



CAPE COD COMMISSION

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Date: July 23, 2009

To: Andrew Singer, Esq.
Law Office of Singer & Singer, LLC
P.O. Box 67
Dennisport, MA 02639

From: Cape Cod Commission

Re: Hardship Exemption
Cape Cod Commission Act, Section 23

Applicant: Alan J. Dalby
944 Shootflying Hill Road
P.O. Box 10
Centerville, MA 02632

Project: Dalby ANR 2-Lot Division
944 Shootflying Hill Road
Centerville, MA

Project # TR/HDEX 09001

Certificate of Title: Ctf. No. 142065; LC Plan 11611-A2; Doc. No. 676, 501;

DECISION OF THE CAPE COD COMMISSION

SUMMARY

The Cape Cod Commission (the "Commission") hereby approves with conditions the Hardship Exemption application of Alan J. Dalby (the "Applicant") for a two-lot division at 944 Shootflying Hill Road, Centerville, MA pursuant to Section 23 of the Cape Cod Commission Act (the "Act"), c. 716 of the Acts of 1989, as amended. The decision is rendered pursuant to a vote of the Commission on July 23, 2009.

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PROJECT DESCRIPTION

The subject property is situated at 944 Shootflying Hill Road in Centerville and is identified as Barnstable Assessor's Map 211 Parcel 6. The property consists of a 31.5-acre parcel of land improved with a single-family residence and related accessory structures, which according to plans submitted by the Applicant, include two sheds, a greenhouse, and a tennis court. The remaining portions of the property consist of driveway areas, wooded areas, and wetlands. North Lily Pond and South Lily Pond are situated in the eastern portion of the subject property.

The proposed project involves a division of the existing 31.5-acre parcel of land into two lots: one 18.5-acre parcel (Lot 1) containing the existing single-family residence and related accessory structures, and one 13.0-acre vacant parcel (Lot 2). Both lots will have frontage on Shootflying Hill Road. Lot 1 will retain the existing frontage on Wequaquet Lake, and will include South Lily Pond and North Lily Pond, and all wetland resources. Lot 2 will have no frontage on nor access to Wequaquet Lake or the ponds, and will be 100% upland. Other than the division of land into two lots, additional development, as the term is defined by the Act, is not proposed on Lot 1 or Lot 2 as part of this proposed project. According to the application materials, the request is to create two lots so that the Applicant can sell Lot 1, and better arrange for the disposition of Lot 2 in his estate plan.

PROCEDURAL HISTORY

On January 28, 2009, the project was referred to the Commission by John Klimm, Barnstable Town Manager, through the Planning Board, as a DRI under Section 3(c) of the DRI Enabling Regulations. On February 18, 2009, the Commission received a Hardship Exemption application from the Applicant; the application was deemed complete on March 2, 2009.

On March 26, 2009, a duly noticed public hearing was conducted by an authorized Subcommittee of the Commission pursuant to Section 5 of the Act. Immediately following the public hearing on March 26, and again on April 13, 2009, the Subcommittee held public meetings to deliberate on the project. On March 26, 2009, the Subcommittee voted unanimously to recommend to the Commission that the project be granted a Hardship Exemption. On April 13, 2009, the Subcommittee voted unanimously to approve the DRI with conditions, and to forward the draft decision to the Commission. On April 27, 2009, upon request by the Applicant, the subcommittee reconvened to approve a continuance of the public hearing before the full Commission scheduled for April 30, 2009 to May 28, 2009. On May 28, 2009, at the full Commission meeting, upon the Applicant's request, the project was continued to the June 11, 2009 Commission meeting. At the June 11, 2009 Commission meeting, the Commission voted to continue the final public hearing on the project to the July 23rd Commission meeting. On June 22, 2009 the hearing period was closed by Hearing Officer. A subcommittee meeting was held on July 2, 2009, where the subcommittee directed staff to revise the draft decision. At the subcommittee meeting held on July 15, 2009, the subcommittee voted unanimously to forward the revised draft decision to the Commission.

A final public hearing was held before the Cape Cod Commission on July 23, 2009, during which the Commission voted unanimously to approve the Hardship Exemption, subject to conditions.

MATERIALS SUBMITTED FOR THE RECORD

By Applicant

- Hardship Application dated February 18, 2009, and associated materials.
- Aerial photos of the site taken April 28, 2001, and submitted on March 26, 2009.
- Email from Mr. A. Singer to Ms. M. Sarkisyan, dated March 25, 2009; Re: Comments on Staff Report
- Email from Mr. A. Singer to Ms. M. Sarkisyan, dated March 27, 2009; Comments on public hearing discussion, draft decision.
- Email from Mr. A. Singer to Ms. M. Sarkisyan (and related correspondence), dated April 9, 2009; Re: Comments on draft decision.
- Highlighted copy of letter sent to Ms. M. Sarkisyan from Mr. A. Singer, submitted by hand during April 14, 2009 Subcommittee meeting; Re: Changes to draft decision.
- Email from Mr. A. Singer to Ms. M. Sarkisyan (and related correspondence), dated April 14, 2009; Re: Plans referencing disturbed areas in respect to condition GC4.
- Email from Mr. A. Singer to Ms. M. Sarkisyan and Ms. K. Senatori (and related correspondence), dated April 15, 2009; Re: Condition GC4.
- Email from Mr. A. Singer to Ms. M. Sarkisyan, dated April 20, 2009; Re: Asking to postpone the April 30, 2009 Commission hearing of the project for one month.
- Email from Mr. A. Singer to Ms. M. Sarkisyan, dated April 22, 2009; Re: Scheduling a meeting with Commission staff on May 7, 2009.
- Email from Mr. A. Singer to Ms. M. Sarkisyan, dated May 26, 2009; Re: Cancelling a previously scheduled meeting.
- A letter from Mr. A. Dalby to Mr. Paul Niedzwiecki, dated June 1, 2009, and received June 2, 2009; Re: Comments on Commission review of Project.
- A topography sketch plan from Mr. A. Singer to Ms. M. Sarkisyan, submitted on June 19, 2009.
- Letter from Mr. A. Singer to the subcommittee, dated June 25, 2009; Re: Updates on the project.
- Site plan reflecting Sarah Korjefff's rendition of areas A and B on Lot 1, received on June 25, 2009.
- Site plan reflecting applicant's rendition of the archaeologically sensitive knolls, and delineating NHESP Priority Habitat for Rare Species,
- Email from Mr. A. Singer to Ms. S. Korjefff and Ms. M. Sarkisyan, dated June 29, 2009, Re: background on areas A and B on the revised plan.
- Site plan showing area A, revised area B, NHESP Priority Habitat, wetland buffers, and existing structures on Lot 1, submitted on July 9, 2009.
- Email from Mr. A. Singer to Ms. M. Sarkisyan, dated July 14, 2009, Re: Revised site plan.
- Email from Mr. D. Ojala to Ms. M. Sarkisyan, dated July 14, 2009, Re: Revised site plan, showing area C.

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- Revised Exhibit A, Site Plan with the latest numbering scheme, submitted by Dan Ojala on July 15, 2009.

By Commission Staff

- Letter from Ms. A. Adams to Mr. A. Singer, dated January 29, 2009; Re: Notice to Applicant that project was referred to Commission as a DRI.
- Letter from Ms. A. Adams to Mr. A. Singer, dated March 3, 2009; Re: Notice to Applicant that the application is complete.
- Email from Ms. A. Adams to Ms. A. Andres, dated March 16, 2009; Re: Public Hearing notice.
- Email from Ms. A. Adams to Ms. A. Andres, dated March 16, 2009; Re: Public Hearing notice.
- Staff Report, dated March 19, 2009.
- Notebook presentation slides on Staff Report, dated March 26, 2009.
- Public Hearing sign up sheet, dated March 26, 2009.
- Email from Ms. M. Sarkisyan to Ms. J. Buntich (and related correspondence) dated March 27, 2009; Re: Barnstable's zoning code.
- Email from Ms. M. Sarkisyan to Mr. A. Singer, dated April 10, 2009; Re: Discussion of proposed changes to draft decision.
- Email from Ms. M. Sarkisyan to Mr. A. Singer, dated April 10, 2009; Re: Forwarding revised draft decision.
- Excerpt from Barnstable's Zoning Code, submitted by hand at the April 13, 2009 Subcommittee meeting.
- Email from Ms. M. Sarkisyan to Ms. J. Buntich, dated April 14, 2009; Re: Forwarding draft decision.
- Email from Ms. M. Sarkisyan to Mr. A. Singer, dated June 18, 2009; Re: Discussing timeframes for project, and requesting a topography map.

By Others

- Memorandum from Ms. J. Buntich to Mr. J. Klimm, dated January 24, 2009; Re: Cape Cod Commission mandatory referral.
- Letter from Mr. J. Klimm to Cape Cod Commission, dated January 28, 2009; Re: Mandatory referral.
- Letter from the Massachusetts Historical Commission to Ms. S. Korjeff, dated March 5th, 2009; Re: Review of Project Notification Form.
- Letter from Ms. J. Buntich to Ms. M. Sarkisyan, dated March 13, 2009; Re: Project's consistency with local zoning.

TESTIMONY

March 26, 2009 Public Hearing

The Commission received testimony at the March 26, 2009 public hearing from the following:

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Attorney Andrew Singer, representing the Applicant, described the project, including the existing settings, and the proposed division. He noted that the future uses for Lot 2 were currently unknown, and proposed that the Applicant or his successors to Lot 2 come back for Commission review at such time as any development on the lot is proposed. Mr. Singer requested that if Lot 1 were to ever be further divided, or be used for something other than single-family residential purposes, then the Applicant, or the successors and/or assigns of Lot 1 would come back for Commission review as well. Attorney Singer expressed his opposition to having the Commission's decision enforced through an express deed restriction listing applicable conditions. Following discussion, Attorney Singer proposed that instead of expressly writing the conditions on the faces of the deeds, the deeds could have a reference to the Commission's decision. Attorney Singer also voiced his concern in respect to what was meant by staff's recommendation that "any development" on Lot 1 be subject to future Commission review.

Ms. Marianna Sarkisyan, Regulatory Officer, presented the Commission's staff report. She described the existing setting as well as the proposed project, Commission's jurisdiction, and standards applicable to Hardship Exemptions. She discussed the staff's findings and recommendations in the issue areas of natural resources, historical and archeological resources, transportation, and water resources. She noted that the site's location in a Significant Natural Resources Area would warrant further Commission review at such time as development on the site is proposed. She also noted the Massachusetts Historical Commission (MHC) letter to the Commission, and the staff's recommendation that a Project Notification Form (PNF) is filed with MHC prior to any site disturbance. Ms. Sarkisyan noted the transportation staff's recommendation that any development on Lot 2 share the existing Shootflying Hill driveway. Ms. Sarkisyan concluded her presentation by stating that if the Subcommittee finds a Hardship, that the application is approved with conditions, and that these conditions include that the Applicant, and future successors and/or assigns of Lot 1 and Lot 2 return to the Commission for review at such time as there is any proposed development, as defined by the Act, on either one of the lots, and that this condition be enforced by recording it on the deeds. She also recommended a specific deed reference in respect to the requirements of open space and archeological resources.

Attorney Jon Idman, on behalf of the Applicant, stated that he believed prima facie deed restrictions could affect the marketability of the lots.

Ms. Kristy Senatori, Chief Regulatory Officer noted the significance of specific conditions on the deeds to the lots.

Ms. Jo Anne Miller Buntich, Interim Director of Growth Management, spoke on behalf of the Town of Barnstable, and expressed her support for Commission staff's recommendations. She noted her concern with the transportation condition regarding a shared driveway, and noted that though the Town supports a reduction of curb cuts, a shared driveway may not always be appropriate.

Mr. Welch, an abutter, spoke in favor of the project and also recommended that Lot 2 be given to the Barnstable Land Trust.

Attorney Singer voiced his concern in regards to the use of the phrase “any development” in conditioning Lot 1. He also stated his opinion that a PNF for Lot 1 should only be required if the use of the property exceeds that of a single-family residence.

Ms. Sarkisyan discussed MHC’s letter, and the archeologically sensitive nature of the area, and discussed the staff’s reasoning for requiring a PNF to be filed prior to any site disturbance.

March 26, 2009 Subcommittee Meeting

A Subcommittee meeting immediately followed the March 26, 2009 public hearing. The Subcommittee members discussed the applicable Commission standards for granting a Hardship Exemption. The Subcommittee found that there should be a reference on the deed to each lot that would reference the Commission decision rather than expressly listing specific conditions on the deed. Additionally, the Subcommittee found that any future development on Lot 1, other than single family residential use, would trigger Commission review. A suggestion was made to use the Town of Barnstable’s by right uses for guidance in drafting of this condition.

April 13, 2009 Subcommittee Meeting

A Subcommittee meeting took place on April 13th, 2009. Ms. M. Sarkisyan presented to the Subcommittee the draft decision, noting the changes that were made to it that were per Attorney Singer’s request and were agreed upon by staff. Staff sought guidance from the Subcommittee on the appropriate language for condition GC4. Ms. Sarkisyan explained the staff’s reasoning behind the language of the condition, and the Subcommittee indicated that it approved the staff’s language for the condition. Mr. A. Singer stated that the Applicant wanted the language of the condition to allow those uses as are currently permitted by the Town of Barnstable’s zoning code in RD-1 districts without having to come back for Commission review. Included in the uses permitted by the zoning code as accessory uses were the keeping, stabling, and maintenance of horses, and renting of rooms. Conditional uses permitted by the code include public or private golf courses, a more intense keeping, stabling and maintenance of horses, windmills and other devices for the conversion of wind energy, and bed and breakfasts. Ms. Sarkisyan and Attorney Wielgus discussed the implications of the proposed language which included excluding from Commission review the potential regional impacts to water resources, and historic and archeological resources, and that adopting the proposed language would deprive the Commission of its ability to review these uses. Issues included the nitrogen loading that could result from the stabling of horses, and damages to archeological resources from ground disturbance without a survey.

Attorney Singer argued that he could not foresee any regional impacts that could result from changing GC4 to reflect his proposed language. The Subcommittee disagreed, and Mr. Richardson, Mr. Trebat, and Mr. Graham all voiced their concerns over the potential impacts in the area of water resources and archeological resources which were possible should the condition be changed from what the staff recommended.

The Subcommittee showed its satisfaction with condition HRC1 as drafted, and Ms. Sarah Korjeff, the Commission's Historical Preservation Specialist noted that the findings stated that an archeological survey could be done at any time, and that this clause provided the Applicant with additional flexibility.

Attorney Wielgus and the Subcommittee agreed to incorporate Attorney Singer's draft language to be recorded on each deed into the condition GC2.

Attorney Singer requested that condition GC8, allowing Commission staff to enter the property upon reasonable notice be stricken. Staff discussed the importance of including the condition, and Ms. Adams recommended additional language to provide further reassurance to the Applicant in terms of notice and privacy, which the Subcommittee adopted.

Mr. Olsen recommended that TC1 be stricken, and Ms. Senatori suggested that it be included as a finding instead, which the Subcommittee found acceptable.

Further discussion took place as to revising GC4, and the Subcommittee concluded that no further changes should be made to the condition. Attorney Wielgus noted the importance of a baseline from which to judge the disturbed areas referenced by Condition GC4. The Applicant agreed to provide a plan to be referenced in the decision.

The Subcommittee meeting concluded with two motions. The first motion was to approve the DRI with conditions as outlined and to forward the draft decision to the Commission meeting on April 30, 2009. The second motion was to allow the Subcommittee Chair to review the draft decision prior to it being forwarded to the Commission to ensure it referenced the changes articulated at the meeting.

April 27, 2009 Subcommittee Meeting

A subcommittee meeting took place on April 27, 2009. At the meeting, Attorney Singer, speaking on behalf of the Applicant stated that he requested the meeting for the purposes of requesting a one month continuance from the April 30, 2009 full Commission meeting. He stated that the purpose of the continuance was not to simply continue discussing the language of Condition GC4, but rather to meet with staff and discuss possible development options and alternatives.

Ms. Kristy Senatori noted that she discussed with Attorney Singer the possibility of providing on-site mitigation now rather than deferring Commission review until the future, and that if there were proposed development scenarios, then another public hearing would likely be required.

Mr. Virgilio moved to recommend to the Commission that at its meeting on April 30, 2009 it continue the public hearing to the May 28, 2009 Commission meeting. Mr. Richardson seconded the motion, which was approved unanimously.

June 22, 2009 Hearing Officer.

On June 22, 2009, at 10 AM at the Cape Cod Commission office, Ms. Sarkisyan, acting as Hearing Officer closed the 90 day hearing period. No testimony was taken on the project at that time.

July 2, 2009 Subcommittee Meeting

A subcommittee meeting took place on July 2, 2009. At the meeting, Attorney Singer proposed to the subcommittee three revised concepts to the project. The first revision involved limiting the number of horses allowed on Lot 1 to no more than five horses. This measure was meant to address potential nitrogen overloading of the water resources on the property that could result if accessory uses allowed by Barnstable code (which included stabling of horses) were allowed to continue unrestricted on Lot 1.

Attorney Singer also discussed the possibility that Lot 1 may contain archaeological resources, and the Applicant's proposal to delineate areas A and B on the site plan, and to place a condition that would require Commission review before any ground disturbance on these two areas could take place.

Discussion also took place in regards to using similar measures to protect land waterward of the house and tennis court, by delineating Massachusetts Natural Heritage and Endangered Species Program rare species habitat as well as wetland buffers, and having the Applicant come back for Commission review prior to these areas being developed. Mapping these areas would serve the same purpose as a conservation restriction, which Attorney Singer explained the Applicant was not able to obtain. Attorney Singer also discussed the Applicant's desire to keep the wetland buffer areas behind the house and tennis court to fifty rather one hundred feet to account for existing development. Attorney Singer stated that he was before the subcommittee for concept approval only, and if the subcommittee approved the concepts, then he could work with staff to define the final boundaries of the areas discussed.

A discussion took place as to the differences between Attorney's Singer's versus Commission staff's delineation of areas A and B. Attorney Singer stated that Ms. Sarah Korjeff would still have to approve the final boundaries of the archaeologically sensitive areas. Ms. Sarkisyan added that the area waterward of the house protected by NHESP and wetland buffers was the third site on Lot 1 which Ms. Korjeff determined was archaeologically sensitive, and that this was one of the reasons that the habitat areas and buffers were delineated as the boundary for development that would require Commission review. This approach would protect both open space and archaeological resources.

The subcommittee voiced their concerns that conditions in the draft decision be specific enough to make future owners of Lot 1 aware of the archaeologically sensitive nature of portions of the property, and that any development proposed on the delineated areas undergo Commission review, which would involve a consultation with Massachusetts Historical Commission, and could potentially involve performing an archaeological survey.

The subcommittee voted unanimously to approve the three conceptual changes proposed by Attorney Singer and directed staff to draft a decision reflecting this.

July 15, 2009 Subcommittee Meeting

The subcommittee met on July 15, 2009 to review the changes made to the draft decision. At the meeting, Ms. M. Sarkisyan discussed each of the changes made to the decision, noting that the changes highlighted in blue reflected Attorney Singer's suggestions. She discussed each of the changed findings, noting that finding NRC4 was new. Mr. Graham made a motion that since the Applicant has agreed to a condition requiring DRI review should additional development be proposed in the future on Area C as identified in Condition GC4, that the Commission finds at this time, and based on the proposal to divide the lots, that relief from open space requirements of the RPP may be granted without substantial detriment to the public good, and without nullifying or substantially derogating from the intent or purpose of the Act. Mr. Richardson seconded the motion, which was approved unanimously. Ms. Sarkisyan noted that finding WRF3 was new, and was inserted to reflect the reasoning behind limiting Lot 1 to the keeping, stabling, and maintenance of no more than five horses. Ms. Sarkisyan discussed in detail revised Conditions GC4 and GC5. She also discussed the changes made to Condition HRC1, and the new Conditions NRC2 and NRC3.

Mr. Richardson moved that the subcommittee approve the revised draft decision approving the hardship exemption application with conditions and forward it to the full Commission for its July 23, 2009 meeting. Mr. Graham seconded the motion, which was approved unanimously.

JURISDICTION

The proposed project qualifies as a DRI under Section 3(c) of Chapter A of the Enabling Regulations Governing Developments of Regional Impact, as a division of land totaling 30 acres or more in common ownership or control on or after September 30, 1994. The Applicant has applied for a Hardship Exemption per Section 8 of the DRI Enabling Regulations.

FINDINGS

The Commission has considered the application of Mr. A. Dalby for the proposed project, and based on consideration of such application, and upon the information presented at the public hearings and submitted for the record, makes the following findings pursuant to Section 23 of the Act:

General Findings

- GF1 Based on the date of the first substantive public hearing of March 26, 2009, this project was reviewed subject to the 2009 Regional Policy Plan ("RPP").
- GF2 The subject property is situated at 944 Shootflying Hill Road in Centerville, and is identified as Barnstable's Assessor's Map 211 Parcel 6. It consists of a 31.5 acres of land

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improved with a single-family residence and accessory structures, including two sheds, a greenhouse, and a tennis court. The remaining portions of the property consist of driveway areas, wooded areas, and wetlands. North Lily Pond and South Lily Pond are situated in the eastern portion of the subject property.

- GF3 The proposed project involves a division of the existing 31.5 acre-parcel of land into two lots: one 18.5 acre parcel (Lot 1) containing the existing single-family residence and related accessory structures, and one 13.0 acre vacant parcel (Lot 2). Both lots will have frontage on Shootflying Hill Road. Lot 1 will retain the existing frontage on Wequaquet Lake, and will include South Lily Pond and North Lily Pond, and all wetland resources. Lot 2 will have no frontage on nor access to Wequaquet Lake or the ponds, and will be 100% upland. No further development is proposed on either Lot 1 or Lot 2 as part of the proposed project.
- GF4 The land division will be conducted in accordance with *Exhibit A, Site Plan in Barnstable, (Centerville) MA prepared for Alan Dalby*, prepared by Down Cape Engineering, Inc., and dated July 13, 2008, attached as Exhibit A to this decision, and which is incorporated by reference. Areas A, B, and C shown on this plan are identified as potentially archaeologically sensitive areas. Additionally, Area C includes fresh water bodies, wetland resources, and rare species habitat. The Applicant is not proposing development in Areas A, B, or C as part of this project.
- GF5 The project lies within the Barnstable District of Critical Planning Concern (DCPC). Because the current proposal does not include any additional development other than the division of the property into two lots, the project appears to be consistent with the purposes of the DCPC.
- GF6 The proposed project is consistent with the local development by-laws and the Commission-certified Local Comprehensive Plan (LCP).
- GF7 The probable benefits of the proposed project outweigh the probable detriments. The Commission finds that a benefit of the project is that it would allow the Applicant to sell Lot 1 and better arrange for the disposition of Lot 2 in his estate plan.
- GF8 The Commission finds that a Hardship Exemption is appropriate and that the Applicant has fulfilled its burden to show that a hardship exists in conforming to the requirements of the RPP at this time. A literal enforcement of the Act would require comprehensive Commission review under the RPP, including the preparation of appropriate technical studies, and imposition of corresponding mitigation. Partial relief from these studies and mitigation may be granted without a substantial detriment to the public good, and without nullifying or substantially derogating from the intent or purposes of the Act. The relief granted relates directly to the nature of the identified hardship and is the minimum relief necessary to address the hardship.

Historic and Archaeological Resources

HRF1 In its March 3, 2009 letter, the Massachusetts Historical Commission (“MHC”) determined that there are no recorded historic or archeological resources within the project parcels. However, in the same letter, the MHC did note that interior portions of the Town of Barnstable containing level, well-drained sandy soils in close proximity to freshwater bodies such as Wequaquet Lake and associated wetlands, including the project parcels, are considered by the MHC to be archeologically sensitive. While the proposed division of land will not impact any archaeological resources on the property, any future development that involves ground disturbance in previously undisturbed areas has the potential to impact archaeological sites. RPP Minimum Performance Standard HPCC1.3, regarding protection of archaeological sites, requires development proposed on or adjacent to sites with high archaeological sensitivity to be configured to maintain and/or enhance such resources where possible. According to the standard, a predevelopment investigation of such sites shall be required early in the site planning process to serve as a guide for layout of the development. The Applicant may conduct an archaeological survey of the property in consultation with MHC at any time in order to facilitate appropriate site planning for future development.

HRF2 Because an archeological survey will be conducted in accordance with Condition HRC1 of this decision prior to any ground disturbance in Areas A, B, and C, which are considered as archeologically sensitive due to environmental conditions, and are delineated on *Exhibit A, Site Plan in Barnstable, (Centerville) MA prepared for Alan Dalby*, prepared by Down Cape Engineering, Inc., and dated July 13, 2008, attached as Exhibit A to this decision, and which is incorporated by reference, the Commission finds that a hardship exemption may be granted, because a literal enforcement of provisions of the Act would involve a substantial hardship and desirable relief may be granted without a substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the Act.

Natural Resources

NRF1 The project site is located in a Significant Natural Resource Area due to the presence of mapped potential public water supply and rare species habitat. The site is also mapped as a Resource Protection Area in Barnstable’s Land Use Vision Map.

NRF2 As the proponent is not planning any development other than land division at this time, the preparation of a natural resource inventory was not required. The site is located on Lake Wequaquet and contains two ponds, North and South Lily Ponds, as well as associated wetlands and extensive wooded upland. Based on observations made during a staff site visit on March 11, 2009, the site is largely undisturbed, with the exception of the buildings and tennis court noted on the plan, and some walking trails throughout the site, between the lake, ponds, upland, and neighboring woodlands. The proposed land division (location of the lot line) does not appear to involve wetlands or vernal pools, and does not include the mapped rare species habitat. Lot 2 appears to be entirely upland. The wetlands, as well as North and South Lily Ponds and the shore of Wequaquet Lake on

Lot 1 are all presently mapped as priority habitat for rare species by the Natural Heritage and Endangered Species Program.

- NRF3 Since no development other than land division is proposed at this time, and since the open space requirement is calculated on the total development area of a site, the Commission finds that a literal enforcement of the Act in requiring the provision of open space as it relates to Lot 2 would pose a substantial hardship for the Applicant to comply with at this time. In addition, since the Applicant has agreed to a condition requiring DRI review should additional development be proposed in the future as identified in GC3, the Commission finds at this time and based on the proposal to divide the lots that relief from the open space requirements of the RPP may be granted without substantial detriment to the public good, and without nullifying or substantially derogating from the intent or purpose of the Act.
- NRF4 The Commission finds that since no development other than land division is proposed at this time and since the open space requirement is calculated based on the total development area of a site, that a literal enforcement of the provisions of the Act in requiring the provision of open space as it relates to Lot 1 would pose a substantial hardship to the Applicant. The Applicant has agreed to restrict development within Area C as identified in *Exhibit A, Site Plan* in accordance with Condition NRC3 of this decision, and therefore, the Commission finds that due to the difficulty of placing a conservation restriction on portions of the property at this time, and due to the requirements of the Massachusetts Endangered Species Act and the Wetlands Protection Act as well as the Regional Policy Plan, a waiver of the open space requirement for Lot 1 does not present a substantial detriment to the public good nor nullify or substantially derogate from the intent or purpose of the Act.

Transportation

- TF1 The Commission has not estimated any traffic generation for the proposed 31.5 acre, two-lot division because a development scenario has not been developed for this project. The Commission finds that the creation of the two-lot division (without a development scenario) does not in itself generate any traffic and therefore will not have a significant impact on the regional roadway system.
- TF2 MPS 4.1.1.7 requires all DRIs access/egress locations with public ways to meet Massachusetts Highway Departments (MHD) and American Association of State Highway Transportation Officials (AASHTO) standards for safe stopping sight distance.

The site currently has a single driveway on Shootflying Hill Road in Centerville and driveway access is not proposed to change as a result of this project. Therefore, the Commission finds that the Shootflying Hill Road driveway will comply with MPS 4.1.1.7.

For the benefit of public safety, any future Commission review should take into consideration the recommendation of Commission staff that regardless of the ultimate

number of lots created, that no more than two curb cuts should be created for Lot 2, which would limit the total number of curb cuts for both Lot 1 and Lot 2 to three.

- TF3 The standard of review for transportation safety impacts is 25 or more new peak hour trips through a high crash location. A high crash location is defined as a location where three (3) or more crashes have occurred for three (3) consecutive years. The proposed project is not estimated to generate any new traffic, and therefore the Commission does not expect this project to cause degradation in public safety.
- TF4 Because the proposed project will not generate any new traffic, the Commission finds that a literal enforcement of the provisions of the Act, including the requirement of a traffic study and the payment of mitigation would involve substantial hardship, financial or otherwise, and 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.

Water Resources

- WRF1 The area is located in multiple sensitive water resource areas including the Freshwater Recharge Area to Wequaquet Lake, the Three Bays Marine Water Recharge Area, and a Potential Water Supply Area. The MPS for these issue areas would apply to future development in addition to the RPP General Aquifer Protection and Stormwater MPS, and therefore the Commission finds that any future proposed development at the site as identified in conditions GC3 and GC4 should be reviewed in the area of water resources.
- WRF2 Because the proposed project will not impact water resources, the Commission finds that a literal enforcement of the provisions of the Act would involve substantial hardship, financial or otherwise, and 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.
- WRF3 The potential use of land on Lot 1 to allow for the keeping, stabling, and maintenance of no more than five horses on the property as restricted by Condition GC4 will not result in a substantial detriment to the public good, and will not nullify or substantially derogate from the intent or purpose of the Act.

CONCLUSION

Based on the findings above, the Commission hereby concludes that:

1. The Applicant has demonstrated that a hardship exists, and a literal enforcement of the provisions of the Act would involve a substantial financial hardship for the Applicant; and
2. 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;

3. That the relief granted from the requirements of the Minimum Performance Standards relates directly to the nature of the identified hardship and is the minimum necessary to address the hardship; and
4. That the relief granted does not result in a substantial detriment to the public good.

The Cape Cod Commission hereby approves the application of Alan J. Dalby as a Hardship Exemption, pursuant to Section 23 of the Act, c. 716 of the Acts of 1989, as amended, for the proposed division of the existing 31.5 acre parcel of land into two lots, provided that the following conditions are met:

CONDITIONS

General Conditions:

- GC1 The two-lot division shall be created in accordance with the *Exhibit A, Site Plan in Barnstable, (Centerville) MA prepared for Alan Dalby*, prepared by Down Cape Engineering, Inc., and dated July 13, 2008, attached as Exhibit A to this decision, and which is incorporated by reference. Any deviation from this plan shall require approval by the Cape Cod Commission as a modification to this decision in accordance with the Modifications section of the Enabling Regulations Governing Review of Developments of Regional Impact, Barnstable County Ordinance 90-12 (hereinafter "Enabling Regulations"), prior to any application for any development permits.
- GC2 The respective deeds to Lot 1 and Lot 2 shall include a reference to this Decision as follows: "The Premises has the benefit of and is subject to Cape Cod Commission Hardship Exemption Decision Project No. TR/HDEX 09001, a copy of which is registered with the Barnstable Registry District of Land Court as Document No. _____"
- GC3 No additional development, as that term is defined by the Act, shall be undertaken on Lot 2 without approval by the Cape Cod Commission. Prior to the time that any development permits are sought for Lot 2, the Applicant, or his heirs, successors and assigns of Lot 2, shall return to the Commission for Development of Regional Impact (hereinafter "DRI") review of the entire development and associated impacts in all applicable resource issue areas of the Regional Policy Plan in effect at the time of the first substantive public hearing on the DRI, in accordance with the Enabling Regulations.
- GC4 Lot 1 shall not be further subdivided without additional Commission review. In addition, prior to applying for any development permits for Lot 1, as the term development is defined by the Act, the Applicant, or his heirs, successors and assigns shall comply with Conditions GC1, GC2, GC6-8, HRC1, NRC2, NRC3, as well as return to the Commission for DRI review pursuant to the Enabling Regulations, except as follows: The Applicant, or his heirs, successors and assigns to Lot 1 may continue using Lot 1, except for Areas A, B, and C as delineated on *Exhibit A, Site Plan*, as a single family residential dwelling use, and may continue accessory uses of the property, which include

the renting of rooms for not more than three non-family members by the family residing in a single-family dwelling, and the keeping, stabling, and maintenance of no more than five horses on the property. The keeping, stabling, and/or maintenance of horses is allowed provided that the horses are not kept for economic gain, that all state and local health regulations relating to horses are complied with, that adequate fencing is installed and maintained to contain the horses within the property, except that the use of barbed wire is prohibited, that all structures, including riding rings and fences to contain the horses conform to the 50% of the setback requirements of the district in which located, that no temporary buildings, tents, trailers or packing crates are used, that the area is landscaped to harmonize with the character of the neighborhood, that the land is maintained as not to create a nuisance, and that no outside artificial lighting is used beyond that normally used in residential districts.

- GC5 Except as provided in Condition GC4, prior to applying for any development permit for Lot 1 for any proposed development as the term development is defined by the Act within areas A, B, or C as shown on *Exhibit A, Site Plan*, the Applicant, his heirs, successors and assigns shall comply with Conditions GC1, GC2, GC6-8, HRC1, NRC2, NRC3, as well as return to the Commission for DRI review pursuant to the Enabling Regulations, except that the Applicant or his heirs, successors and assigns may use, maintain and repair, but not change the size of the existing items as identified on *Exhibit A, Site Plan*. Each item is assigned a reference number in Exhibit A for ease of reference. The items are as follows: boardwalk (“1”), steps (“2”), and bridge leading to the northerly beach (“3”), kayak & boat storage area adjacent to the northerly beach (“4”), northerly beach (“5”), boardwalk and the five-foot path leading easterly from the northern beach (“6”), permitted dock leading northerly from juncture of the above referenced boardwalk and five-foot path (“7”), dirt drive leading southwesterly from the mowed clearing (“8”), five-foot path leading westerly from the above referenced dirt drive (“9”), mowed clearing (“10”), pebble beach (“11”) and the observation stand to the south of South Lily Pond (“12”). In addition, the Applicant may install the dock previously permitted by the Town of Barnstable (“7”). The Applicant may also use, maintain and keep clear the existing dirt drive bisecting area B (“13”) in its natural condition provided the drive is not widened or expanded.
- GC6 This DRI Hardship Exemption decision is valid for 7 years, and local development permits may be issued pursuant hereto for a period of 7 years from the date of the written decision.
- GC7 Failure to comply with all conditions stated herein, and all related statutes and other regulatory measures, shall be deemed cause to revoke or modify this decision.
- GC8 No development work, as the term “development” is defined by the Act, shall be undertaken until all appeal periods relating to this decision in accordance with section 17 of the Act have elapsed or, if such an appeal has been filed, until all judicial proceedings have been completed.

GC9 The Applicant agrees to allow Cape Cod Commission staff to enter the property, which is subject to this decision at reasonable times and after reasonable notice and upon mutually agreed upon terms for the purpose of determining whether the conditions contained in this decision are met. Permission to enter the property shall not be unreasonably withheld.

Historic and Archaeological Resources:

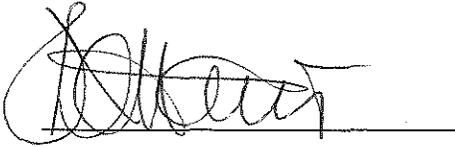
HRC1 Prior to the application for any building or development permit that would involve ground disturbance in areas A, B, or C as delineated on *Exhibit A, Site Plan* except as provided in Condition GC5, the Applicant shall notify the Cape Cod Commission and shall consult with the Commission and Massachusetts Historical Commission (MHC) to determine whether an archaeological survey is necessary to ensure that the project will not impact significant archaeological sites. If an archaeological survey is deemed necessary by the MHC and/or the Commission, it shall be conducted in consultation with the Massachusetts Historical Commission/State Archaeologist.

Natural Resources

NRC1 If the Applicant or his heirs, successors and assigns are required to complete a DRI review on Lot 2 by condition GC3, then a review and mitigation of impacts to natural resources, including wetlands, wildlife and plant habitat, and the provision of open space, consistent with the standards of the Regional Policy Plan in effect at the time of the first substantive public hearing on the DRI review, shall be required.

NRC2 If the Applicant, his heirs, successors and assigns are required to complete a DRI review on Lot 1 by conditions GC4 or GC5, a review and mitigation of the impacts to natural resources, including wetlands, wildlife and plant habitat, consistent with the standards of the RPP in effect at the time of the first substantive public hearing on the DRI review shall be required.

NRC3 Prior to applying for any development permits for any proposed development within area C as shown on *Exhibit A, Site Plan*, as the term development is defined by the Act, the Applicant, or his heirs, successors and assigns shall return to the Commission for DRI review, except as provided by Condition GC5.



John D. Harris, Chair of the Cape Cod Commission

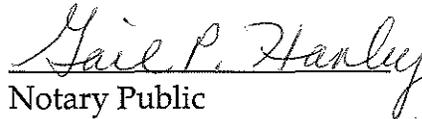
23 July 2009

Date

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss July 23, 2009

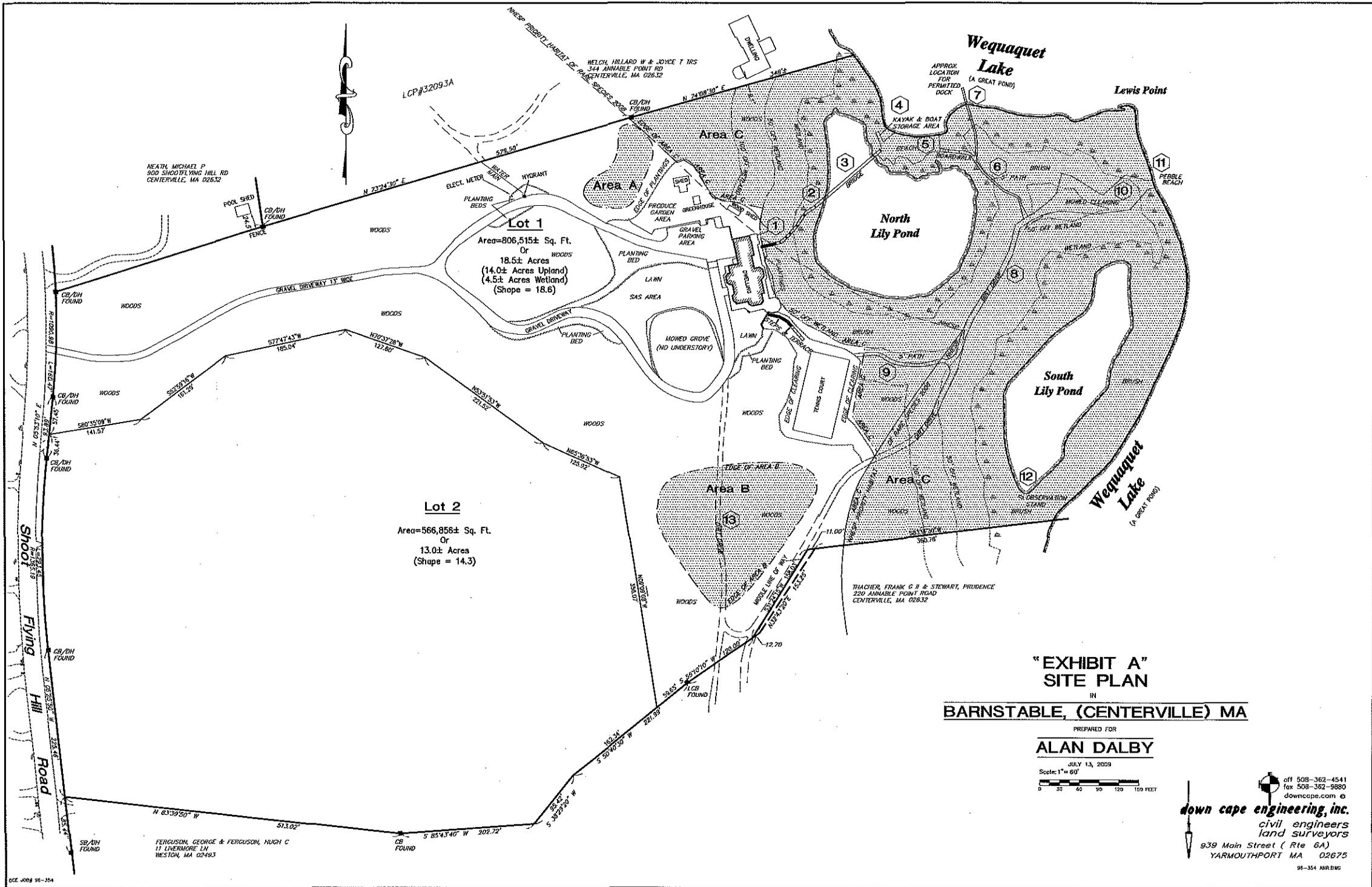
Before me, the undersigned notary public, personally appeared John D. Harris, in his/her capacity as Chairman of the Cape Cod Commission, whose name is signed on the preceding document, and such person acknowledged to me that he/she signed such document voluntarily for its stated purpose. The identity of such person was proved to me through satisfactory evidence of identification, which was photographic identification with signature issued by a federal or state governmental agency, oath or affirmation of a credible witness, or personal knowledge of the undersigned.



Notary Public

My Commission Expires:

10.13.11



Lot 1
 Area=806,515± Sq. Ft.
 Or
 18.5± Acres
 (14.0± Acres Upland)
 (4.5± Acres Wetland)
 (Shape = 18.6)

Lot 2
 Area=566,856± Sq. Ft.
 Or
 13.0± Acres
 (Shape = 14.3)

**"EXHIBIT A"
 SITE PLAN
 IN
 BARNSTABLE, (CENTERVILLE) MA**

PREPARED FOR
ALAN DALBY

JULY 13, 2009
 Scale: 1" = 60'



down cape engineering, inc.
 civil engineers
 land surveyors
 939 Main Street (Rte 6A)
 YARMOUTHPORT MA 02675