift of 78 acres to the Massachusetts Audubon Society. Lot 2 contains one single-family home and Lot 5 contains a hunting cabin. Lot 3 and Lot 5 will remain with the Ferguson family and provide two additional building lots.

JURISDICTION:

The project is being reviewed as a Development of Regional Impact (DRI) under the threshold, "any development which proposes to divide, combine or develop any parcel(s) of land totaling 30 acres or more." The applicant applied for a Development of Regional Impact Exemption and the Town of Barnstable referred the project as a Development of Regional Impact. Both hearings were conducted simultaneously.

PROCEDURAL HISTORY:

The Commission received a Development of Regional Impact (DRI) application for and Exemption on September 9, 1998 from Daniel J. Mullen, Esq. representing the applicants. The Commission received a Development of Regional Impact Referral letter from Ralph M. Crossen, Building Commissioner for the Town of Barnstable on September 15, 1998. A duly noticed Public Hearing pursuant to Section 5 of the Cape Cod Commission Act was held by an authorized Subcommittee of the Commission on the DRI Exemption request and on the DRI on November 4, 1998 at the Assembly of Delegates Chamber, Barnstable County Complex. At this hearing the record and hearing were left open and continued to a full Commission meeting on November 19, 1998. On November 19, 1998, to allow for more time to finalize details concerning the conservation restriction, a Hearing Officer continued the hearing to the December 3, 1998 Commission meeting. A final Hearing on both the DRI Exemption and the DRI was held on December 3, 1998 where the full Commission voted to deny the Exemption request and to approve the DRI with Conditions.

Materials Submitted for the Record

Application Materials:

- DRI Exemption Application
- Preliminary Site Plan
- Form letter signed by Eric S. Johnson of Massachusetts Historical Commission, September 21, 1998
- Letter to Daniel Mullen from Gary R. Clayton, Massachusetts Audubon Society, October 30, 1998
- Letter to Georgia C. Ferguson from Gary R. Clayton of Massachusetts Audubon Society, December 15, 1997.

Correspondence from Applicant:

- Letter to Gay Wells from Theresa A. Cook, September 2, 1998
- Letter to Gay Wells from Daniel J. Mullen, September 9, 1998
- Letter to abutters from Gary R. Clayton, September 9, 1998
- Letter to Gay Wells from Daniel J. Mullen, September 21, 1998
- Letter to Gay Wells from Daniel J. Mullen, October 1, 1998
- Letter to Dennis Coffee from Daniel J. Mullen, October 10, 1997
- Letter to Daniel J. Mullen from Dennis Coffee, EOTC, November 24, 1997
- Letter to Daniel J. Mullen from Arne H. Ojala, P.E., P.L.S., November 3, 1998
- Letter to Daniel Mullen from Gary R. Clayton, October 30, 1998

Correspondence from the Cape Cod Commission:

- Letter to Daniel J. Mullen from Gay Wells, August 26, 1998
- Letter to Daniel J. Mullen from Gay Wells, September 22, 1998
- Memorandum to Subcommittee from Gay Wells, October 16, 1998
- Memorandum to Subcommittee from Gay Wells, October 30, 1998
- Memorandum to Gay Wells from Ed Eichner, November 2, 1998
- Fax to Daniel J. Mullen from Gay Wells, November 2, 1998
- Fax to Ralph Crossen from Gay Wells, November 2, 1998
- Fax to Jackie Etsten from Gay Wells, November 2, 1998
- Staff Report, October 28, 1998
- Letter to Daniel J. Mullen from Gay Wells, November 4, 1998
- Sign-in sheet for Public Hearing, November 4, 1998
- Agenda for Public Hearing, November 4, 1998
- Minutes of Public Hearing, November 4, 1998

Other Correspondence and Information:

- Letter to the Cape Cod Commission from Ralph M. Crossen, September 14, 1998
- Letter to the Cape Cod Commission from A. Roy Fogelgren, October 27, 1998
- Abutters List
- Meeting notes with Mr. Alvin Oppenheim, November 2, 1998 and November 12, 1998

TESTIMONY:

Public Hearing: Wednesday, November 4, 1998 - 7:00 p.m. (See minutes in file)

Daniel Mullen, attorney for the applicant, explained that the project is the subdivision of over 100 acres of land, 75+ acres of which will be donated to the Massachusetts Audubon Society, along with a house. The remainder of the land will remain with the sons of Georgia Ferguson. Due to the low amount of development and the large donation of land, the applicant believes that an Exemption should be granted.

George Ferguson, one of Mrs. Ferguson's sons, gave an historical perspective on the family's ownership of the land and stated that his father bought the land in the 1960's to preserve land from development.

Arne Ojala, P.L.S., P.E., explained the project which is the subdivision of the site into five (5) lots. There are two existing homes on the site. There is extensive wetlands and also an old hunting camp on the site.

Mario DiGregorio, biologist and consultant for the applicant, did a site assessment for the project and gave his report. Bob Prescott, Wellfleet Bay Sanctuary Manager, stated that the site will be part of the Great Marsh Sanctuary. The site would not be open to the public on their own, but would be a program-driven site where a few people will be brought in together via van. He stated that they are very grateful to receive the property.

Mr. Mullen stated that the property was assembled from two pre-existing parcels.

Gay Wells, Commission Planner and Project Manager, presented the staff report and gave the water portion of the report stating that the Water Resources staff's evaluation of potential nitrogen loading impacts of the proposed subdivision showed the projected nitrogen load is less than the most sensitive of the available areal loading rates.

Kathy Sferra, Commission Natural Resources Planner, stated that the site contains outstanding natural habitats and she noted that the donation is a significant parcel of land. Ms. Sferra discussed the methods to calculate Open Space requirements. Commission staff will work with the applicant regarding Open Space and conservation methods.

Bob Mumford, Transportation Program Manager for the Commission, gave the transportation report and noted that the questions in the staff report regarding the railroad crossing, trip generation for the project, and Route 6A access have all been resolved.

Jackie Etsten, Principal Planner for the Town of Barnstable, presented the Town's concerns and stated that the review is very focused and is restricted to zoning and access. She noted that Open Space and Natural Resources cannot be reviewed and addressed by the Planning Board and, for this reason, it is important to have the Commission's review of these issue areas. The Planning Board has stated that existing access and future development is a concern and that the Board may want to place a condition for not allowing future subdivision of land.

Herb Olsen, Orleans representative to the Commission, stated that the subcommittee recognizes that this is an important donation of land. He also said that he believes that

the Subcommittee should deny the Exemption in order to be able to place Conditions on resource protection through DRI review.

There was a discussion of the Exemption. Rob O'Leary spoke strongly in favor of the project. He noted that the donation of this significant portion of land is important to the preservation of natural resources on Cape Cod and is the type of project the Commission encourages. Mr. O'Leary stated if the Exemption is denied, the importance of a swift decision on the DRI. He also noted that it is important to not require the applicants to spend more money on the review than they have already spent.

Herb Olsen made the motion to recommend denial of the Exemption and Sumner Kaufman seconded the motion. The vote was unanimous.

Herb Olsen made the motion to recommend approval of the DRI with the understanding that the staff and the applicant would work out final details on the provision of required Open Space prior to the hearing before the full Commission. The motion to recommend approval of the DRI and continue the Hearing to November 19, 1998 was unanimously approved.

FINDINGS:

General Findings:

G1. The project is being reviewed as a Development of Regional Impact (DRI) under the threshold "any development which proposes to divide, combine or develop any parcel(s) of land totaling 30 acres or more."

G2. The project proposes a subdivision of Ferguson family land of approximately 103 acres to provide for a gift of 78 acres on Lot 4 and Lot 2 to the Massachusetts Audubon Society. Division of the remaining land among family members would create two additional building lots for a total number of five lots. Lot 1, Lot 3, and Lot 5 will remain with family members.

Natural Resources and Open Space Findings:

N/O1. The proposed project is located within a Significant Natural Resource Area as well as within the Sandy Neck/Barnstable Harbor Area of Critical Environmental Concern. The site includes diverse habitat areas such as tidal creeks and salt marsh, bordering and isolated vegetated wetlands, and upland areas.

N/O2. The applicant is proposing to deed all of Lot 2 and Lot 4 to the Massachusetts Audubon Society to become part of their "Great Marshes" Sanctuary. This donation provides for 13.3 acres of upland Open Space in addition to 61.33 acres of wetland (salt marsh) area.

N/O3. Based on Minimum Performance Standard 2.5.1.3, additional upland is required to meet Regional Policy Plan requirements for the set aside of permanent Open Space. Calculation of additional land necessary to meet the Regional Policy Plan Open Space requirements depends upon how the area is restricted:

Option 1: 6.6 acres of Open Space can be permanently restricted in a manner satisfactory to Commission Counsel as land area on the proposed lots; or,

Option 2: 4.8 acres can be included within the area to be deeded to the Massachusetts Audubon Society.

N/O4. The Regional Policy Plan requires a minimum 100' undisturbed buffer to wetland areas on the site in Minimum Performance Standard 2.3.1.2. There are several isolated wetlands scattered in the upland portion of the site. The site plan shows buffer areas to these wetlands, as well as to the salt marsh, as "Reserved Areas" on the site plan. No new development, as defined by the Cape Cod Commission Act, can occur within these Reserved Areas, although the existing cart paths may remain (but may not be, widened beyond twelve (12) feet, or relocated closer to the wetland).

N/O5. As an exception to this buffer provision, the applicant has noted that Lot 5 will need to be served by a driveway off the existing cart road. The Commission finds that it is appropriate to invoke the *Flexibility Clause* in the Regional Policy Plan to allow this driveway to be constructed due to the overall benefit being provided to wetland resource areas by this project, including the large amount of wetland being donated to the Massachusetts Audubon Society (61.33 acres of salt marsh) and the small amount of development being permitted on the overall property. This driveway should be designed to be as far from Wetland #1 and Wetland #2 as possible and should be no greater than twelve feet in width. Approval from the Barnstable Conservation Commission will also be required for this driveway.

N/O6. The proposed plan also contains development envelopes for the two new building lots (Lot 3 and Lot 5) that are outside of the 100' buffer and the designated open space. Potential adverse impacts to wetlands and wetland buffers will be mitigated by restricting development activity outside of the development envelopes.

N/O7. The Commission finds that it may be necessary to invoke the Regional Policy Plan's *Flexibility Clause* with regard to the future protection of Open Space on Lot 2. Should this lot ever be sold as provided by Condition N/O3, the Commission has conditioned that the Open Space may be restricted by a permanent Chapter 184 Conservation Restriction. Such a Conservation Restriction would not otherwise have been permitted by Minimum Performance Standard 2.5.1.3. It is appropriate to invoke the *Flexibility Clause* due to the substantial benefit provided by this Open Space.

Transportation Findings:

TR1. The applicant has an easement to cross the existing railroad right-of-way (November 24, 1997 letter to Daniel Mullen from Dennis Coffey, Executive Office of Transportation and Construction).

TR2. According to Massachusetts Highway Department records there is no record of motor vehicle accidents in the vicinity of the property's access to Route 6A (between Aunt Hatches Lane and Old Neck Road) in the last three years, .

TR3. The applicant has requested waivers from road construction standards contained in the Barnstable Planning Board's Subdivision Rules and Regulations.

Correspondence from the Barnstable Planning Board indicates that the Board may require upgrading the existing access drive/road if additional development occurs on any of the lots created by this subdivision.

TR4. Expected average traffic generation from a five (5) lot residential subdivision is 50 trips per day (25 in/25 out). This site, however, includes two existing dwellings. Therefore, developing two additional residential lots would typically be expected to increase traffic by 30 trips per day (15 in/15 out).

TR5. The applicant proposes to give Lot 4 and Lot 2 to the Massachusetts Audubon Society with several restrictions to limit public use. Expected trip generation from the Audubon parcels is estimated to be two to three visits using one or two vehicles every month (letter from Massachusetts Audubon to Daniel Mullen dated October 30, 1998). Expected daily trip generation is approximately 0.4 vehicle trips per day (3 visits x 2 vehicles x 2 directions over 30 days). Therefore, the total expected increase in average trip generation from this project is 20.4 daily trips (two additional residential lots and the Audubon property).

TR6. Due to the use restrictions placed on the Audubon lots, the expected increase in trip generation from this project is over 30% less than the average traffic generation expected for a typical five lot residential subdivision. Therefore, the project complies with the Regional Policy Plan Minimum Performance Standard 4.1.2.1 (20% trip reduction).

TR7. The increase in traffic expected on regional roads and intersections is less than the thresholds of MPS 4.1.1.1 to require mitigation of transportation impacts.

TR8. Access to the regional road system is expected to be at the location of the existing road/driveway serving the property. Traffic operations at the project's access with Route 6A is expected to be Level-of-Service C or better. Sight distance at the project's access with Route 6A is adequate, based on the November 3, 1998 letter from Arne Ojala, PE of Down Cape Engineering to Daniel Mullen. Therefore, Minimum Performance Standards 4.1.1.5, 4.1.1.6 and 4.1.1.7 are satisfied.

TR9. The project, as presented, complies with applicable transportation Minimum Performance Standards. No transportation conditions are necessary.

Water Resources Findings:

WR1. The proposed subdivision is located within the watershed or Marine Water Recharge Area to Barnstable Harbor.

WR2. Based upon two existing dwellings, one each on Lot 1 and Lot 2, and two proposed dwellings, one each on Lot 3 and Lot 5, the projected nitrogen load is less than the most sensitive of the available areal loading rates for Barnstable Harbor.

WR3. Based on Finding WR2, DEP-approved alternative systems with enhanced nitrogen removal will not be required on any lot.

WR4. In consideration of the relatively small nitrogen loading impact of four homes and since flushing study funds have already been appropriated, no money contribution will be required for development of nitrogen management strategies.

CONDITIONS:

General Conditions:

G1. All conditions shall be met prior to the issuance of a Certificate of Compliance by the Cape Cod Commission unless otherwise specified below. Prior to the time that a Certificate of Compliance is needed by the applicant, notification shall be given to the Cape Cod Commission at least 30 days in advance to allow time for staff to ascertain that all conditions have been met.

G2. The applicant shall obtain a Certificate of Compliance from the Cape Cod Commission prior to conveyance of lots to anyone other than the Massachusetts Audubon Society or George or Hugh Ferguson et al, as set forth in the second codicil to the Will of Georgia Cook Ferguson and/or prior to the issuance of building permits for Lot 3 or Lot 5, whichever occurs first.

G3. This approval is for the creation of four new lots. Two of these are building lots, two are for conveyance to the Massachusetts Audubon Society. No further division of land shall be permissible without review and approval by the Cape Cod Commission.

G4. Lot 1 and Lot 2 are approved for only the existing single-family home on each lot. Construction of only one single-family home is permitted on Lot 3 and Lot 5 each. No further development shall occur on Lots 1, 2, and 4.

G5. Notwithstanding #G4 above, minor improvements may be made to the existing hunting cabin on Lot 5, but this shall not serve as a single-family residence.

G6. No visitor center for the Massachusetts Audubon Society will be permitted on either Lot 2 or Lot 4.

Natural Resources & Open Space Conditions:

N/O1. The applicant shall deed all of Lot 2 and Lot 4 to the Massachusetts Audubon Society to become part of their "Great Marshes" Sanctuary. This conveyance shall occur prior to issuance of any building permit or lot release for Lots 3 and 5 and prior to the issuance of any Certificate of Compliance for this project by the Cape Cod Commission.

N/O2. If in the future, the Massachusetts Audubon Society wishes to convey Lot 4, this must be conveyed to another land trust or Conservation agency and preserved in a predominantly natural state.

N/O3. If in the future, the Massachusetts Audubon Society wishes to convey Lot 2, the right of first refusal shall be given to the owner of Lot 3, the owner of Lot 1, and the owner of Lot 5, successively in the order named, as stipulated in the second codicil to the Will of Georgia Cook Ferguson. Should none of the owners of Lots 3, 1, and 5 wish to purchase Lot 2, it must be conveyed to another land trust or Conservation agency or become subject to a permanent conservation restriction with the existing residence to remain.

N/O4. The applicant is required to provide upland Open Space in addition to the land proposed for the donation to the Audubon Society to comply with Minimum Performance Standards of the Regional Policy Plan. This can be either 4.82 acres additional acres of upland that is deeded to the Massachusetts Audubon Society for conservation purposes or 6.6 acres of permanently restricted open space on Lots 1, 3, and/or 5.

N/O5. The applicant shall submit a plan to the Cape Cod Commission showing the areas to be provided as permanent Open Space. Any conveyance of additional land or recording of a restriction shall occur prior to issuance of a building permit or lot release for Lots 3 and 5 and prior to the issuance of any Certificate of Compliance for this project by the Cape Cod Commission.

N/O6. The 100' buffer "Reserved Areas" on the site plan shall remain undisturbed in accordance with Minimum Performance Standard 2.3.1.2. No new development, as defined by the Cape Cod Commission Act, can occur within these Reserved Areas, although the existing cart paths may remain (but may not be widened beyond twelve (12) feet, or relocated closer to the wetland).

N/O7. As an exception to this buffer provision, Lot 5 is permitted to be served by a driveway off the existing cart road. This driveway shall be designed to be as far from Wetland #1 and Wetland #2 as possible and shall be no greater than twelve (12) feet in width. Approval from the Barnstable Conservation Commission shall also be required for this driveway.

N/O8. The proposed plan also contains shaded development envelopes for the two new building lots (Lot 3 and Lot 5) that are outside of the 100' buffer and the designated open space. No clearing other than minor vista pruning and the driveways required to service the dwellings shall occur outside of these development envelopes.

CONCLUSION:

The Cape Cod Commission concludes that the Audubon/Ferguson subdivision is consistent with the Regional Policy Plan, the Barnstable Local Comprehensive Plan, and the Barnstable Zoning Ordinance, as Conditioned. The Commission also concludes that the benefits of the project outweigh the detriments. This conclusion is supported by the Findings and Conditions contained within this Decision. The Cape Cod Commission hereby approves with Conditions the application of the Estate of Georgia Cook Ferguson for the Audubon/Ferguson subdivision as a Development of Regional Impact.

This Decision is rendered pursuant to a vote of the Cape Cod Commission on December 3, 1998.

Herbert Olsen
Herbert Olsen, Chair, Cape Cod Commission

12/7/98
Date

Commonwealth of Massachusetts

Barnstable, ss.

Subscribed and sworn to before me this 7th day of December, 1998

Katharine L Peters

Notary Public



My commission expires:

BARNSTABLE PLANNING BOARD

APPROVAL REQUIRED

DATE _____

"APPROVAL OF THIS PLAN SUBJECT TO COMPLIANCE WITH COVENANT TO BE RECORDED HEREWITH"

BARNSTABLE PLANNING BOARD SUBDIVISION# 768

I, _____ CLERK OF THE TOWN OF BARNSTABLE, HEREBY CERTIFY THAT THE NOTICE OF APPROVAL OF THIS PLAN BY THE PLANNING BOARD HAS BEEN RECEIVED AND RECORDED AT THIS OFFICE AND NO NOTICE OF APPEAL WAS RECEIVED DURING THE 20 DAYS NEXT AFTER SUCH RECEIPT AND RECORDING OF SAID NOTICE.

DATE _____ TOWN CLERK _____

I CERTIFY THAT THIS ACTUAL SURVEY WAS MADE ON THE GROUND IN ACCORDANCE WITH THE LAND COURT INSTRUCTIONS OF 1989 ON OR BETWEEN MAY 11, 1988 AND AUGUST 3, 1990.

Arne H. Ojala P.L.S.

DATE Sept. 4, 1998

NOTES:
 TOWN WATER IS SUPPLIED TO LOCUS.
 GROUNDWATER PROTECTION DISTRICT: AP
 LOCUS LIES IN THE OLD KINGS HIGHWAY HISTORICAL DISTRICT.
 ROUTE 6A IS DESIGNATED AS A SCENIC ROAD BY STATE STATUTE.

FLOOD ZONES ARE AS SHOWN ON PLAN AND ARE APPROXIMATE ONLY TAKEN FROM BARNSTABLE COAMA, PANEL 250001 0003 D DATED 7/2/92.

LOT 2 AND LOT 4 ARE TO BE CONVEYED TO MASSACHUSETTS AUDUBON SOCIETY.

NO DEVELOPMENT OR DISTURBANCE SHALL BE PERMITTED IN THE "RESERVED AREAS".
 100 FT WETLAND BUFFER IS SHOWN AS "RESERVED AREA".

APPLICANT AND OWNER OF RECORD
 GEORGIA COOK FERBUSON
 2444 MAIN STREET
 BARNSTABLE, MA 02830
 CERT. #34829 (L.C.C. 29726)
 CERT. #9906 (L.C.C. 35874)

DEFINITIVE SUBDIVISION PLAN OF LAND IN

BARNSTABLE, MASS.

BEING A SUBDIVISION OF LAND COURT PLAN 29726A AND LAND COURT PLAN 35874A

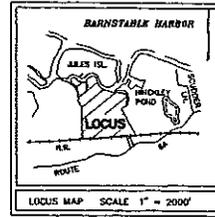
120 0 120 240 360

SCALE 1" = 120'

AUGUST 25, 1998
 REVISED: SEPTEMBER 4, 1998

down cape engineering, inc.
 CIVIL ENGINEERS
 LAND SURVEYORS

off. 508-362-4541
 fax 508-362-9880



BARNSTABLE ASSESSORS MAP 238 PCL. 5
 MAP 237 PCL. 21

ZONING DISTRICTS: RF RF-1 RF-2

MINIMUM LOT SIZE: 43,560 s.f. - ALL

MINIMUM LOT FRONTAGE: RF-1 & RF-2 20 ft. BY 150 ft.

MINIMUM YARD SETBACKS:

RF-1 & RF-2	FRONT - 30 ft.
RF-1 & RF-2	SIDE/REAR - 15 ft.
RF-2	FRONT - 30 ft.
RF-2	SIDE/REAR - 10 ft.

AREA: UPLAND 1,530,800± s.f. (35.1 ac.)

WETLAND 2,012,100± s.f. (84.6 ac.)

TOTAL 4,343,000± s.f. (99.7 ac.)

TOTAL RESERVED AREA = 739,300± s.f. (UPLAND) 17.0 ac. +/-

OPEN SPACE AREA LOT 4 = 335,820± s.f. (ALL UPLAND) 7.7 ac.

TOTAL OPEN SPACE (RESERVED AREA) = 1,075,120± s.f. 24.7 ac. +/-

1,075,120/1,530,800 = 70% OF UPLAND IS RESERVED OPEN SPACE

