



CAPE COD COMMISSION

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E-mail: frontdesk@capecodcommission.org

DATE: September 21, 2000

TO: Philip J. Fennell
PO Box 441
South Harwich, MA 02661

FROM: Cape Cod Commission

RE: Hardship Exemption
Cape Cod Commission Act, Section 23

APPLICANT: Philip J. Fennell
PO Box 441
South Harwich, MA 02661

PROJECT #: HDEXDCPC20025

PROJECT: Fennell Reconfiguration
Queen Anne Road
North Harwich, MA

BOOK/PAGE: 1890/101
13033/135

DECISION OF THE CAPE COD COMMISSION

SUMMARY

The Cape Cod Commission (Commission) hereby denies the Hardship Exemption application of Philip J. Fennell, for reconfiguration of two residential lots within the Six



Ponds District of Critical Planning Concern, pursuant to Section 23 of the Cape Cod Commission Act (Act), c. 716 of the Acts of 1989, as amended, for the proposed Fennell Reconfiguration. The decision is rendered pursuant to a vote of the Commission on September 21, 2000.

PROJECT DESCRIPTION

The proposed reconfiguration concerns two contiguous residential lots (G2 and G4) located off of Queen Anne Road in North Harwich just inside the southern boundary of the 6 Ponds District of Critical Planning Concern (DCPC). Lot G2 (the front lot) is approximately 1.5 acres, and Lot G4 (the rear lot) is approximately .5 acre. The lots are located within a Wellhead Protection Area, as defined in the Regional Policy Plan. Access to the front lot is via Queen Anne Road, and an easement across the front lot provides access to the rear lot.

The applicant purchased the rear lot in April 1973 and the front lot (which he owns through Lucky Break Trust) in March 2000. He is proposing to reconfigure them so that the 1.5 acre front lot "gives" .5 acre to the .5 acre rear lot, creating two 1 acre lots. The applicant is seeking the lot reconfigurations to satisfy 30 CMR 15.214 (Title V) for construction of a four bedroom dwelling on the rear lot. Due to its size, it currently can accommodate only a two bedroom dwelling under existing Title V regulations.

Both lots are currently buildable under existing zoning regulations, but the proposed lot reconfiguration is prohibited during the limited development moratorium currently in effect in the DCPC until implementing regulations are developed. The applicant is seeking a hardship exemption to allow the lot reconfiguration during the limited development moratorium and prior to the development of implementing regulations for the DCPC.

REVIEW CRITERIA

Under the Act, the Commission has two overall areas of review in a hardship exemption request. The first pertains to a finding of hardship. The Commission may grant a hardship exemption where it 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's policy on determining whether substantial hardship exists states that "the basis for a finding of hardship shall be in the

land or in the nature of the development rather than in the circumstances of the applicant.”

PROCEDURAL HISTORY

The Harwich Planning Board submitted the nomination of the 6 Ponds DCPC to the Cape Cod Commission on October 26, 1999. A moratorium on the granting of municipal development permits began on October 30, 1999. The DCPC nomination was accepted by the Commission on December 2, 2000. In its acceptance of the nomination, the Commission identified those types and classes of development that may proceed during the moratorium because they are not substantially detrimental to the protection of public health, safety, and welfare, and will not contravene the purposes of the Act. The 6 Ponds DCPC Ordinance was adopted by the Assembly of Delegates on May 3, 2000. Under Section 12 of the Cape Cod Commission Act, the moratorium is to remain in effect until implementing regulations are developed for the area. The town has 12 months from the date of the adoption of the ordinance to enact the regulations. (A 90 day extension may be granted.)

The applicant submitted a hardship exemption application to the Commission on July 12, 2000. The application was deemed to be complete on July 18, 2000. A duly noticed public hearing was conducted by the Commission pursuant to Section 5 of the Act by an authorized subcommittee of the Commission on August 14, 2000 at Harwich Town Hall in Harwich, MA. The public hearing was closed on August 14, 2000 and the record was left open for the submission of written materials until September 21, 2000.

The subcommittee held a public meeting after the close of the public hearing to deliberate on the project on August 14, 2000.

At the August 14, 2000 subcommittee meeting, the subcommittee voted unanimously to recommend to the full Commission that the hardship exemption request be denied. A final public hearing was held before the full Commission on September 21, 2000. At this hearing, the Commission voted _____ to deny the hardship exemption.

Materials submitted for the record

From the applicant:

- Hardship exemption application form
- Certified abutters list
- Filing fee of \$200

Date received

July 12, 2000
July 12, 2000
July 12, 2000

- 8 1/2 x 11" section USGS quadrangle map of project area July 12, 2000
- Copy of deed for each parcel July 12, 2000
- Parcel map of 6 Ponds DCPC July 12, 2000
- Copy of Assessors book/map showing subject parcels July 12, 2000
- 8 1/2 x 11" section USGS quadrangle map of project area July 12, 2000
- Copy of deed for each parcel July 12,2000
- Parcel map of 6 Ponds DCPC July 12, 2000
- Copy of Assessors book/map showing subject parcels July 12, 2000
- 8 1/2 x 11" sketch plan of easement for Philip Fennell July 12, 2000
- 24 x 36" copies of reconfiguration plan July 18, 2000
- 11 x 17" copy of reconfiguration plan July 18, 2000
- Letter stating reasons for requesting hardship exemption July 18, 2000

From Cape Cod Commission staff

Date

- Letter to applicant regarding incomplete application July 12, 2000
- Letter to applicant regarding complete application July 18, 2000
- Subcommittee notice July 24, 2000
- Letter to applicant regarding rescheduling of hearing July 24, 2000
- Staff report August 9, 2000
- Subcommittee memo August 9, 2000
- Letter to applicant regarding transmission of staff report August 11, 2000
- Subcommittee memo August 11, 2000

From state/local officials

Date received

- Letter from Robert Widegren, Harwich Planning Board Chair regarding Board's position on hardship exemption July 27, 2000

From the public

Date received

- Letter from Robert R. Hampton regarding abutters list August 2, 2000
- Letter from John A. Shuttleworth Sr. and Mary A. Shuttleworth in opposition to granting the hardship exemption August 11, 2000
- Letter from John and June Thomas in opposition to granting the hardship exemption request. September 20, 2000
- Letter from Patricia C. Johnson in support of granting the hardship exemption request. September 20, 2000

The application and notices of public hearings relative thereto, the Commission staff's notes, exhibits, and correspondence, the transcript and minutes of meetings and hearings

and all written submissions received in the course of our proceedings are incorporated into the record by reference.

TESTIMONY

August 14, 2000 Public Hearing

Applicant Philip J. Fennell presented the proposed lot reconfigurations and his reasons for seeking a hardship exemption. He stated that the current development moratorium creates a financial hardship and a "living conditions" hardship for the prospective buyers of the lots. He said that a delay in developing the lots will create financial strain for their prospective buyers, as construction costs will be higher a year from now than they are today. He also explained that the prospective buyers of the lots are families with young children who are currently in need of housing.

Martha Hevenor, Commission planner, presented the staff report. She discussed the Commission's review criteria for hardship exemptions and explained that to grant a hardship exemption the Commission must make two findings: one, that literal enforcement of the provisions of the Act would create substantial hardship, financial or otherwise, to the applicant, and two, that desirable relief may be granted without substantial detriment to the public good and without nullifying or derogating from the intent or purposes of the Act. Ms. Hevenor stated that Commission review involves the relevant sections of the Cape Cod Commission Act, the Six Ponds DCPC Ordinance, and the minimum performance standards of the Regional Policy Plan. She explained that protection of surface and ground water quality is a primary concern of all three documents. She added development on the lots to the extent currently possible will likely exceed the regional nitrogen standard of 5 ppm. Ms. Hevenor stated that staff did not recommend granting the hardship exemption because the applicant had not demonstrated that there is substantial hardship.

The subcommittee's initial questions concerned the current buildability of the two lots and, in particular, how many bedrooms the lots can accommodate currently. Jay Schalikjer also asked staff to clarify the issue of nitrogen loading.

Sue Leven, Harwich Town Planner, spoke several times throughout the hearing to clarify questions about the lots' frontage and access. She stated that the building inspector had determined that the lots are buildable.

Several members of the public spoke. John Thomas, an abutter who lives at the western corner of the front lot, voiced his concern about the cart path the applicant is clearing for

access to the rear lot. Austin Warner questioned the ability of the applicant to proceed with his plans under zoning regulations. He also discussed stormwater problems, clearing, and pond buffering concerns. Alec Stanley said she was concerned about precedent and did not see how the board could approve this change, as there are no extenuating circumstances.

Kelly Hatfield, who will be owner of the rear lot, explained that a 2 bedroom home is not sufficient for her family and that they want to move the house to the back of the lot. John Mooney, an abutter, explained what can be built under zoning and said that nitrogen impacts will be there no matter what. Sylvia Laffin, Harwich Selectperson, spoke against granting the exemption because of growth management and precedent issues.

Mr. Schlaikjer asked staff if the lots would be buildable after the town enacts implementing regulations for the DCPC. Sharon Rooney stated that she believed some provision would be made to protect currently buildable lots. Ms. Leven concurred but added that the town is looking into the grandfathering issue.

JURISDICTION

The hardship exemption request is being heard under Section 23 of the Cape Cod Commission Act, which states that *"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 this 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."*

FINDINGS

The Commission has considered the DCPC Hardship Exemption of Philip J. Fennell for the proposed Fennell Reconfiguration, and based on consideration of such application and upon the information presented in the public hearing and submitted for the record, makes the following findings pursuant to Section 23 of the Act:

General

1) The Cape Cod Commission received a nomination for the 6 Ponds DCPC from the Harwich Planning Board on October 26, 1999. The Cape Cod Commission voted to accept the nomination on December 2, 1999. The nomination set in place a limited development moratorium in the area.

- 2) The Harwich Planning Board held a public hearing on September 7, 1999 to discuss the potential nomination for a DCPC. Notice of receipt of the nomination was provided as required by the Cape Cod Commission Act, and in addition, was provided by mail to all property owners within the District.
- 3) The Cape Cod Commission expressly found in its acceptance of the nomination that “there is a need for special planning and regulations in the Six Ponds DCPC area that will preserve and maintain values and resources intended to be protected by the Act.”
- 4) The Assembly of Delegates adopted the 6 Ponds DCPC Ordinance on May 3, 2000. Pursuant to this designation and the Cape Cod Commission Act, the Town of Harwich has 12 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 Act specifies that the District will expire if implementing regulations have not been adopted within 18 months of the enactment of the District. Therefore, the temporary limited development moratorium created by the nomination of the district will end when implementing regulations are adopted or at the end of this timeframe specified in the Act.
- 5) The applicant purchased the front lot (G2) in March 2000, nearly five months after the town had nominated the area as a DCPC.
- 6) The reconfiguration of lots is prohibited during the current development moratorium.
- 7) The limited development moratorium does not prevent the applicant from building one residence on each lot. The construction of one single family residence on a developable lot which is shown on a plan recorded at the Barnstable Registry of Deeds as of October 26, 1999, or shown on a definitive subdivision plan as of October 26, 1999 (and subsequently approved by Board) is permitted during the moratorium, provided that a septic system may be sited that meets all state and local requirements, and that such development is in conformance with existing Zoning Bylaws and applicable Board of Health Regulations
- 8) State wastewater-water disposal regulations (Title V) allow a maximum of one bedroom per 10,000 square feet. The rear lot, at approximately 20,000 s.f., can accommodate only a 2 bedroom dwelling. The applicant is seeking the lot reconfigurations to satisfy Title V regulations for construction of a four bedroom dwelling on the lot.

9) For purposes of Title V, a maximum of two and six bedrooms are currently allowable on the rear and front lots, respectively. The maximum number of bedrooms allowed by Title V for both lots together (8 bedrooms) will not change as a result of reconfiguration. (No determination has been made with regard to existing zoning regulations whether the front lot in its current configuration could accommodate a 6 bedroom house and comply with dimensional and setback requirements.)

10) The applicant did not demonstrate the existence of substantial hardship based on the land or in the nature of the development rather than in the circumstances of the applicant or the prospective buyers of the lots.

Water Resources

WR1) The Cape Cod Commission Act, the 6 Ponds DCPC Ordinance, and the Regional Policy Plan each identify the protection of ground and surface water as an important interest.

WR2) The DCPC ordinance cites potential for nitrogen concentrations in ground water to approach the Cape-wide nitrogen standard of 5 mg-N/L (Minimum Performance Standard 2.1.1.2.A.1 of the Regional Policy Plan), notably nitrogen concentrations in ground water destined for public wells.

WR3) Development plans for the two lots describing attributes such as lawn square footage are not available at this time. As a result, nitrogen loading from fertilizer application is not quantifiable. However, there is potential for development on the two lots, to the extent permitted by Title V, to result in exceedance of the referenced nitrogen standard at the property boundary.

WR4) The Cape Cod Commission has not made a determination as to whether approving the hardship exemption would derogate from the intent and purposes of the Act or DCPC as no hardship was found.

CONCLUSION

Based on the findings above, The Cape Cod Commission hereby denies the Hardship Exemption application of Philip Fennell for the reconfiguration of two lots within the Six Ponds District of Critical Planning Concern



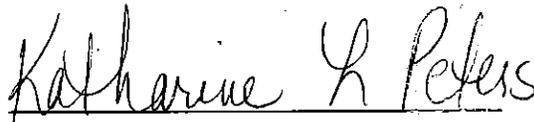
Frank Shephard, Chair

10/2/00
Date

Commonwealth of Massachusetts

Barnstable, ss

Subscribed and sworn to before me this 2nd day of October, 2000.



Katharine L. Peters, Notary Public

