

# CAPE COD COMMISSION

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Date: January 12, 2006

To: John Austin and Christine Froula

From: Cape Cod Commission

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

Applicant: Mr. John Austin, Ms. Christine Froula  
2801 Girard Ave.  
Evanston, IL 60201

Project: 56 Shepherds Way, Barnstable, MA

Project #: HDEX # 05032

Certificate: Lot 26, Plan 20950F, Certificate # 170371

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## DECISION OF THE CAPE COD COMMISSION

### SUMMARY

The Cape Cod Commission (Commission) hereby approves the Hardship Exemption (the "Project") application from the Pond Village District of Critical Planning Concern (DCPC) limited moratorium for the John Austin and Christine Froula residence at 56 Shepherds Way in Barnstable, MA pursuant to Section 23 of the Cape Cod Commission Act (Act), c. 716 of the Acts of 1989, as amended. The decision is rendered pursuant to a vote of the Commission on January 12, 2006.

### PROJECT DESCRIPTION

The project consists of construction of a 2,576 square foot single-family residence on a 2.63-acre lot at 56 Shepherds Way, off Scudder Lane and to the north of Route 6A, in Barnstable, MA. The site is on the northern end of Hinkley's Pond. The property has been in the family since 1948.

Hardship Exemption Decision – Mr. John Austin and Ms. Christine Froula  
Pond Village DCPC - Barnstable, MA  
January 12, 2006



## PROCEDURAL HISTORY

The applicant filed a Hardship Exemption application from the Pond Village DCPC on December 13, 2005. The application was deemed complete on December 13, 2005.

A duly noticed public hearing was held on January 3, 2006 at the Cape Cod Commission offices in Barnstable, MA. Following the hearing, the subcommittee voted unanimously to recommend to the full Commission that the Project be granted a Hardship Exemption.

A final public hearing was held before the full Commission on January 12, 2006. At this hearing the Commission voted unanimously to grant the Hardship Exemption.

## MATERIALS SUBMITTED FOR THE RECORD

### *By Applicant:*

- Revised site plans dated December 30, 2005
- Copy of the Barnstable Building permit dated December 19, 2005
- Close-up of site map showing test site west of house site
- Parcel map from the town of Barnstable
- Email dated December 30, 2005
- Email dated December 29, 2005
- Email and additional information December 27, 2005
- Hardship Application dated December 13, 2005
- Email dated December 12, 2005
- Email dated December 9, 2005

### *By the Town of Barnstable*

- Minutes of the Barnstable Planning Board meeting dated December 12, 2005
- Email from Tom Broadrick dated January 3, 2006
- Email from Tom Broadrick dated December 15, 2005

### *By Commission Staff:*

- Letter dated December 13, 2005
- Staff Report dated December 28, 2005

### *By Interested Parties:*

- Letter from Neil and Sara Ringler dated December 30, 2005
- Letter from Neil and Sara Ringler dated December 28, 2005
- Letter from Dorothy Carver dated December 19, 2005
- Letter from Ted Theodores dated December 19, 2005

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

Hearing #1 – January 3, 2006, Cape Cod Commission, Barnstable MA

Martha Twombly, staff planner, discussed the Pond Village DCPC history and the location of the property within the DCPC boundaries, adjacent to Hinkley's Pond. She noted that findings for the hardship exemption must be made. She said the three issues of concern in the DCPC included water quality in Hinkley's Pond, water quality in Barnstable Harbor, and community character regarding historic and scenic elements of the neighborhood. She noted that the Austins were well along in their permitting prior to the town nominating the DCPC, having begun Old King's Highway (OKH) review in the fall of 2004, and receiving their OKH permit on August 10, 2005. She noted the Austins had made investments to date of approximately \$100,000, and said they were concerned that further delays would potentially cause the loss of their contractor. She noted that Mr. Kelley, land surveyor for the Austins, provided new site plans today that showed both the house location and the septic system had been moved north, to a location about 215' away from Hinkley's Pond. Ms. Twombly explained that the DCPC decision made a recommendation that septic systems be outside of the 300' buffer to the pond as a conservative measure to protect water quality, while the state regulations require 50' and the town bylaw is currently set at 100'.

Scott Michaud, staff hydrologist, explained concerns related to how septic systems may have an effect on water quality in surface ponds. He noted that there was no other location on the Austin site for the septic system because of clay soils and the property boundary. He noted that the 300' buffer was a stricter policy recommended by the DCPC guidelines until the research could be completed that would further define the geology of the area and determine what distance would be best in order to protect water quality over the long term.

Ms. Twombly noted that regarding community character, the size and scale of the proposed house is modest, and consistent with the general architecture and materials of the area. She stated that the staff believed the Applicants met the criteria for a hardship exemption.

Ed Kelley, engineer, spoke on behalf of the Austins, and stated that the foundation/septic permit had been approved and issued by the town on December 19, 2005. He cited the location of the test pits on the site plans submitted to staff on January 2, 2006, and said that they found clay soils that were unsuitable for septic in other areas on the site. He also expressed that in working with the Austins for five years, he found them to be very conservation minded.

### *Testimony from the public:*

Mr. Steven Berglund, abutter, said that the family is conservation minded and stated he supports the hardship exemption request.

Mr. Joe Dugas spoke in support of the Austin's request, and said he supports the DCPC tool.

*Comments and questions from the subcommittee:*

Mr. Crowell expressed concern that the Austins implied that the DCPC was being imposed by the Commission, which is not the case. He said that he believed the Applicants met the technical requirements of hardship exemption from the DCPC limited moratorium.

Mr. Hogan asked if an innovative septic system was considered. Mr. Michaud answered that these systems remove nitrogen, but not phosphorous, which is the concern in Hinkley's Pond.

Mr. Doherty was concerned about other potential hardship requests that may come forward in a piecemeal manner. However, he stated that the Applicant initiated their permitting well in advance of the DCPC in good faith and supported the hardship exemption.

Mr. Olsen said he believed the Applicant meets the standards for a hardship exemption.

### **JURISDICTION**

The Project is located within the boundaries of the Pond Village DCPC, which was nominated by the Cape Cod Commission for designation as a DCPC on July 15, 2005. The Project is seeking exemption from a limited moratorium on all building permits, which is currently in effect as part of the DCPC, as the proposed project is a new single-family home.

### **FINDINGS**

The Commission has considered the application of Mr. Austin and Ms. Froula for the proposed Project, and based on consideration of such application and upon the information presented at the public hearing and submitted for the record, makes the following Findings pursuant to Section 23 of the Act:

#### **General Findings:**

- G1.** The proposed Project is an approximately 2600 square foot single-family home, including the basement and 2-car garage.
- G2.** The Project will be built in accordance with the following plans: Elevation plans dated July 14, 2005, and site plans by Edward Kelley received January 3, 2006.
- G3.** The Project is consistent with local zoning and the Barnstable Local Comprehensive Plan, and received a foundation permit from the Barnstable Building Department on December 19, 2005. The project had received a Disposal System Construction Permit from the Health Department # 2005-574 for a 3-bedroom capacity septic system on November 11, 2005.
- G4.** The Applicant has expended approximately \$100,000 in design, construction and permitting fees, and planned to begin construction in November 2005.
- G5.** The Applicants began their local permitting through the Old King's Highway Regional Historic District Committee in the fall of 2004.

- G6.** Mr. Austin and Ms. Froula received Old King's Highway Regional Historic District Committee approval on August 10, 2005 after the nomination of the DCPC had been accepted for consideration by the Cape Cod Commission, initiating a limited moratorium on development activities within the District.
- G7.** The Applicant had expended a significant amount of time and money, and completed a large part of the permitting process, prior to the nomination of the DCPC.
- G8.** Mr. Austin and Ms. Froula have demonstrated a need to begin construction as soon as possible to prevent the loss of their contractor. In addition, further delays would prevent the completion of the house prior to summer 2006, causing additional financial hardship in requiring the family to rent a home.
- G9.** A Hardship Exemption may be granted to the Applicant without derogating from the intent or purpose of the Act, and without detriment to the public good.

**Water Resource Findings:**

- WR1.** Protection of groundwater and Hinkley's Pond water quality is a principal goal of the Pond Village DCPC. Fresh surface-waters such as Hinkley's Pond tend to be sensitive to phosphorus additions.
- WR2.** A development moratorium is currently in place which prohibits building in the DCPC until the Town can develop and enact regulations that adequately protect Hinkley's Pond. The applicant seeks an exemption from the development moratorium in order to construct a 2-bedroom home on a 2.63-acre parcel situated on the northern shoreline of Hinkley's Pond. The septic system was designed for 3 bedrooms.
- WR3.** Pond Village generally has access to the public water supply although homes in the vicinity of the project site use private wells. The site engineer, Edward Kelley has indicated that the Town intends to extend the water main to the project and nearby properties currently using private wells.
- WR4.** The project results in a nitrogen concentration in groundwater of 2.4 ppm pursuant to methodology of CCC TB 91-001. This concentration is below the regional 5-ppm nitrogen loading standard promulgated by the RPP and recommended in the CCC DCPC decision rendered on July 15, 2005 for enactment as a DCPC regulation by the Town.
- WR5.** The CCC DCPC decision recommends that the Town enact a regulation that provides a 300-foot setback of subsurface septic and stormwater disposal from Hinkley's Pond until the pond's watershed can be delineated and a phosphorus-loading assessment provides information necessary to establish a more appropriate setback. Although regional-scale water table interpretations show groundwater beneath the site flowing away from the pond, local water-level information necessary to refine these interpretations and determine whether groundwater flowing beneath the site discharges to Hinkley's Pond is not available at this time.

**WR6.** The project's potential to contribute phosphorus to Hinckley's Pond with septic discharge to groundwater was a primary concern during consideration of the exemption request. Other potential sources of phosphorus, such as lawn fertilizers, were not explicitly considered because project plans did not contain plans for turf. The CCC DCPC decision recommends that the Town encourage the establishment of a community-supported education program for the DCPC to disseminate information that encourages the use of best lawn- and landscape-management practices protective of water quality.

**WR7.** The CCC DCPC decision recommends that the town require technology capable of removing phosphorus from project wastewater where an appropriate setback from Hinckley's Pond cannot be provided. Only one septic-system type is approved in Massachusetts on a limited experimental basis, and initial and on-going costs of deploying, monitoring and maintaining the system can be substantial.

**WR8.** Requirement of a 300-foot septic setback from Hinckley's Pond is not possible at the site due to its size without rendering the lot undevelopable. The site is characterized by silt and clay loam underlain by medium sand. Siting of the septic system is most favorable toward the eastern portion of the lot where the top of the sand increases in elevation and is closer to grade.

The Applicant's original proposal sited the already permitted septic system leaching trench approximately 185 feet from Hinckley's Pond. To take advantage of shallower depths to sand in the eastern side of the property and to maximize the setback from Hinckley's Pond, plans were revised and submitted to provide a 215-foot setback from Hinckley's Pond. According to site engineer Mr. Kelley, additional investigation may allow for an additional 30 to 40 feet of setback. Considering the merit of the hardship request and the site's physical constraints, this setback is appropriate and does not derogate from the intent or purposes of the Act or cause substantial detriment to the public good.

#### **Community Character Findings:**

**CC1.** The proposed residence is located within the Old Kings Highway Regional Historic District and has already been reviewed and approved by Barnstable Old King's Highway Regional Historic District Committee, receiving a Certificate of Appropriateness on August 10, 2005.

**CC2.** The proposed building is a modest, two-story, single-family home with a two-car garage. The proposed structure is traditional in form and materials and, as seen from across the pond, is broken down into three distinct massings: a 2-story central mass, a 2-story side ell, and a one-story porch. As such, the design is consistent with the general historic character of the district.

#### **CONCLUSION**

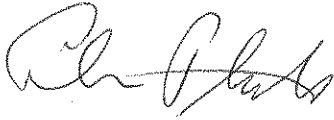
Based on the Findings above, the Commission hereby concludes:

1.) The Applicant has demonstrated that a hardship exists in conforming with all of the requirements of the Pond Village DCPC. A literal enforcement of the provisions of the Act would involve additional delays that would represent financial and personal hardships to the Applicant, and

2.) That 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.

The relief granted relates directly to the nature of the identified hardship and is the minimum necessary to address the hardship.

The Cape Cod Commission hereby approves the application of Mr. John Austin and Ms. Christine Froula as a Hardship Exemption from the Pond Village DCPC building moratorium pursuant to Section 23 of the Act, c. 716 of the Acts of 1989, as amended, for the proposed single-family home at 56 Shepherds Way, Barnstable, MA.



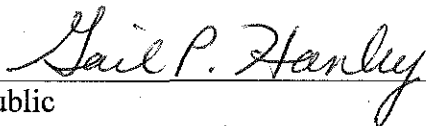
Alan Platt, Chair

1/12/06

Date

Commonwealth of Massachusetts  
County of Barnstable

On this 12<sup>th</sup> day of January, 2006, before me, the undersigned notary public, personally appeared Alan Platt, proved to me through satisfactory evidence of identification, which were Alan Platt/personal knowledge, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he signed it voluntarily for its stated purpose.



Notary Public  
Commonwealth of Massachusetts

My Commission Expires: 10/13/11