



CAPE COD COMMISSION

3225 MAIN STREET
P.O. BOX 226
BARNSTABLE, MA 02630
(508) 362-3828
FAX (508) 362-3136

E-mail: frontdesk@capecodcommission.org

Date: August 7, 2008

To: Mr. Peter Farber
Attorney at Law
293B Orleans Road, P.O. Box 768
North Chatham, MA 02650

From: Cape Cod Commission

Re: Procedural Denial Decision according to DRI Enabling
Regulations, Section 13

Project Applicant: Carrie L. Nickerson
Project Location: 791 South Orleans Road, Brewster, MA

Property Owner: Carrie L. Nickerson
321 Red Top Road
Brewster, MA 02631

Project: Nickerson Property/Horse Farm
Project #: DR07023

Book/Page: 14146/337
14357/71
14419/218

Map/Parcel: 45/47-7, 44 & 79

DECISION OF THE CAPE COD COMMISSION

The Cape Cod Commission (Commission) hereby procedurally denies without prejudice the proposal of Carrie L. Nickerson as a Development of Regional Impact (DRI) pursuant to Sections 12 and 13 of the Cape Cod Commission Act (Act), c. 716 of the Acts of 1989, as amended, for the proposed Nickerson Property/Horse Farm development in Brewster, MA. This decision is rendered pursuant to a vote of the Commission on August 7, 2008.

PROJECT DESCRIPTION

The proposed project is located on approximately 15 acres at 791 South Orleans Road, Brewster, MA. The applicant has constructed a 13,440 square-foot two-story structure consisting of a horse barn and one 2,040 square-foot living area/apartment on the second floor.

Prior to the referral to the Commission the applicant cleared approximately 15.4 acres of land, with the intention to grade and develop pastureland. As shown by the Massachusetts Natural Heritage Atlas the site is mapped as Priority Habitat.

The project is located in a Zone II for a municipal water supply well located in the Town of Orleans. The project is also located in a watershed that drains to Pleasant Bay, a nitrogen-sensitive marine embayment that is experiencing water-quality problems resulting from development in its watershed. Pleasant Bay is a regional resource with coastline and watersheds that transcend four municipalities, including the Towns of Brewster and Orleans.

JURISDICTION

The Orleans Board of Selectman made a limited Discretionary Referral according to Section 12(e) of the Act and Section 2(b) of the Enabling Regulations setting forth the Regional Policy Plan issue area of Water Resources to be applied by the Commission in a limited DRI review as further authorized under Section 6(viii)[2] of the Enabling Regulations.

PROCEDURAL HISTORY

On December 20, 2007 the Orleans Board of Selectman voted unanimously to refer the proposed project located in the adjacent town of Brewster to the Cape Cod Commission as a limited Discretionary Referral in the area of water resources, pursuant to Section 12(e) of the Cape Cod Commission Act (Act). The Commission received the referral on December 21, 2007.

On January 22, 2008, and on February 4, 2008, the Regulatory Committee considered the discretionary referral from the Orleans Board of Selectman and on February 4, 2008, voted to recommend to the full Commission acceptance of the limited Discretionary Referral in the area of Water Resources.

On February 4, 2008, the Cape Cod Commission considered the limited Discretionary Referral from the Orleans Board of Selectman. The Commission determined that the development may have regional impacts and presents one or more of the concerns listed in Section 12(b), specifically Section 12(b)(1) impacts on natural resources, ground and surface water supply and quality, and agriculture; Section 12(b)(2) impacts on capital

facilities including sewage and water supply; Section 12(b)(7) waste disposal, water supply, and sewage; and Section 12(b)(9) which is the effect of the development on resources of the surrounding municipalities as it may impact the water quality of surrounding towns. The Commission voted 11 in favor and 3 opposed to accept the discretionary referral for DRI review.

A public hearing was opened and closed by a hearing officer of the Commission on April 2, 2008 and June 27, 2008, respectively.

Pursuant to the DRI Enabling Regulations, Section 6(b), the applicant met with Commission staff for a pre-application meeting, in which staff advised the applicant of the materials needed to process the DRI, which include the application cover sheet, DRI application and all required attachments including the project description, lot information, and proposed project plans, and a project filling fee.

The applicant also requested a fee waiver via a Fee Waiver Request Application submitted to the Commission on February 6, 2008. This request was heard by the Executive Committee of the Commission at their February 7, 2008 meeting. The Applicant did not submit her fee to the Commission, nor did she provide any of the additional project details and required application materials.

The Commission notified the applicant and the applicant’s attorney in writing via certified mail, return receipt requested, of a pending procedural denial and provided them an opportunity to address the Regulatory Committee of the Commission on the status of the project at its July 7, 2008 standing committee meeting. The applicant did not respond to that correspondence, nor did the applicant or her attorney appear at the July 7, 2008 standing committee meeting.

A final public hearing on the written decision was held on August 7, 2008 before the full Commission, on which date the Commission voted unanimously to procedurally deny the project without prejudice.

Materials submitted for the record

In addition to the list of materials submitted for the record (see Table 1 below) the notices of public hearings relative thereto, Commission staff’s notes and correspondence, the minutes of any public meetings and hearings, and all other written submissions received in the course of the proceedings are hereby incorporated into the record by reference.

TABLE 1: Materials Submitted for the Record	
<i>Materials from the Applicant</i>	<i>Date Submitted</i>
Letter from P. Farber to S. Justus re Certificate of Occupancy	6/12/08
Fee Waiver Request Application	2/6/08
Email from P. Farber to P. Dascombe re materials	2/1/08

Emails (3) from P. Farber to P. Dascombe re materials	1/31/08
Letter from Nickerson to J. Kelley re curb cut withdrawal	1/25/08
Letter from Nickerson to P. Niedzwiecki re commercial nature of project	1/25/08
Email from P. Farber to P. Dascombe re manure management	1/4/08
Email from P. Farber to P. Dascombe re staff report	1/4/08
<i>Materials from Commission Staff</i>	<i>Date</i>
Emails from S. Michaud to S. Spear and T. Akins re nitrogen loading	3/5/08
Letter from J. Wielgus to P. Farber re municipal permits	6/24/08
Letter from J. Wielgus to P. Farber re municipal permits	6/19/08
Letter from S. Justus to Nickerson and Farber re pending procedural denial	6/10/08
Letter from S. Justus to Nickerson and Farber re DRI acceptance	2/13/08
Email from P. Dascombe to P. Farber re process	2/1/08
Email from P. Dascombe to P. Farber re process	2/1/08
Email from P. Dascombe to P. Farber re applicant questions	1/31/08
Email from P. Dascombe to P. Farber re process	1/31/08
Memo from P. Dascombe to Commission members re meetings	1/29/08
Letter from P. Niedzwiecki to V. Staley re commercial nature of project	1/24/08
Email from S. Michaud to P. Dascombe re number of horses	1/15/08
Staff Report	1/2/08
Phone notes by P. Dascombe	12/28/07
Email from P. Dascombe to M. Nickerson re regulations	12/28/07
Phone notes by P. Dascombe	12/27/07
Fax cover sheet to Nickerson re Orleans referral form	11/27/07
<i>Materials from the Town of Brewster</i>	<i>Date Received</i>
Letter from M. Mooers to P. Farber re zoning board of appeals	4/29/08
Email from N. Ice to S. Michaud re Board of Health plan	3/27/08
Letter from V. Staley to C. Nickerson re occupancy	3/26/08
Memo from V. Staley to C. Nickerson re mandatory referral	2/6/08
Letter from V. Staley to P. Farber re proposal	1/31/08
Letter from V. Staley to C. Nickerson re breeding program	1/29/08
Letter from V. Staley to P. Farber re building permit	1/23/08
Email from V. Staley T. French re MESA violation	1/22/08
Email from J. Douglass to P. Dascombe re MESA program	1/24/08
Memo from J. Douglass to D. Fox re discretionary referral	1/18/08
Brewster Building Permit application	11/21/07
<i>Materials from the Town of Orleans</i>	<i>Date Received</i>
DRI referral from Town of Orleans	12/26/07
<i>Materials from Others</i>	<i>Date Received</i>
Email from R. Lehan to V. Staley re MESA violation	7/2/08
Email from R. Lehan to V. Staley re MESA violation	6/10/08
Email from S. Spear to S. Michaud re nitrogen loading	4/29/08
Email from S. Spear to S. Michaud re nitrogen loading	3/26/08
Email from S. Spear to S. Michaud re manure management nitrogen calculations	2/25/08
Email from J. Regosin to V. Staley re MESA violation	1/24/08

Letter from T. French to Nickerson re MESA violation	11/26/07
<i>General Correspondence Received</i>	<i>Date Received</i>
Letter from C. Ridley to P. Niedzwiecki re project proposal	1/29/08
Email from C. Watts to CCC re Nickerson project vote	2/4/08
Letter from anonymous to J. Lipman re project concern	2/7/08
Letter from P. McGraw to J. Hinckley et al. re project concern	5/19/08

TESTIMONY

The Commission received no testimony on this project as the applicant did not provide a completed application to the Commission. DRI public hearings were procedural and held by hearing officer of the Cape Cod Commission.

FINDINGS

The Commission has considered the proposed project of Carrie L. Nickerson concerning the proposed Nickerson Property horse farm development, and makes the following findings pursuant to Sections 12 and 13 of the Act:

1. The proposed project is located on a parcel of land that is approximately 15-acres located at 791 South Orleans Road, Brewster, MA. The applicant has cleared and graded approximately 15.4 acres of land and constructed a 13,440 square foot two-story structure consisting of a horse barn with one 2,040 square-foot living area/apartment located on the second floor.
2. As shown by the Massachusetts Natural Heritage Atlas, the site is mapped as Priority Habitat and it is the Commission's understanding that land and vegetation clearing on the site were obtained without a conservation permit from the Massachusetts Natural Heritage and Endangered Species Program in violation of the Massachusetts Endangered Species Act.
3. The project is located in a Zone II for a municipal water supply well located in the Town of Orleans. The project is also located in a watershed that drains to Pleasant Bay, a nitrogen-sensitive marine embayment that is experiencing water-quality problems resulting from development in its watershed. Pleasant Bay is a regional resource with coastline and watersheds that transcend four municipalities, including the Towns of Brewster and Orleans.
4. On December 21, 2008, the Commission received a limited Discretionary Referral for the Nickerson Property/Horse Farm project from Mr. John Hinckley, Jr., Chairman of the Orleans Board of Selectman, which described the project as follows:
“Project is a significant clearing, grabbing, and regrading of land in Brewster that is located within the contributing area to the Orleans public

wells #4, 5 and 7. Property owner states that 13 acres have been cleared, but the actual area has not been confirmed and may be as much as 25 acres. Project is referred as a Discretionary Development of Regional Impact for protection of groundwater and proper management of a proposed horse farm.”

5. At the February 4, 2008 Regulatory Committee meeting, the Commission members and staff discussed the use and coordination with the applicant of the Nickerson site as a potential site for a groundwater monitoring program to evaluate the potential impacts of a horse farm on water quality. The Applicant indicated a willingness to participate in such a program in the course of the DRI review.
6. After considering the limited Discretionary Referral request received from the Town of Orleans Board of Selectman on 12/26/08, the Commission, on 2/4/08, accepted the referral as a development that may have regional impacts and presents one or more of the concerns listed in Section 12(b) of the Act. The Commission excluded from its review the living area.
7. Project details have not been formally delineated because a DRI application was not filed with the Commission. General information about the project has been informally received by the Commission from local officials and representatives of the US Department of Agriculture (USDA) who have been working with the project proponent. Additionally, the applicant filed a Fee Waiver Request Application on February 6, 2008, where the approximate cleared area (15.4 acres) and a general project description were provided. Other project information was provided to the Town of Brewster in a Building Permit Application filed July 11, 2007, with the Brewster Building Department. The town sent this information to this Commission.
8. Commission staff worked closely with the USDA and local officials in an attempt to address concerns about the project's effect on water quality. Commission staff and USDA representatives jointly reviewed horse-nitrogen loading parameters, and the USDA had expressed a willingness to explore funding options for the development of a groundwater-monitor program. Commission staff met with representatives from the Towns of Brewster and Orleans on March 12, 2008 to discuss nitrogen loading of groundwater from the equestrian operations and whether the project could be consistent with minimum performance standards of the Regional Policy Plan. A draft policy was subsequently discussed at the March 18, 2008 meeting of the Brewster Board of Health.
9. Staff met with the applicant and representatives from the Town of Brewster on March 17, 2008 to discuss the Commission's regulatory process, review standards, and information that needed to be submitted with the DRI application. The applicant did not return to the Commission nor provide any of the materials discussed. Commission staff wrote to the applicant and advised them of their ability to seek an extension for the DRI in a letter dated June 10, 2008. The applicant did not respond.

10. Due to the lack of a DRI application, a hearing officer opened and closed pro-forma hearings at the Cape Cod Commission office, Barnstable, MA on April 2, 2008 and June 27, 2008, respectively. No testimony was heard and no substantive action was taken at these hearings.
11. As of the date of this decision and despite repeated requests by Commission staff, the applicant has failed to submit a completed DRI application, the filing fee or the necessary information demonstrating compliance with the Commission regulations.
12. The applicant failed to progress continuously and expeditiously through required regulatory processes, thereby providing no information on which to conduct a substantive hearing or to base a substantive decision by the Commission. The Commission determines that a procedural denial without prejudice may properly be granted.

CONCLUSION

The Cape Cod Commission hereby procedurally denies without prejudice the proposal of Carrie L. Nickerson as a Development of Regional Impact (DRI) pursuant to Sections 12 and 13 of the Cape Cod Commission Act (Act), c. 716 of the Acts of 1989, as amended, for the proposed Nickerson Property/horse farm development in Brewster, MA.

Mr. John D. Harris	Date
Chairman	

COMMONWEALTH OF MASSACHUSETTS

Barnstable, ss _____, 2008

Before me, the undersigned notary public, personally appeared Mr. John D. Harris, in his capacity as Chairman of the Cape Cod Commission, whose name is signed on the preceding document, and such person acknowledged to me that he 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: