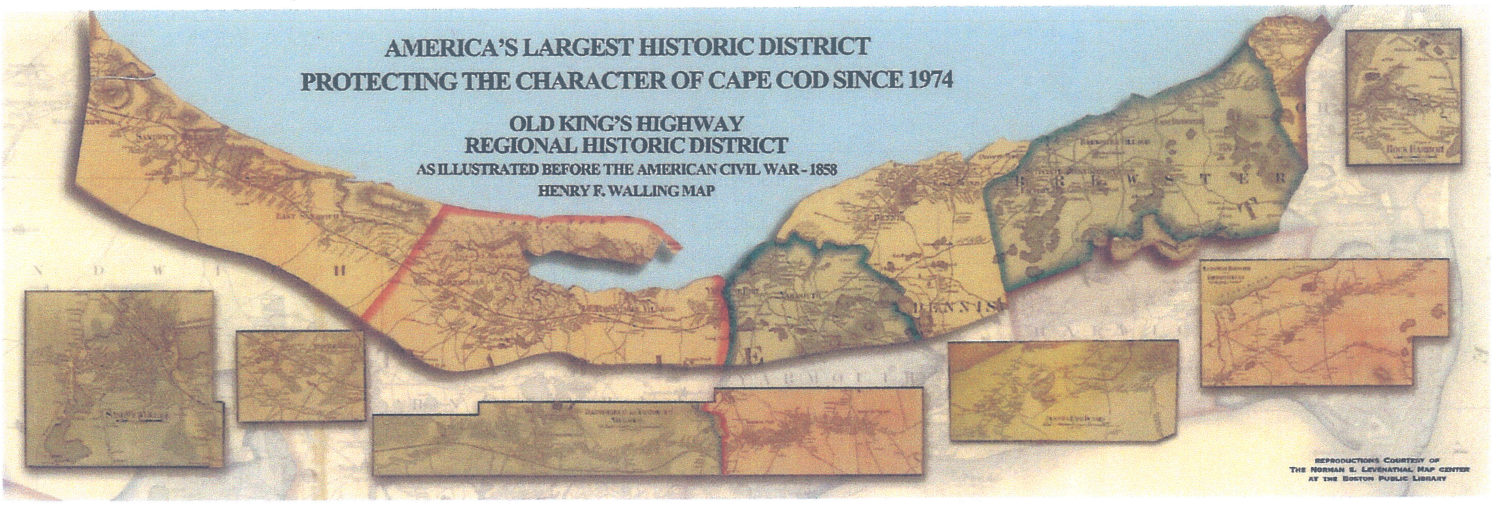

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT

COURT RULINGS & DECISIONS

(11/5/1974 - 11/9/2015)

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OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION
P.O. Box 140, Barnstable, Massachusetts 02630-0140

STANDARDS FOR APPROPRIATENESS

&

HARDSHIP

Old King's Highway Regional Historic District Commission
First District Courthouse, Barnstable, Mass. 02630 Telephone: 617-362-4092

DONALD H. SLEEPER,

- Appellant -

VS

TOWN OF DENNIS OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMITTEE,

- Appellee -

DECISION ON APPEAL TO OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION

A hearing was held on September 6, 1977 by the above commission on the appeal by Donald H. Sleeper from the decision of the Town of Dennis Historic District Committee denying a certificate of appropriateness to appellant for the erection and maintenance of a radio antenna at the rear of his house lot at No. 7, Anchor Lane, East Dennis.

From the evidence presented and a viewing of the premises it appeared that the radio antenna consists of a slender metal tower, 68 feet high, with several cross arms at or near the top, stabilized with several guy wires anchored at various points on appellant's lot. It was erected without the prior issuance of a building permit or certificate of appropriateness, and thereafter when the necessity for a certificate was brought to appellant's attention the application therefor was filed.

Appellant's and neighboring houses are, in general, modest, attractive " Cape Cod " or " Ranch " stylebuildings in the area of Scargo Hill and Scargo Tower, a prominent site and landmark of some historical importance. House lots appear to be about 100' x. 150' in size. Appellant's radio antenna extends far above the roof ridges of his and neighboring houses, and is highly visible from many public streets in the area and from considerable distances. While many neighboring houses are equipped with conventional television antennae none are comparable in visual impact to appellant's structure. Appellant suggested, by way of compromise, that his antenna might be lowered to a height of 48 feet, but it appeared that this would not effect a significant reduction in its unacceptable visual impact.

Appellant asserts a " constitutional right " to maintain his antenna in pursuit of his hobby. There is no such right where the structure involved is as grossly inappropriate to the neighborhood as that under consideration. The fact that the Dennis zoning by-law may recognize communication towers as an

accessory use in certain situations does not relieve any proposed structure within the historic district of the requirement of appropriateness.

For the foregoing reasons this Commission found that the Dennis town Committee properly denied the issuance of a certificate of appropriateness to appellant and unanimously voted to affirm the decision of that Committee. William G. Hanger of Dennis abstained from voting.

September 8, 1977

Donald Bourne
Commission Chairman

RECEIVED
SEP 9 1977
TOWN CLERK-TREAS.
TAX COLLECTOR
TOWN OF DENNIS

DONALD H. SLEEPER *vs.* OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION.

Barnstable. December 12, 1980. -- March 13, 1981.

Present: GREANEY, ROSE, & KASS, JJ.

Historic District Commissions, Appeal, Radio antenna. *Practice, Civil*, Historic district appeal. *Radio Antenna. Statute*, Federal preemption.

A town's historic district committee did not err in refusing to issue a "certificate of appropriateness" to an amateur radio operator for the erection of a sixty-eight foot high antenna on property lying within a regional historic district in an area with structures having a generally low physical profile. [573-574]

The failure of an historic district committee to make written findings as to whether an amateur radio operator would suffer "substantial hardship" within the meaning of St. 1973, c. 470, § 10, by the committee's denial of a "certificate of appropriateness" for the erection of a sixty-eight foot high antenna on his property was without consequence where hardship could not have been found as a matter of law. [574-575]

The criteria for determining the appropriateness of a structure to be erected in a regional historic district, as set forth in § 10 of St. 1973, c. 470, which created the district, were not impermissibly vague. [575]

The application of the provisions of St. 1973, c. 470, creating a regional historic district, to prohibit an amateur radio operator from erecting a sixty-eight foot high antenna on his property did not intrude on an area preempted by Federal law or constitute an interference with interstate commerce. [575-576]

CIVIL ACTION commenced in the Second District Court of Barnstable on September 27, 1977.

The case was heard by *Welsh*, J.

An appeal to the Supreme Judicial Court was transferred to the Appeals Court.

Duane P. Landreth for the plaintiff.

James R. Wilson for the defendant.

KASS, J. Donald H. Sleeper is an amateur radio operator who desires to erect an antenna sixty-eight feet high in the backyard of his residence in East Dennis. It is his misfortune that his home is located in the Old King's Highway Regional Historic District, established by St. 1973, c. 470, as amended by St. 1975, c. 298; St. 1975, c. 845; St. 1976, c. 273; and St. 1977, c. 38 (hereinafter the Act). Under § 6 of the Act, no structure may be erected within the district without the issuance of a "certificate of appropriateness" by the town historic district committee of the town within which the proposed structure is to be located.

Denied a certificate of appropriateness on August 11, 1977, by the historic district committee of Dennis (committee), Sleeper exercised his rights under § 11 of the Act to appeal to the regional historic district commission (commission), which found that the committee had acted properly.[1] He thereupon proceeded under the second paragraph of § 11 of the Act with an appeal from the action of the commission to the Second District Court of Barnstable, the district court having jurisdiction over the affected town. That court affirmed the decision of the commission and Sleeper took the next step available to him under the statute: an appeal to the Southern Appellate Division District of the District Courts. The District Court judge who had heard the case reported it to the appellate division, which, finding no error, dismissed the report. Thereupon, Sleeper appealed to the Supreme Judicial Court which, acting under G. L. c. 211, § 4A, transferred the case to this court. We affirm.

Sleeper's house is not itself historic. It was only about ten years old when Sleeper undertook to build his radio tower in 1977. The house is located in a subdivision of 109 lots,

[1] The Act (§ 11) requires the commission to find whether "the committee exceeded its authority or exercised poor judgment, was arbitrary, capricious, or erroneous in its action." Although the commission did not use the statutory vocabulary, its conclusion that the committee "properly denied the issuance of a certificate of appropriateness" has the same meaning.

which are occupied by one-story ranch style houses of substantially the same vintage as Sleeper's. Fifty-six of the houses have television antennae on roofs and five have pole or whip CB (citizens' band) antennae which stand seventeen to twenty feet above the roof line. Telephone poles carry electric service and telephone service to the area. Although resolutely contemporary, the subdivision in which Sleeper lives is within the Scargo Hill area, to which the commission and reviewing courts attributed historic significance. The tower on Scargo Hill itself is prominent and something of a landmark on Cape Cod. It and Scargo Lake are the subject of Indian legend. There is also a historically significant place called Hokum Rock.

1. *The standard of "appropriateness."* Hokum is what Sleeper ascribes to the finding of the regional commission that the visual impact of the radio tower was unacceptable. Conceding the existence of conventional television antennae in the area, the commission described Sleeper's proposed radio tower as "grossly inappropriate" by comparison. Sleeper argues that in the context of a late-Twentieth Century subdivision there is nothing discordant about a late-Twentieth Century radio antenna. It is a position that has some allure. Under § 10 of the Act, however, the committee, in passing upon the quality of appropriateness, shall consider "the historical value and significance of the . . . structure . . . involved and the relation of such factors to similar factors of buildings and structures in the immediate surroundings." The committee shall also consider "settings, relative size of buildings and structures . . . ." A purpose of the Act, as set forth in § 1, is to preserve settings "within the boundaries of the regional district." Given these statutory criteria, the finding by the reviewing court of the historic significance of the Scargo Hill area as a whole and the generally low physical profile of the structures surrounding Scargo Hill, it is difficult to quarrel with the conclusion that a sixty-eight foot steel structure is not evocative of what § 1 of the Act says is to be promoted: "the aesthetic tradition of Barnstable County, as it existed in the early days of Cape

Cod." At least such a conclusion is not an irrational or whimsical view of the problem.

The purpose of the statute is to suppress the obviously incongruous. See *Gumley* v. *Selectmen of Nantucket*, 371 Mass. 718, 724 (1977) (considering similar legislation establishing a historic district in Nantucket). The Act does not exempt, from the restrictions it imposes, subareas within the historic district which, taken in isolation, may have little or no historic significance. Compare *Berman* v. *Parker*, 348 U.S. 26, 34-36 (1954). The committee, therefore, acted neither on a legally untenable ground nor unreasonably, whimsically, capriciously or arbitrarily. See *MacGibbon* v. *Board of Appeals of Duxbury*, 369 Mass. 512, 515-516 (1976); *Gumley* v. *Selectmen of Nantucket*, 371 Mass. at 724.[2]

2. *Hardship*. The Act confers upon the committee authority to approve inappropriate structures to avoid "substantial hardship." See § 10.[3] Being prevented from engaging in his hobby to the fullest, while undoubtedly a blight on Sleeper's spirit, is not a hardship in the statutory sense. See *Wolfson* v. *Sun Oil Co.*, 357 Mass. 87, 90 (1970) (inability to use land to maximum economic potential is not a hardship). Not much need be said about Sleeper's argument that under the Act, a lesser quantum of misfortune entitles the sufferer to a hardship exception. Were that so, the exception would quickly swallow the rule. Compare *Pratt* v. *Building Inspector of Gloucester*, 330 Mass. 344, 345-347

---

[2] States differ as to the degree of tolerance they afford radio antennae in residential zones. Compare *Wright* v. *Vogt*, 7 N.J. 1 (1951) (erection of radio tower in residential zone for use by amateur as hobby is permissible accessory use) with *Presnell* v. *Leslie*, 3 N.Y.2d 384, 388 (1957) (erection of forty-four foot radio tower not an accessory use incidental to residential area). See generally Note, 44 Cornell L.Q. 94, 104-106 (1958). See also on the general subject of land use regulation to achieve aesthetic ends, *John Donnelly & Sons* v. *Outdoor Advertising Bd.*, 369 Mass. 206, 219-221 (1975), and articles cited in nn. 12 & 13.

[3] The hardship exception language is substantially similar to the language authorizing zoning variances, which appears in G. L. c. 40A, § 10. See G. L. c. 40A, § 14(3), prior to St. 1975, c. 808, § 3.

(1953). The failure by either the commission or the committee to make written findings on the hardship question is without consequence since, on the facts agreed upon and found, hardship could not have been found as a matter of law.

3. *Sufficiency of "appropriateness" criteria.* Sufficient explication of the elements of appropriateness appears in the Act to fend off Sleeper's attack on the ground of impermissible vagueness. A committee is to consider the historical value and significance of the structure, the general design, arrangement, texture, material, color, the setting, and immediate surroundings, with a view toward avoiding exterior effects "obviously incongruous to the purposes set forth in this act." Similar elements of appropriateness have been found sufficient. *Opinion of the Justices*, 333 Mass. 773, 775, 778-781 (1955). See *MacGibbon* v. *Board of Appeals of Duxbury*, 356 Mass. 635, 638 (1970); *Gumley* v. *Selectmen of Nantucket*, 371 Mass. at 722-723. Compare *North Landers Corp.* v. *Planning Bd. of Falmouth*, 382 Mass. 432, 438-445 (1981).

4. *Federal preemption and interstate commerce.* Although the Federal Communications Act of 1934, 47 U.S.C. §§ 151-609 (1976), preempts "local regulation of radio transmission, including assignment of frequencies, interference phenomena, and the content of broadcast material," *Schroeder* v. *Municipal Court*, 73 Cal. App. 3d 841, 846 (1977), appeal dismissed, 435 U.S. 990 (1978), it does not purport to regulate the manner in which physical structures involved in radio transmission have an impact upon local land use considerations. The regulation, for example, of antenna height is a matter of local concern, not national interest. *Kroeger* v. *Stahl*, 248 F.2d 121, 123 (3d Cir. 1957). *Skinner* v. *Zoning Bd. of Adjustment of Cherry Hill*, 80 N.J. Super. 380, 392 (1963). Note, State Regulation of Radio and Television, 73 Harv. L. Rev. 386, 395 (1959). Note, 44 Cornell L.Q. 94, 96-103 (1958). The local regulation conflicts with no Federal law, and Congress has evidenced no design to preempt land use questions. See e.g., *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 141 (1963).

Nor is there any better force to Sleeper's argument that the prohibition of his tower is an unwarranted interference with interstate commerce. If Sleeper is engaged in commerce at all, the effect of the Act is not so "direct and positive" as to raise a commerce clause question. *Kroeger* v. *Stahl*, 248 F.2d at 123. See *Kelly* v. *Washington*, 302 U.S. 1, 10 (1937).

5. *First amendment rights.* Reasonable restrictions on the time, place and manner of free speech are consistent with the first amendment. See *Cox* v. *New Hampshire*, 312 U.S. 569, 575-576 (1941); *Columbia Bdcst. Sys., Inc.* v. *Democratic Natl. Comm.*, 412 U.S. 94, 121 (1973); *Schroeder* v. *Municipal Court*, 73 Cal. App. 3d at 847-848.

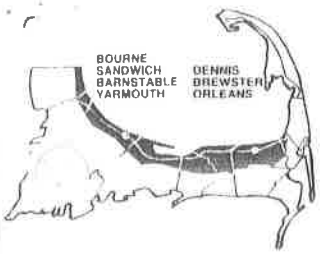
6. *De facto taking.* The suggestion that the Act, as applied, amounts to a taking of property from Sleeper without just compensation is wholly devoid of merit. See *Opinion of the Justices*, 333 Mass. at 777-778 (Historic Nantucket District). *Opinion of the Justices*, 333 Mass. 783, 790 (1955) (Historic Beacon Hill District). See *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 138 (1978) (application of New York city's landmark law).

Order dismissing report affirmed.

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION
P.O. Box 140, Barnstable, Massachusetts 02630-0140

STANDARDS FOR APPROPRIATENESS

"CONTEMPORARY DESIGN"



Old King's Highway Regional Historic District Commission
First District Courthouse, Barnstable, Mass. 02630 Telephone: 617-362-4092

PAUL J. WHITE, CAROL M. WHITE)
and H. EUGENE CARR,)
Appellants)
VS.)
TOWN OF SANDWICH HISTORIC)
DISTRICT COMMITTEE)
Appellee)

DECISION ON APPEAL TO
THE ABOVE COMMISSION

TOWN CLERK
TOWN OF SANDWICH
MAY 18 1978
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RECEIVED & RECORDED

A hearing was held on May 16, 1978 by the above Commission upon the appeal by the above appellants from the decision of the Town of Sandwich Historic District Committee granting a certificate of appropriateness to John E. Conway for the demolition of an existing building at No. 128 Route 6A, Sandwich, and the erection of a new commercial building on the same plot of land. Appellants were present and represented by Jonathan D. Fitch, Esq. John E. Conway was present and represented by Joseph P. Dunn, Esq. Also present were Commission members Bourne, of Sandwich, chairman, Bonner, of Brewster, Luoni, of Bourne, Marsh, of Dennis, MacSwan, of Barnstable, and Cole, of Yarmouth. Pursuant to the Commission's Rules and Regulations, Mr. Bourne, chairman of the Sandwich Committee, abstained from voting.

From the evidence it appeared that the building site is on a section of Route 6A constructed in the 1930's to bypass the Sandwich central village and Old Main Street. The neighboring buildings are commercial in character and are an architecturally undistinguished and heterogeneous group. The proposed new building is of conservative contemporary design, in scale and compatible with neighboring buildings, using to advantage various features frequently employed in the past in regional architecture, such as the hip roof, white cedar shingles and white trim. The site is to be attractively landscaped and laid out to comply with local by-laws as to parking and the like.

Appellants contended that the building was not appropriate within the meaning of the Regional Historic District Act, admitted that the building was an attractive structure, but contended that it did not sufficiently imitate early Cape Cod architecture.

This Commission found that the proposed building was architecturally appropriate to the site and compatible with and a distinct visual improvement over the neighboring buildings; that it fully met the standards of appropriateness imposed by the Regional Historic District Act. The Commission therefore found that the Sandwich Committee had properly issued the certificate under review and unanimously voted to affirm that Committee's decision.

May 18, 1978

Harold Bourne
Commission Chairman

BARNSTABLE, SS.

FIRST DISTRICT COURT O
BARNSTABLE, NO. 11987

PAUL J. WHITE, CAROL M. WHITE
AND H. EUGENE CARR, APPELLANTS

VS.

DONALD BOURNE, ALFRED LUONI,
ELLIOT MACSWAN, WILLIAM BONNER,
JOHN MARSH, ERNEST COLE AND
J. WILLIAM ANDERSEN AS THEY
CONSTITUTE THE OLD KING'S HIGHWAY
REGIONAL HISTORIC DISTRICT
APPELLEES

FINDINGS, RULINGS AND ORDER
JUDGEMENT

This is an appeal from the decision of the Old King's Highway Regional Historic District Commission ("Commission"). The Commission affirmed the decision of the Town of Sandwich Historic District Committ ("Committee") which granted a Certificate of Appropriateness to John E. Conway for the demolition of an existing building and the construction of a new building. The Appellants brought the petition commencing this action claiming to be aggrieved by the decision of the Commission.

Chapter 470, The Acts of 1973 established the Old King's Highway Regional Historic District. Under the terms of that Act (Section 6) "[n]o building, structure or part thereof...shall be erected within the district unless and until an application for a Certificate of Appropriateness as to the exterior architectural features shall have been filed with the Committee....". The parties agree that the buildi which is the subject of this action is within the district and that no exemption contained in the Act is applicable.

The Committee is required by Section 10 of the Act to pass upon t appropriateness of the exterior architectural features of the building to be erected. Section 10 of the Act establishes the standards which the Committee is to consider, and provides, in part as follows: "in

or structure, the general design, arrangement, texture, material and color of the features...involved and the relation of such factors to similar factors of buildings and structures in the immediate surrounding. The Committee shall consider settings, relative size of buildings and structures,....".

The Committee approved the application and the Appellants appealed in accordance with the Act to the Commission which is made up of representatives of all the towns in the district in contrast to the Committee which is made up of residents of the Town of Sandwich. The Appellants were present and represented by counsel at the hearing before the Commission. The Commission unanimously voted to affirm the Committee decision and in its written decision made findings of fact.

The points with which the Appellants particularly pressed in this appeal, as they did before the Commission are: A) that the building is of a contemporary style and therefore, per se, inappropriate; and B) hat the Committee and the Commission failed to take into account an appropriate geographic area in determining "immediate surroundings".

The Court is satisfied that the Commission did not exceed its authority and that the decision of the Commission should be affirmed.

Five architects were called who gave their opinions concerning the proposed building, its place in the historic continuum of architecture, and architectural styles represented immediately adjacent to the site, within the Town of Sandwich, and generally on Cape Cod. Renderings and plans of the proposed building were offered as exhibits and numerous photographs of other structures were also offered. In addition, a view was taken which followed Route 6A, the Old King's Highway, from the

andwich to those surrounding areas which counsel for the parties
equested that the Court view.

The central issue in this case is what is mandated by the Act. f the position of the Appellant is to be sustained than the only thing hich might be constructed within the area covered by the Act would e a reproduction of some architectural style found in the past, such as colonial". In fact, Mr. White when he testified, saw nothing in the tyle of the proposed building which likened it to other buildings in he area and therefore found it unacceptable.

I must reject the Appellants position.

I find that the Act does not require that buildings to be constructed e reproductions of any previous style. Section 1 of the Act speaks of ...a contemporary landmark compatible with the historic, literary and esthetic traditions of Barnstable County, as it existed in the early lays of Cape Cod...." It may be that the Act could have required that ll structures to be constructed conform to some specifically described rchitectural style. The Act, however, establishes no such requirement nd indeed the essential thrust of the Act and its guiding mandate is ompatability. The Commission and the Committee in passing on appropriate- ess or compatability considered the general design of the proposed uilding, its arrangement, texture, material and color and the relationship f such factors to similar factors of buildings and structures in the immediate surroundings. From all that would appear from the testimony resented, the application received careful and thoughtful attention y both the Committee and the Commission and in reaching their conclusions they clearly rejected the concept that new construction had to follow "pseudo-historic forms as copies of historic buildings".

Indeed all of the testimony of the architectural experts leads he Court to the conclusion that if there is a tradition in the rchitecture of Cape Cod it is diversity. Town House Square, recognized the parties as having particularly significant historical value, ontains a varied assortment of architectural styles and is in no way imited to "colonial". Indeed it is apparent that the term has little eal meaning.

The Appellants suggest that the Committee and the Commission failed o take into account an appropriate area in determining "the immediate urroundings". While it is difficult to determine with any precision here a line is to be drawn as to the boundaries of "the immediate urroundings" the Court is satisfied after having viewed the site and hose surrounding areas which counsel for the parties requested that he Court view, that the Committee and the Commission acted appropriately.

It is not for the Court to substitute its aesthetic judgement for judgements of the Committee and the Commission. The issue for the ourt is whether or not the "...approval is found to exceed the authority f the Commission....". I find that it does not, therefore, judgement hould enter denying the petition and affirming the decision of the ommission.

The Requests for Findings of Fact and Rulings of Law are disposed of s follows: The Appellants Requests for Findings of Fact numbered one, wo, four and five are allowed; three, six, seven and eight are denied. ppellants Requests for Rulings of Law numbered one, two and four are llowed; three, five, six and seven are denied.

The Requests of the Appellees are deemed waived in light of the inding.

ERED: September 1, 1978

Lewis L. Whitman
Special Justice

Old King's Highway Regional Historic District Commission
First District Courthouse, Barnstable, Mass. 02630 Telephone: 617-362-4092

HARRY F. SCHROEDER,
Appellant

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMITTEE in the TOWN OF YARMOUTH
Appellee

DECISION ON APPEAL TO THE ABOVE COMMISSION

A hearing was held on June 13, 1978 by the above commission upon the appeal by HARRY F. SCHROEDER from the decision of the Yarmouth Historic District Committee granting a certificate of Appropriateness to Roger P. and Sarah A. Williams with respect to construction at their dwelling at 51 Homestead Lane, Yarmouthport.

Present at the hearing were appellant Schroeder, represented by James H. Quirk, Esq., Mr. and Mrs. Williams represented by Robert J. Donahue, Esq., commission members Bourne, chairman of Sandwich, Bonner, of Brewster, Marsh, of Dennis, MacSwan, of Barnstable, and Cole of Yarmouth, and James R. Wilson, Esq. counsel to the Commission. Mr. Cole abstained from voting, pursuant to the Commission's Rules and Regulations.

Application for the certificate was filed April 26, 1978 and a hearing was held thereon on May 9, 1978. The certificate which was filed with the town clerk on May 11th approved sliding glass doors, already installed at second floor level, the construction of a 4' by 8' landing (instead of 6' by 8' as applied for) outside the sliding glass doors at the rear of the Williams dwelling, an egress stairway leading from the landing to a ground level deck, landing and stairway to be enclosed with balusters, all constructed of wood, and screened at ground level with four foot plantings.

Proceedings involving Schroeder and Williams with respect to the subject premises prior to the April 26th application do not seem relevant to the present appeal except that the Commission noted that at an informal conference called by the Commission on April 21st, in response to a letter from Schroeder, Schroeder stated that he did not object to the sliding doors already installed by Williams. Schroeder and the other abutters of the Williams property appear to have been duly notified of the May 9th hearing and Schroeder appeared at and participated therein. His appeal from the committee's decision to this commission was timely.

Schroeder's house faces Wild Hunter Road which runs parallel to Homestead Lane. It is back to back with the Williams house and about 75 feet therefrom. Both houses are in a modern development, are of fairly recent construction, are of pseudo "Cape Cod" or pseudo "colonial" style and are attractive but unimportant from an architectural or historic standpoint. The Williams back yard is completely enclosed by a six foot stockade fence. From a viewing of the site and photographs offered by appellant it appears that the visibility of the proposed construction

from a public street (Wild Hunter Road) is largely blocked by the houses of appellant and his adjoining neighbors. Even then approximately the lower half of the proposed construction is effectively screened from view from Wild Hunter Road by the Williams fence.

Appellant contends that the construction is not appropriate under the Regional act and should not be allowed and that the sliding glass doors should be ordered removed. Williams contends that it is appropriate, in character for the area, and minimally visible from a public street. He also noted that the stairway is an important means of egress from a family bedroom in case of a fire which might make access to the interior stairway, at the opposite end of the house, difficult or impossible.

After hearing the parties and their counsel and reviewing the evidence the Commission determined that the Yarmouth committee acted properly in granting the certificate of May 9, 1978, and accordingly unanimously voted to affirm the decision of that committee.

At the hearing counsel for appellant submitted to the Commission a "Statement of Facts and Request for Rulings." The statement of facts, prepared prior to the hearing, appears to be appellant's version of what happened prior to the April 26 application, and as such has little if any relevance to the issue here decided. The facts which this Commission deemed relevant are sufficiently recited above. The requested rulings are contrary to the Commission's decision, stated above, and are therefore denied.

Donald Bourne
Chairman

June 15, 1978

TRIAL COURT OF THE COMMONWEALTH

BARNSTABLE, SS.

DISTRICT COURT DEPARTMENT
FIRST BARNSTABLE DIVISION
NO. 12178

HARRY F. SCHROEDER

V.

DONALD BOURNE, ALFRED LUONI, ELLIOT MacSWAN, WILLIAM BONNER, JOHN MARSH, ERNEST COLE and J. WILLIAM ANDERSON, As they are members of the Old King's Highway Regional Historic District Commission

FINDINGS, RULINGS AND ORDER FOR JUDGMENT

This cause comes before me on an appeal filed pursuant to Section 11, Chapter 470 of the Acts of 1973, as amended by Chapter 845 of the Acts of 1975 for review of a determination of the Old King's Highway Regional Historic District Commission confirming the Town of Yarmouth Historic District Committee's decision to issue a certificate of appropriateness for the maintenance of a previously installed second floor sliding glass door and the adding of a four-foot by eight-foot landing and exterior wooden stairway all to be located to the rear of a dwelling located on Homestead Lane in Yarmouth Port, county of Barnstable, Massachusetts.

Findings of Fact

The plaintiff in this action is Harry F. Schroeder of 34 Wild Hunter Road, Yarmouth Port. I shall hereafter refer to Mr. Schroeder as Schroeder. Schroeder is an abutter to the rear of the applicants that are concerned with the decision herein. The applicants are Roger P. and Sarah A. Williams, and I shall hereinafter refer to them as Williams if necessary. They

applied to the Yarmouth Historic District Committee hereinafter referred to as the Committee, for a certificate of appropriateness to raise a roof and add a second floor with sliding glass doors, wooden deck and wooden stairs to their dwelling located at 51 Homestead Lane in Yarmouth Port. After a hearing on August 23, 1977, a hearing which I find to be duly held and duly advertised, the Committee approved the application with certain exceptions. The Committee deleted the slider, deck and outside stairs from their certificate of appropriateness. Apparently there was some discussion either caused by Mr. Schroeder's objection or by some other factors, in any event some members of the district Committee, I believe three in number, met at the homesite and after observation and discussion approved and there is some question as to how the approval was made, but apparently verbally approved the items that had been deleted from their decision of August 23, 1977. An amended certificate of appropriateness was filed with the town clerk on August 26, 1977. Williams then obtained a building permit and sometime about December 15, 1977 began construction of the addition allegedly granted to them by the district Committee. Schroeder at some point apparently after January of 1978 made a complaint or filed a complaint with the Old King's Highway District Commission hereinafter to be referred to as the Commission. On or about April 21, 1978 the Commission held a hearing or a review of the matter and decided that there was a violation of the open meeting law and that Williams should file a new application with the local Committee (See Exhibit 11). On April 26, 1978 Williams filed a new application with the town Committee for a certificate

of appropriateness (See Exhibit 12). This new application described the work as follows:

1. Sliding glass doors 5'-0" x 6'-8" from second floor bedroom. (Already installed.) (Rear of house)

2. Capital landing 6'x8' and stairway to ground level deck. All wood construction, wood rails and balusters.

A legal notice was published in the Cape Cod Times and a copy of said notice was mailed to the abutters. The meeting was set for May 9, 1978. There is no question that Schroeder and all other neighbors received notice and that this hearing, public hearing, was well attended and included Mr. Schroeder, the appellant herein. There is no question that the Historic District Committee, that is the Town Committee, were well aware of the objections and the reasons therefore. On or about May 11, 1978 the findings of the Committee were filed with the town clerk. It is to be noted that no notice of their finding was sent to Schroeder, nor was any notice sent to any of the other abutters. There is no statutory requirement. Mr. Schroeder was well aware of the decision apparently because within a few days he filed his written appeal with the Commission.

In due course the Commission held a public hearing on Schroeder's appeal. This hearing was held on June 13, 1978 and Schroeder appeared with his attorney. After a full hearing, the Commission decided to approve the Yarmouth Committee's actions and ruled that the town Committee acted properly in granting the certificate of May 9, 1978 and unanimously voted to affirm the

decision of the local town Committee. This Court has not gone into the facts as set forth in Exhibit 14 or the conclusions of facts set forth in Exhibit 14 because this Court determines that the law allows the Court to determine the facts anew and in view of the Court's findings and view will rely on those facts to affirm or deny or modify the decision of the Commission. It would appear from the legislation that the Court has that power and until an upper Court takes that power away or the legislation is changed, I feel we may perform in accordance with the legislation enacted in the broadest sense.

In reading the decision of the local Committee of May 9, 1978, it is apparent to me that the Commission approved the deck, that is a four-foot by eight-foot landing with a wooden enclosed stairway and balustrade and presumed that the glass doors in the rear of the second story bedroom as set forth in the decision ("already installed by permission of Historic District") were there and that their tacit approval was granted, and that Schroeder did not object to the doors. The Court had this in mind when the Court took a view, as suggested by counsel for both parties or all parties herein.

It is to be noted that the Historical District Committee made note of the fact that there was no historical value and significance to <u>this</u> area. The Homestead Lane area is new and that there were no houses in that immediate area of historical significance. When the Court took a view it is to be noted that the whole area and certainly the immediate area could not be viewed

with any degree of clarity from Route 6A which is the historically significant area nearby. I find that the Homestead and Hunter Lane area is a very new area. The area has been developed in the last 10-12 years. Schroeder moved in to his newly finished home in 1975. The subdivision is residential, a rather charming area of fifty or so homes. The homes are, as far as I could determine, single-family, done in a contemporary Cape Cod or Colonialstyle of architecture. It is a well-kept area where the residents appear to take deserved pride in maintaining their homes and surrounding yards.

I find that the conclusions of the Commission are warranted. I was particularly impressed with the testimony of one Gill, an architect from Sandwich. He had served on the Sandwich Historical District Committee. He viewed the premises and the surrounding area. His conclusions that the structural changes would have a "very, very minor and insignificant affect" seem warranted. The fact that the change(s) are in the rear of the property, cannot be seen from a public way, or barely, and not at all from Route 6A, where the historical district lies, led him to feel that the change(s) were "compatible and appropriate and had no affect or historical impact on the historical district.

The chairman of the Commission testified that there were no historical landmarks in the immediate area, that the Board had examined the plans, taken a view, and concluded that the action of the local Committee was appropriate.

An issue which the appellant raises, and which the Court

feels it must direct its attention to is the "sliding glass doors." The fact that I find that Schroeder did not object to the "doors" at the appeal before the Commission is of some crucial significance when added to the fact that the Committee and the Commission "presumed" the doors were accomplished and not subject to appellant's appeal. This is a technical and possibly fatal omission in the decision, however, I find that it is not. I further find that as a fact that the sliding glass doors were brought up, and a proper subject discussion occurred and that appellant did not object to the doors. In my interpretation of the statute, I have great latitude in my final decision on the law of the case. I therefore find and rule as follows:

1. That the local committee acted properly.

2. That the Committee and the Commission followed the requisites of the statute and that appellant was granted due process.

3. That it is not required that the Commission or the Committee set forth reasons in detail for their finding.

4. That the statute, though broad and capable of wide interpretation, is constitutional and valid and suits the purpose for which it was enacted. It does not usurp or take individual rights without proper safeguards.

5. That the statute allows local government to decide issues of local import. Proper power is delegated.

6. That the decision of the Commission is sustained and not found to be arbitrary or capricious. It is supported by

substantial evidence.

7. That appellant's rights were carefully protected.

8. That the "sliding glass doors" should have been included in the decision(s) and that the Court so adds same to the decision by power of amendment.

9. That the "changes" are compatible and appropriate and do not deter, affect, harm, or vary the historical district.

10. That the local autonomy should prevail, especially in this instance.

11. That an Order for Judgment issue in accord with this decision affirming the decision of the King's Highway District Commission with the amendment adding "the sliding glass doors."

Both appellant and appellees submitted requests for rulings, appellees' are deemed waived. I rule as follows on appellant's requests:

No. 1 - Finding of fact.

No. 2 - Finding of fact and law.

No. 3 - Denied and not pertinent.

No. 4 - Denied, facts.

No. 5 - Allowed, even though facts.

No. 6 - Denied, mixed findings of fact and law---see my findings and rulings.

No. 7 - Denied, prayer(s) for disposition by Court.

No. 8 - Allowed, but of no import on facts.

No. 9 - Allowed.

Nos. 10-16 - Denied, see findings and rulings.

ORDER FOR JUDGMENT

The decision of the Old King's Highway Regional Historic District is affirmed as granted and said decision is amended by adding the words "including sliding glass doors."

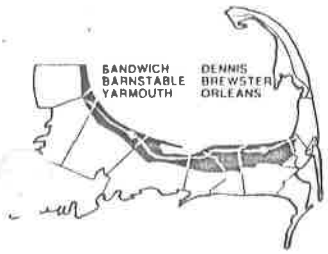
ENTERED: March 2, 1979

John P. Curley, Jr.
Presiding Justice

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION
P.O. Box 140, Barnstable, Massachusetts 02630-0140

STANDARDS FOR APPROPRIATENESS

"BUBBLE SKYLIGHT"



Old King's Highway Regional Historic District Commission
First District Courthouse, Barnstable, Mass. 02630 Telephone: 617-362-4092

EARL CHIPMAN
Appellant
VS.

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMITTEE IN THE TOWN OF DENNIS
Appellee

DECISION ON APPEAL TO THE ABOVE COMMISSION

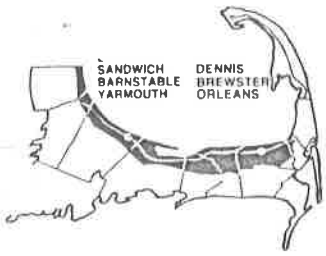
RECEIVED
DEC 6 , 1979
TOWN CLERK-TREAS.
TOWN OF DENNIS
2:56 pm

A hearing was held on December 4, 1979, by the above Commission upon an appeal by the above Appellant from a decision of the Dennis Historic District Committee denying a Certificate of Appropriateness for the addition of a skylight upon a dwelling located on Lot 141, Sea Meadow Drive, Dennis, Mass.

Present were: Mr. MacSwan, Barnstable, Ms.Peros, Yarmouth, Mr. Ivers, Brewster, Mr. Sutton, Sandwich, Mr. Marsh, Dennis, Mr. Chipman, Mr. Hanger of the Dennis Committee and James R. Wilson, counsel for the Commission.

At the outset of the hearing it became apparent that no application for a Certificate of Appropriateness had been filed with the Town Committee for the skylight which had been added after the approval of the original Certificate of Appropriateness dealing with the construction of the dwelling. It was the opinion of Attorney Wilson that the absence of the filing for a Certificate of Appropriateness rendered the whole procedure defective and thereby a nullity.

After a brief discussion, it was decided that an



Old King's Highway Regional Historic District Commission
First District Courthouse, Barnstable, Mass. 02630 Telephone: 617-362-4092

application should be filed with the Dennis Committee for the approval of the skylight which would include a local hearing conducted by the Dennis Committee. The following motion was made by Mr. Sutton and seconded by Mr. Ivers:

MOVED: That the matter be remanded to the Dennis Committee for a full and proper hearing on a new application for a Certificate of Appropriateness for the skylight.

Vote: 4-0-1

The appellant is informed that he has the right to appeal this decision to the Second District Court of Barnstable located in Orleans, Mass., within 20 days of its filing with the Dennis Town Clerk

Respectfully submitted

Elliott B. MacSwan

Elliott B. MacSwan

CORRECTED JUDGMENT

TRIAL COURT OF THE COMMONWEALTH
DISTRICT COURT DEPARTMENT
ORLEANS DIVISION
ORLEANS, MASSACHUSETTS

Barnstable, ss. NO: 24432

EARL E. CHIPMAN,
Petitioner

VS.

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION, ET AL.
Respondent

JUDGMENT

This cause came on to be heard before the Court - Feloney, J.

and IT IS ORDERED AND ADJUDGED

1. That the decision of the Commission does not exceed its authority, and

2. That said decision be affirmed by the Court - Feloney, J.

3. The bubble skylight is to be removed by April 1, 1981.

Attest: Leon L. Dary
Magistrate

ENTERED: February 6, 1981

COMMONWEALTH OF MASSACHUSETTS

Barnstable, ss. Second District Court
No. 24432

EARL E. CHIPMAN,
Petitioner
vs.

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION, ET AL.
Respondent

FINDINGS, DECISION & ORDER FOR JUDGMENT

This is an appeal filed pursuant to Section 11 of Chapter 470 of the Acts of 1973, as amended by Chapter 845 of the Acts of 1975 for a review of a determination by the Old King's Highway Regional Historic District Commission requiring that the bubble type skylight installed in a house constructed by the plaintiff be replaced with a flat skylight. Section 11.

In an earlier proceeding the Dennis Historic District Committee had denied a certificate of appropriateness for the skylight. The plaintiff then appealed to the respondent, regional commission, hereinafter referred to as the commission, which approved the use of a skylight but of a flat design and ordered the removal of the bubble type skylight. Section 10.

The petitioner appealed to this court which has heard all pertinent evidence, found the facts and rules that the determination of the commission does

not exceed its authority, and therefore, affirms the decision. Section 11.

The parties have acknowledged that there are no issues of procedure to be decided in this appeal. Testimony was taken from the parties and from architects who presented clashing statements as to the appropriateness of the skylight. The court had the benefit of a view of the house and its site and surroundings and of other structures in the area, many of which had prominent skylights, several of the bubble type design.

Skylights have been used often in the old houses of Cape Cod, and until recently they were all of flat design and constructed of glass. They have the obvious purpose of admitting light and when in a raised position, the much prized Cape Cod air. The contour of the bubble shape, plexi-glass type used by the plaintiff has the advantage of being self-cleaning. The plaintiff, however, states his preference for the bubble design in terms of aesthetics. A flat skylight could be placed in the existing frame. The cost of replacement does not constitute "substantial hardship" (Section 10c) since the plaintiff violated the act by erecting the skylight without receiving a certificate of appropriateness. Section 6.

The issue presented is whether the denial of approval of the bubble skylight as inappropriate exceeds the authority of the commission. Section 11.

A previous decision under the act affirmed the denial of the certificate of appropriateness for the erection of a radio tower in Dennis. Sleeper vs. Old King's Highway Regional Historic District Commission (No. 22799). The exhaustive statement of applicable legal principles set out by Judge Welsh in that decision is applied in this case.

This new house is in a typical, modern subdivision Seameadow Drive at the intersection of King's Row Drive. The bubble is located in the front of the roof and immediately asserts itself for the attention of the observer and, therefore, constitutes an "exterior architectural feature" and requires the approval of the commission. Section 10(a). It is subject to view from both public ways. Section 3. The commission determined that the bubble is "inappropriate because of its high profile and lack of any historical relevance." The purpose of the act is stated in terms of the promotion of cultural and aesthetic values in the preservation and development of settings including the exterior appearance of buildings and places in order to preserve the historic district as a contemporary landmark compatible with the historic and aesthetic traditions as it existed in the early days of Cape Cod. Section 1.

The shape and location of this skylight conjures visions of the trek of our grandchildren to the stars in space vehicles in the next century, and

rejects any reference to the historic past. It is a feature of the house and not a detail. The decision of the commission carries out the public policy of the Act, and adequately sets out the facts, the grounds for the decision and the absence of substantial hardship. Indeed this compromise decision is a very limited intrusion into the rights of the plaintiff to build his kind of house. Although the court observed other bubble type skylights in the area, the history of those buildings was not established, and each building and immediate neighborhood could present different considerations. It was observed that some of these bubbles were shaped differently and did not present such a high profile as the one under the visual and judicial scrutiny of the court.

On the basis of the record and the evidence received, the court finds that the bubble type skylight is an inappropriate exterior architectural feature under the policy and standards of the Act.

The plaintiff's requests numbered 1 to 14 appear, for the most part, to be requests for findings of fact, and reference may be made to the decision already set out.

The court is acting directly only on the two "rulings of law" requested by the plaintiff and they are denied.

ORDER: The decision of the commission is affirmed. The bubble type skylight is to be removed by April 1, 1981.

Lawrence F. Feloney, Justice

January 28, 1981

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION
P.O. Box 140, Barnstable, Massachusetts 02630-0140

STANDARDS FOR APPROPRIATENESS

"Wind turbine"

TOWN CLERK
BARNSTABLE, MASS.
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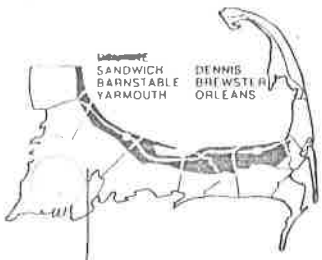


Old King's Highway Regional Historic District Commission
First District Courthouse, Barnstable, Mass. 02630 Telephone: 617-362-4092

KATHRYN ARKUS)
Appellant)
VS)
)
THE OLD KING's HIGHWAY)
REGIONAL HISTORIC DISTRICT)
COMMITTEE FOR THE TOWN OF)
BARNSTABLE)

DECISION

Case No. 81-7

A hearing was held on July 7, 1981 by the above Commission on an appeal filed by Kathryn Arkus from the decision of the Barnstable Historic District Committee approving a Certificate of Appropriateness which allows Luther M.Strayer, III to place an 80-foot Pinson wind generator devise on property located on Route 6A in Cummaquid, Massachusetts.

Present were Mr. Hanger, Dennis, Mr. Ivers, Brewster, Mr. Long, Yarmouth, Mr. MacSwan, Barnstable, Mr. Sutton, Sandwich, Mr. Brown, Orleans, James R. Wilson Commission counsel, Attorney Rougeau for the appellant, and Attorney Alger for the applicant.

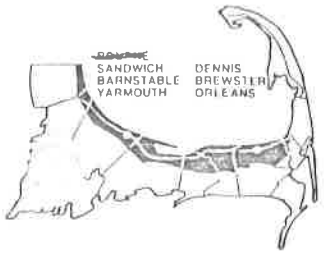
The decision of the Town Committee was filed with the Town Clerk on May 28, 1981, and the appeal entered with the Commission on June 8, 1981, within the ten day appeal period.

Mr. MacSwan turned the hearing over to Mr. Hanger, the Vice-Chairman and indicated that because he had sat on the hearing at the local level he felt it would be appropriate to disqualify himself at the Commission hearing.

All of the Commission members, except Mr. Brown, indicated that they had previously visited the site and had reviewed the appeal and related documents.

Pictures of the proposed Rhone tower and Pinson wind generator were shown to the Commissioners. Additionally, a plot plan showing the location of the proposed tower as well as various photographs of the area were shown to the Commission.

Attorney Rougeau stated that it appeared as though the new guidelines adopted by the Commission had not been properly applied by the Barnstable Committee and the structure had not been located as far as psssible from Route 6A. He indicated that the applicant owned land to a distance of over 600 feet and indicated a 300 foot setback was insufficient to comply with the guidelines. He further analogized to that of Sleeper's radio tower that was denied by the Dennis Committee to the regional Commission. He suggested that the area had substantial historic significance and offered an historic inventory report.



Old King's Highway Regional Historic District Commission
First District Courthouse, Barnstable, Mass. 02630 Telephone: 617-362-4092

on his client's house. He further argued that an 80-foot tower located in the neighborhood would have a permanent detrimental impact on property values and the visual aesthetics of the neighborhood.

Mr. MacSwan addressed the Commission and stated that the Committee felt that they did apply the guildlines properly and that the proposed tower would be screened by trees and houses. He stated that while the appellants'view from their backyard would be adversely effected, the view from Route 6A would not be significantly effected.

Attorney Alger addressed the Commission and stated that the height of the tower was mandated in order to retain steady and consistent wind currents for the operation of the tower. He further indicated that the tower would be suitably hidden behind trees and other structures so as to minimize its impact.

Based upon the evidence before the Commission, it makes the following findings:

1. That the local Town Committee properly applied the guidelines in approving the tower in its present location.

2. That the Committee did not err and that the decision of the Committee is affirmed.

The applicant was advised that she may appeal to the First District Court of Barnstable within twenty days from the filing of this decision with the Barnstable Town Clerk.

William G. Hanger

William G. Hanger, Vice-Chairman

July 8, 1981

TRIAL COURT OF THE COMMONWEALTH
DISTRICT COURT DEPARTMENT
BARNSTABLE DIVISION

Barnstable, ss. Civil No. 18025

KATHRYN ARKUS,
Appellant

VS.

ELLIOTT B. McSWAN, et al[1/]
Members of the Old King's Highway Regional Historic District Commission,
Appellee

AND

LUTHER M. STRAYER, III,
Intervenor

FINDINGS, RULINGS
A N D
ORDER FOR JUDGMENT

I. STATEMENT OF CASE

This matter comes before this court by way of an appeal by Kathryn Arkus, an abutter, (hereinafter "the appellant") from a decision of the Old King's Highway Regional Historic District Commission (hereinafter "The Regional Commission") upholding the award of a certificate of appropriateness by the Barnstable Town Committee (hereinafter "The Town Committee") to Luther M. Strayer III (hereinafter "the applicant") to erect on his property a cycloturbine or wind driven generator.

1/ The other members named as defendants are William G. Hanger, Harris H. Ivers, Luther M. Long, George Sutton and Ludlow Brown,

The applicant's residence is located on the southerly side of Route 6A in the village of Cummaquid in the Town of Barnstable. The appellant's property abuts the intervenor's property on its easterly boundary. Both premises are within the Old King's Highway Regional Historic District and are subject to its provisions.

Jurisdiction for this appeal arises under St. 1973, C. 470. The act was amended by C. 298 and C. 845 of the Acts of 1975; C. 273 of the Acts of 1976; C. 38 and 503 of the Acts of 1977; C. 436 of the Acts of 1978; and C. 631 of the Acts of 1979. The provisions, purposes and procedures of the legislation were discussed in general terms in Sleeper v. Bourne, Mass. App. Div. [2]; aff'd sub nom Sleeper v. Old King's Highway Regional Historic District Commission, Mass. App. [3]

The case was presented to the court upon a stipulation of agreed facts, the testimony of witnesses and various exhibits. The court took a view at the request of the parties.

II. FINDINGS OF FACT

1. On or about April 13, 1981, the applicant filed a request with the Town of Barnstable Historic District Committee

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2/ 1 Mass. Supp 512 (1980).

3/ Mass. App. Ct. Adv. Sh. (1981) 609.

for a certificate of appropriateness to erect a Pinson Cycloturbine, so called, atop an 80 foot free standing tower at a point on his land some 370 feet southerly of Route 6A. After due notice, the town committee held a public hearing on May 21, 1981 and unanimously approved the request. An appeal was taken by the present appellant. On July 7, 1981, the Regional Commission held a hearing to consider the appeal. On the following day the regional commission issued its decision affirming the award of a certificate of appropriateness by the town committee with all members concurring. The appellant being aggrieved filed a timely appeal in this court pursuant to section 11 of the Act.

2. The structure for which approval is sought is a cycloturbine manufactured by Pinson Energy Corporation. The proposed location for the device is at a point at the rear of the applicant's dwelling approximately 370 feet from Route 6A close to the westerly boundary of the applicant's property. There are nearly a dozen trees on the applicant's lot from 30 to 45 feet in height and a number of smaller trees. The entire lot has a depth of approximately 544 feet from the highway with 120 feet of frontage on Route 6A. The proposed tower would be so situated that its base would be screened by trees. However, the top of the tower containing the windmill apparatus would be visible from Route 6A, especially during those portions

of the year in which the leaves are not on the trees. It is observed that the town committee members and the commission members who viewed the locus did so at a time when the foliature was near its zenith. The court took its view when the screening provided by the foliage was at its nadir. While the existing trees and other structures would provide some degree of concealment throughout the year of the lower portions of the tower, I find that the upper portions of the tower and the cycloturbine itself that are likely to have an appreciable visual impact on the area. Unquestionably, the greater portion of the structure, including the wind turbine itself, will be clearly visible from that area of the appellant's land commencing immediately to the rear of the existing buildings, as well as from Route 6A where trees and buildings do not provide concealment.

3. The purpose of the cycloturbine is to generate electrical energy by means of harvesting the kinetic energy of wind and air currents and converting it into rotary energy or torque useful in turning a generator or alternator, thereby providing usable electric current. The blades of the device (analogous to but noticeably different from the arms of a conventional windmill) are about thirteen feet in length, which would bring the total actual height of the structure to 87 or 88 feet, unlike the older types of windmills where the plane of rotation is perpendicular to the ground, the plane of rotation in the cycloturbine is parallel to the ground. The three blades are

perpendicular to the ground and are suspended from the main shaft by means of struts so that the installed device has a width of about 24 feet. The tower is a free standing one with a triangular base. The proposed color of the blades is blue and white. The tower itself is a galvanized steel which turns gray with exposure to weather.

4. In order to operate effectively an elevation of at least 30 feet above the ambient tree level and a minimum of 20 feet lineal distance from trees or structures is recommended. Presently, there are no windmills in the Cummaquid area. There was evidence that the device makes a slight humming sound not louder than the sound of wind through the trees, probably not audible from within the homes of the applicant or the appellant. It is noted that the appellant, in his statement of the basis for his appeal to the commission, indicated, inter alia, that there was insufficient information about the effects of the proposed tower on television and radio reception on nearby residences, but that the visual impact of the structure would be adverse. The court suggests that such factors as the possible impact of the structure on television reception is not a proper concern of the commission in any event.

5. There was ample evidence adduced at the court hearing which tended to show that windmills have been a part of the Cape Cod Scene from as early as 1687. The records show that a windmill was constructed on Cobbs Hill in Barnstable Village by one Thomas Paine of Eastham. Fredrika A. Burrows, Windmills

on Cape Cod & the Islands, 1978, Published by William S. Sullwold Publishing Company, PP 27-31. By 1700, nearly every settlement on the Cape had at least one windmill. However, the configuration of these early windmills bear little resemblance to that which the applicant proposes to erect on his property. They were practically all of the Dutch "Smock" type, consisting of an octagonal tower covered with shingles, broader at the base and tapering slightly toward the cap or top with large graceful vanes resembling sails. They were constructed of wood. The wind power turned heavy granite mill stones for grinding corn and other grains. As Ms. Burrows observes, the milled corn was an important staple and even served as a medium of exchange due to the shortage of hard currency. The windmills were required for the grinding of large quantities of grain, especially where watermills could not be utilized. Windmills were also used in the salt works which were a major part of the industry in the early 1800's on Cape Cod. The author reports that from 1800 up until the early 1900's, wind was a major source of power in America. I find that these picturesque and nostalgic reminders of the 18th and 19th century are indeed worthy of preservation.

6. In addition to the Dutch or "smock" type windmill there gradually appeared on the Cape another sort of windmill.

This type consisted of a steel tower and a wind wheel containing 18 to 20 metal vanes usually 35-50 feet high and was used primarily to pump water out of artesian wells. Such windmills were a common sight in Hyannisport in the 1920's. With the advent of more efficient methods of pumping the water of such wells and the installation of municipal watter supply, this type of windmill fell into disuse and has virtually disappeared from the Cape. This type of windmill with its steel tower was a practical necessity in some places and was a relatively short lived anomaly from the 1890's till the 1930's. The similarity of even these windmills with the proposed cycloturbine is remote at best. The fact that such windmills existed for a time in the past does not, in itself, qualify them as historically or aesthetically appropriate. Indeed, they may not have been considered particularly attractive when they existed but were tolerated because they were manifestly necessary. I find that such windmills were a sort of aberration on the main historical current of wind ~~and~~ river devices on the Cape. Manifestly, the fact that a certain style of windmill might be permitted as being historically and aesthetically appropriate does not warrant that windmills of a different genre must be admitted on an equal footing. I find that the cycloturbine in issue is substantially dissimlar visually from the sort of early Cape Cod Windmills described in Ms. Burrows book, supra.

7. While conceding that wind turbines as an alternative energy source may be a "noble experiment" deserving a fair test, and an idea whose time may have come, a more prudent approach would be to conduct such experiment outside of the district within the protection of the Old King's Highway Regional Historical District. It takes but a few incongruous structures to dilute the historical flavor of a neighborhood. The ambiance of an historical district is especially fragile and vulnerable to such structures. Assuredly there are some who would equate a considered resolve to oppose such structures with an assault on progress or, at least, apathy towards the plight of mankind engendered by anticipated shortages in fossil fuel supplies. Such arguments fall short of the mark. Each historic district is a unique resource enhancing the cultural environment of all members of society whether residing within or without the district, and the preservation of which all have a concern. Ms. Burrows in her carefully researched and readable work describes the Cycloturbine as ".... an efficient and aesthetically pleasing device for extracting power from the wind," Id, at P. 104. Surely, not all would subscribe to this opinion, at least in the context of an historic district. There was testimony from one Mills, a distinguished architect semiretired and residing in Chatham who indicated that such a structure was incongruous and inappropriate to the district because its character was foreign to the style therein prevailing. Indeed, on cross

examination, one of the commission members candidly allowed that he voted to approve the structure in its present location because if it were placed further to the rear of the applicant's lot upon a knoll, it would in his words "stick out like a sore thumb." The clear inference is that the witness in voting to approve seems to have relied more upon what he considered adequate screening of the structure from Route 6A, than a determination that the device was per se aesthetically appropriate for the district.

8. After careful review of the evidence, the court finds itself in substantial disagreement reached by the commission as to visual impact of the structure. The appellant conducted an experiment (presumably with the acquiescence of the applicant) to demonstrate the probable degree of visibility of the proposed structure. The experiment consisted of taking 15 gas filled balloons and connecting them in a cluster tethered to a single line 80 feet long. The other end of the line was anchored at the spot proposed for the location of the cycloturbine tower. The balloons, so clustered, had a collective width of about 8 feet, as compared with some 24 feet in width of the proposed cycloturbine. Photographs were taken at various points in the neighborhood, mostly from Route 6A. The experiment established a marked degree of visibility from a number of locations where neither buildings nor trees eclipsed the "trial balloon" device. Of course, a cluster of variegated balloons silhouetted against the sky moved by wind would perforce be more apt to attract the attention of a wayfarer

on the highway than the proposed structure, but at least in terms of height, the experiment appears to have sufficient relevance to aid the court in assessing the probable visual impact of the proposed structure. I find that the proposed structure would have a sufficient level of visibility to warrant a careful examination of its external architectural features to weigh whether its existence at the location proposed would be consonant historically and aesthetically with the character of the neighborhood.

9. The Village of Cummaquid is perhaps one of the best examples of historical preservation of colonial homes in the entire historic district.4/ The homes are well-spaced and the neighborhood has been spared the disaster of unfortunate incongruous structures. Indeed, the home of the appellant was built in approximately 1700 by James Gorham, Sr. His father, Captain John Gorham was married to Desire Howland, daughter of Pilgrim John Howland. The applicant's home was built in the Federal style and was probably that of a sea captain and dates from the early 1800's. Much of the neighborhood has homes of comparable style. The appellant's home, was owned by one Ezekiel Thatcher, a friend and colleague of William L. Floyd

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4/ Cummaquid is the Indian name given the eastern parts of Barnstable, Sandy Neck and Barnstable Harbor which belonged to Iyanough, Sachem of the Mattakesset Tribe. The Pilgrim explorers were entertained by Iyanough in this area in 1621.

Garrison, a prominent figure in the anti-slavery movement. Other homes in the immediate neighborhood may be characterized as historical treasures. All of the homes in the area are well preserved. Certainly they contain all of the niceties and modern appliances and conveniences, but the degree of exterior preservation is remarkable. It may be observed that if the historic district as an entity could be thought of as a shrine, the immediate neighborhood with which we are concerned might be dubbed the holy of holies. Lest we be accused of judicially "tilting at windmills", it is difficult to imagine a neighborhood on Cape Cod more vulnerable to inappropriate or intrusive structures than the one with which we concern ourselves.

10. We now address ourselves to the decision of the Regional Commission and the Town Committee. The point was made in Sleeper v. Bourne, 1 Mass. Supp. 512 (1980), that substantial deference ought to be accorded by the court to the determination of appropriateness or the lack thereof by the Commission. Id. P. 519. We continue to adhere to this view. However the discretion of the commission and of the town committee as regards appropriateness is not without limits. As the Supreme Judicial Court said in Gumley v. Nantucket, 371 Mass. 718 (1977), the discretionary power afforded by the statute is subject to review to insure that it is exercised within the statutory limits. Id, P. 723. Generally, the decision cannot

be disturbed by the court unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary. Id., P. 724. As a result of recommendations by a "blue ribbon" panel which was established to address concerns of some persons as to the manner in which the various town committees and the commission administered the act, a set of guidelines were drafted to accommodate the perceived desire for greater flexibility in the matter of approvals of certain energy saving devices. Accordingly, these proposed guidelines[5/] sought to encourage "energy conscious design", thus signalling a willingness to approve such energy saving apparatus as solar panels, skylights and wind generators. Perhaps conscious that such a shift in direction might not be consistent with the enabling statute, amendatory legislation permitting such consideration by the commission and the respective town committees was filed and, for aught that appears, still awaits enactment. In any case, no change in the enabling statute was accomplished at the time this application was processed. These proposed guidelines provide that wind generator towers should be located as far as possible from the street line so as to minimize the visual impact of the device. Even if the committee could morally apply such a guideline in the absence of appropriate changes in the enabling statute, it was misapplied in this case

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5/ The guidelines had not been formally adapted at the time this application was processed.

because the location was not at the maximum practical distance from the highway. The problem is more fundamental than that. The commission and the town committees derive their existence and authority from the enabling statute. Therefore the guidelines, whether thought of as binding on all concerned or merely "rules of thumb", as it were, must reflect fidelity to the aims and purposes of the enabling statute. Although the statute clearly permits the promulgation of regulations for the conduct of the business of the commission, any such guideline or regulations that assume to the commission powers not expressly nor impliedly given by the Statute cannot have the sanction of the law. Furthermore, if the commission, albeit in good faith, relies upon guidelines that are in excess of or inconsistent with the grant of authority in the statute in awarding or withholding approval for a certificate of appropriateness, its action is subject to review and appropriate revision by the court. I am persuaded from the evidence adduced in court and from the written decision itself that the committee and the commission intended to rely, and did rely, at least in part upon the proposed guidelines relating to energy conscious design. This situation is analgous to the situation in the Gumley case, supra. There, the commission was found to have fallen into error by applying considerations such as open space to a proposed development. The court in effect admonished the commission to confine its considerations to exterior architectural appropriateness.

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In my opinion, the guidelines which were relied upon at least in part are violative of and inconsistent with the enabling statute by creating what might be characterized as a presumption of approval of certain energy saving devices, if certain conditions are met. The statute as presently in effect authorizes no such immunity from its provisions for structures which might be deemed energy efficient. The mandate of the statute is quite clear: The commission is to consider objectively and fairly the appropriateness of exterior architectural features of buildings and structures to be erected in the district.[6/] Neither the court nor the commission has the right to create exceptions for certain structures because of their energy saving aspects without legislative approval. Stated simply, the energy saving features of a building or structure are not now proper considerations for the determination of an application for a certificate of appropriateness. If public opinion favors a more flexible apprach, the legislature should be importuned to change the law. Long term public interests are not served by a judicial rewriting of the Act The same holds true for the commission.

One final note: The commission denied Donald Sleeper permission to erect a 68 foot radio transmission tower in a lot located in a modern subdivision but within the domain of the historic district. This action was upheld by this court and was sustained by two appellate courts. To paraphrase an argument made by appellant's counsel, would an increase in its height and the attachment at its peak of a wind generator somehow transform a tower deemed inappropriate into an acceptable

6/ Section 10 of C [illegible]

one? Or should the desire of the applicant to supplement the usual electrical energy source for his home by means of a wind turbine be deemed worthier of protection by the commission than that of a "ham" radio operator to practice his avocation whose apparatus could carry distress signals and weather data? It is precisely because such extraneous considerations defy qualification that fidelity to the statute is so essential. Another precedent was mentioned at trial. The Sandwich Town Committee denied permission in 1980 for a wind generator atop a telephone pole in a less historically sensitive neighborhood. Granting that the circumstances may be quite dissimilar, the appearance of a consistent and even handed approach is desirable for a public body such as the commission. How to strike the proper balance between the competing public interest of saving energy and maintaining the historic district is clearly a concern within the special competence of the legislature.

III. ULTIMATE FINDING AND RULING

Upon the basis of facts found by the court, it is determined that the award of a certificate of appropriateness exceeded the authority of the commission for the reasons indicated. Although the statute permits the court to".... issue such superceeding (sic) approval or denial of the application with such condition as said District Court in its discretion deems appropriate, and (the court) shall have all the powers to act in the matter that are available to a court of general equity jurisdiction," due regard for the administrative process dictates

the court should exercise the power in which the commission has primary jurisdiction only in rare instances. See MacGibbon v. Duxbury, 369 Mass. 512, 515-516 (1976). Although a credible argument may be made that section 11 of the Old King's Highway Regional Historic District Act envisions a somewhat broader role for the court than the typical statute which was construed in Gumley, supra, it must be supposed that the present statute was enacted in legislative contemplation of the traditional allocation of authority between administrative adjudication by a board and review by court. In any event, it is not necessary for this appeal to render a determination of this issue.

IV. ORDER FOR JUDGMENT

A judgment shall enter (1) declaring that the decision of the commission exceeded its authority and is therefore null and void, and (2) remanding the cause to the commission for further proceedings not inconsistent with this opinion.

Date: Feb 23, 1982

SO ORDERED

Robert A. Welsh, Jr.,
Assigned Justice

V. DISPOSITION OF REQUESTS FOR RULINGS

In view of the decision of the court, the request for findings and rulings submitted by the appellant Kathryn Arkus are deemed moot. The Commission's requests for rulings are acted upon as follows:

1. The Commission did not exceed its authority when it adopted a set of guidelines on solar and wind devices.

1. Denied: I find that in attempting to apply the so called new guidelines relating to energy saving devices, the commission committed error of law, in that the new guidelines sought to introduce considerations other than architectural appropriateness of exterior design, and in so doing, fell into conflict with the enabling statute. The guidelines themselves were inconsistent with the enabling statute and therefore in excess of the authority of the commission.

2. The commission and the committee acted properly when it applied the new guidelines to the proposed project.

2. Denied: See answer No. 1; section 10 of court's decision.

3. The committee did not exceed its authority when it approved the applicant's proposed wind generator and tower.

3. Denied: See section 10 of court's decision.

4. The commission did not exceed its authority when it affirmed the town committee's decision to approve the proposed wind generator and tower.

4. Denied: See section 10 of court's decision.

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION
P.O. Box 140, Barnstable, Massachusetts 02630-0140

STANDARD OF REVIEW

(Part 1)

"Error by Town Committee"

Old King's Highway Regional Historic District Commission
First District Courthouse, Barnstable, Mass. 02630 Telephone: 617-362-4092

ALBERT ANDERSON ET UX

Applicants

VS.

DECISION
Case No. 82-10

OLD KING'S HIGHWAY REGIONAL
HISTORIC DISTRICT COMMISSION
FOR THE TOWN OF SANDWICH

On November 7, 1982, the Commission held a hearing on an appeal filed by Albert Anderson et ux, to a decision by the Sandwich District Committee for the installation of vinyl siding on a house located at 8 Grove Street, Sandwich Massachusetts.

Present were: Mr. Ivers, Brewster, Mr. MacSwan, Barnstable, Mr. Long, Yarmouth, Mr. Brown, Orleans, Mr. Sutton, Sandwich and Attorney Wilson, Commission counsel. Also present were Mr. and Mrs. Anderson, Mr. Shifflet, contractor and Mr. Chase together with various members from the Sandwich Committee.

The decision of the Sandwich Committee was filed on November 12, 1982, and the appeal entered with the regional Commission on November 22, 1982, within the ten day appeal period.

Dr. Anderson addressed the Commission arguing that parts of his home were very old but indicating that after reviewing all of the literature and information available on vinyl sidi that he and his wife were convinced that ho harm would come t dwelling from the installation of the synthetic siding. He indicated that the maintenance would be much less costly and that he felt the Town Committee was being arbitrary and capricious in the denial of his request for vinyl siding.

DEC 22 1982

Mrs. Anderson stated that the proposal of cedar shingles was unacceptable because she felt aesthetically it would dest the character of the building.

Mr. Shifflet indicated that his firm would do the work manner consistent with the Commission's guidelines and that effort would be made to protect the building against any of possible harms alleged to occur through the use of vinyl sid

Mr. Sutton read a statement to the Commission indicatin Committee's position and set forth the five reasons for the

denial of the application. He pointed out that the house, formerly known as Newcomb Tavern, was built over 250 years ago and is in the heart of the Sandwich District.

A copy of the minutes of the local Committee are attached to this decision.

Mr. Ferro, an architect and member of the Sandwich Committee, addressed the Commission stating his expert opinion on the negatives of the use of vinyl siding on old buildings.

Additionally, Mr. Chase, a builder from Marstons Mills, further stated that in his opinion vinyl siding would lead to damage and destruction of this important building.

Based upon the information submitted to the Commission, it makes the following findings:

1. That the building is of great historic significance.
2. That the reasons set forth in the minutes of the Sandwich Committee's meeting have a reasonable, factual basis.
3. That there is no evidence to indicate that a denial of the Certificate will constitute a legal hardship within the meaning of the Act.
4. That there is no evidence to indicate that the Committee acted in an arbitrary, capricious or erroneous manner in denying a request for a Certificate of Appropriateness

THEREFORE, the decision of the Sandwich Committee in denying a Certificate of Appropriateness is affirmed.

The parties are advised that this decision may be appealed to the Barnstable District Court by filing an appeal within 20 days of the entry of this decision in the records of the Sandwich Town Clerk.

TRIAL COURT OF THE COMMONWEALTH
DIST. CT. DEPARTMENT
FIRST BARNSTABLE DIVISION
FILED DEC 20 1982
CLERK-MAGISTRATE

Respectfully

Harris H. Ivers

/Harris H. Ivers, Chairman

Date: December 9, 1982

TOWN CLERK
TOWN OF SANDWICH
DEC 9 1982
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RECEIVED & RECORDED

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE,SS.

DISTRICT COURT DEPARTMENT
BARNSTABLE DIVISION
DOCKET NO. 20346

ALBERT ANDERSON and
YVONNE ANDERSON,
Plaintiffs

vs.

HARRIS H. IVERS, ELLIOT MacSWAN, LUTHER LONG, WALTER BROWN, and GEORGE SUTTON, AS THEY ARE MEMBERS OF THE OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION,
Defendants

FINDINGS, RULINGS, and ORDER FOR JUDGMENT

I. STATEMENT OF CASE

This case is before me by way of an appeal by Albert Anderson (hereinafter the appellant) from a decision of the Old King's Highway Regional Historic District Commission (hereinafter the Regional Commission) upholding the denial of a certificate of appropriateness by the Sandwich Town Committee (hereinafter the Town Committee) for the installation of white vinyl clapboards to a portion of the rear of appellant's home.

Appellant's [1/] home is located on Grove Street in Sandwich within the Town of Sandwich and the Old King's Highway Regional Historic District and subject to its provisions.

Jurisdiction for this appeal arises under St. 1973 C. 470 as amended by St. 1975 C. 298 and 845; St. 1976 C. 273; St. 1977 C. 38 and

1/ The other appellant is Yvonne Anderson.

503; St. 1978 C. 436; St. 1979 C. 631; and St. 1982 C. 338.

The court took a view of the premises and of other areas within the district in Sandwich, both parties presented evidence through the testimony of witnesses and expert witnesses, various exhibits were introduced into evidence and the parties stipulated to certain facts.

II. FINDINGS OF FACT

1. Of all the areas of the entire historic district few can compare with the area within which appellant's home is located. The mill pond serves as the center of focus with the structures arranged around like lesser jewels around a giant gem. Historically and aesthetically the Town Hall Square serves as a paradigm for the entire district.

2. Without dispute, too, is the historical significance of appellant's home. Built in 1703, listed with the National Register of Historic places, and known as Newcomb's Tavern, it was a Tory meeting place in the days of the Revolution. The structure itself is a wood framed full Colonial with many of its original exterior architectural features: a large center chimney, steep pitched roof, simple trim features, clapboard front and painted shingles on the sides and rear. An ell was added in the rear approximately one hundred years ago.

3. Without seeking the approval of the Town Committee, the appellant caused white vinyl clapboards to be installed over one side of the rear ell. Upon learning that a permit was required he made application for the previously applied vinyl clapboards to remain and

sought permission for the coverage of two adjacent walls. The location of the proposed vinyl clapboard installation is not visible from the front of the dwelling and is visible only in part from a little used road.

4. The reason given by the appellant for his desire to have the vinyl clapboards installed is that the paint constantly peels from the existing shingles and that in the long term, the supposed longer-lasting new material would save money.

5. The Town Committee has permitted the installation of vinyl clapboards similar to those which appellant seeks to use on a significant portion of the exterior of at least three structures (the Doll Museum, the Lewis residence, and the Olson residence) which are in the immediate vicinity of appellants' home.

6. Appellants and appellees, each called as witnesses architects who were duly qualified to testify as an expert as to the architecture of old buildings. As might be expected, the expert who testified for appellant stated that, in his opinion, vinyl siding made to resemble clapboards, providing details are observed and details kept simple, would be appropriate and not incongruous if installed on appellants' dwelling. On the other hand, the architect, Mr. Ferro, who testified for the Regional Commission stated that the installation of vinyl siding made to resemble clapboards on appellants' home would not be appropriate and would be obviously architecturally and demonstrably incongruous.

7. Mr. Ferro's practice and training as an architect appears to be concentrated in the area of preservation, restoration, and

rehabilitation of historic buildings. He testified with great particularity as to the periods during which various types of exterior siding were used on buildings in this area. He identified not only the kinds of sidings (chiefly shingles and clapboards) which were used but also distinguished between wood clapboards which were crafted in the Sandwich area before 1830 and the manufactured clapboards which differed somewhat in texture and appearance.

8. Just as the manufactured clapboards differ from those handcrafted, the vinyl composition clapboards are distinguishable in outward appearance at close range by a person with a trained eye. The trained eye might also discern that, because the vinyl clapboards are applied over the old, the distance between the plane of apertures such as windows and doors and the plane of the siding is changed. Mr. Ferro claims that this causes the windows to become "two-dimensional."

9. Defendants adduced evidence alluding to certain moisture problems associated with the use of vinyl siding because of its impermability. In the context of this case, this evidence is relevant only as it bears on the question of the destructiveness of the moisture. If the alleged moisture problem might cause the total destruction and loss of a building of historical significance, then the commission could properly consider the factor. Plaintiff disputes the allegations that vinyl siding causes moisture problems, pointing out that the siding has "breather" holes and that experience has shown no such problems to exist. I find the evidence that the vinyl clapboards cause moisture problems to be unsubstantial and the risk, at the most, to be speculative.

III. APPLICABLE STANDARD

While it is well settled that the rights given by reason of the ownership of property may be subordinated to the public interest by the regulation of land use, construction and appearance, this right is not unlimited. Statutes which as here, derogate from private rights should be scrutinized with great care in determining legislative intent and unless a contrary intent is expressed should be strictly construed.

In construing the statute none of its words should be regarded as superfluous, but each should be given its ordinary meaning without over emphasizing its effect upon other terms appearing in the statute, so that the entire act considered as a whole may constitute a consistent and harmonious statutory provision capable of effecting the presumed intention of the legislature.

It is noted that while the statute uses the term "appropriateness" in detailing in Section 10 of the Act the powers, functions and duties of Committee, the Section goes on to say "the Committee shall not make any recommendations or requirements except for the purposes of preventing changes in exterior architectural features obviously incongruous to the purposes set forth in this Act." The word "incongruous" is not a technical word and means lack of harmony, consistency or compatibility. The use of the adverb modifier "obviously", which means manifestly, plainly, or evidently, makes clear that the Committee should not examine proposed changes through the eyes of a highly trained and experienced architect specializing in the field of preservation and restoration or historical buildings

but rather through the eyes of the ordinary person.

IV. REQUEST FOR RULINGS

Plaintiff filed Request For Rulings which I deem moot in view of my ultimate findings and conclusions.

The Defendant requested that I make rulings on seven propositions and I rule upon them as follows:

1. Allowed
2. Denied. See Findings.
3. Denied. See Findings.
4. Allowed.
5. Allowed.
6. Denied as the request for the ruling on the proposition is not before the Court.
7. Denied. See Findings.

V. FINDINGS AND ORDER FOR JUDGMENT

The mandate of the statute is clear: the Commission is to consider objectively and fairly the appropriateness of exterior architectural features of buildings to be erected or changed in the District having in mind that no requirement may be made for the purpose of preventing changes obviously incongruous to the purposes set forth in the Act. It is manifest that the use of vinyl siding creates a change that is so slight that only a highly trained eye can detect its use. Such a change is not obviously incongruous and the Committee erred in making such a finding.

Upon the basis of the facts found by the Court it is determined that a Certificate of Appropriateness should have issued. Although

the statute permits the Court to issue superceding (sic.) approval and to have all of the powers to act in the matter that are available to a court of general equity jurisdiction, I deem it appropriate to remand the case to the Committee for action in accordance with this opinion.

Judgement to enter accordingly.

August 17, 1984

Richard O. Staff
RICHARD O. STAFF,
Justice

Albert Anderson and another[1] *vs.* Old King's Highway Regional Historic District Commission

Southern District—June 25, 1985.

Present: Welsh, P.J., Black & Silva, JJ.

Zoning, Certificate of appropriateness; Installation of vinyl siding on historic home.

Report of court's reversal of district court decision for plaintiffs. Action heard in the Barnstable Division by Staff, J.

Michael Ford for the plaintiffs.
James Wilson for the defendant.

Black, J. This is an appeal by the Old King's Highway Regional Historic District Commission (hereinafter referred to as "the Commission"), from a District Court trial judge's overturning of a decision of the Commission upholding the Sandwich Town Committee's denial of the plaintiffs application for a Certificate of Appropriateness for the placement of white vinyl clapboard siding over the wooden shingles on three (3) sides in the rear and side area of a two-story full colonial building located in the Old Village Center of Sandwich.

This case comes to us for review under the provisions of Chapter 470, Statutes of 1973. The stated purpose of that act is:

> . . . to promote the general welfare of the inhabitants of the applicable regional member towns so included, through the promotion of the educational, cultural, economic, aesthetic and literary significance through the preservation and protection of buildings, settings and places within the boundaries of the regional district and through the development and maintenance of appropriate settings and the exterior appearance of such buildings and places, so as to preserve and maintain such regional district as a contemporary landmark compatible with the historic, cultural, literary and aesthetic traditions of Barnstable County, as it existed in the early days of Cape Cod, and through the promotion of its heritage.

Under its provisions, each of the member towns has its own Historical District Committee consisting of five unpaid members, one of whom must be an architect. Each committee has authority to review applications for a certificate of appropriateness. If the work sought to be authorized is determined by the Town Committee to be inappropriate, the Committee is, nonetheless authorized to approve the application when there are special conditions especially affecting the particular building or structure, etc., which do not affect the District generally. In passing upon appropriateness, Section 10 of the Act specifically requires the Town Committee to consider, among other things:

> . . . the historical value and significance of the building or structure, the general design, arrangement, texture, material and color of the features, sign or billboard involved and the relation of such factors to similar factors of buildings and structures in the immediate sur-

[1]Yvonne Anderson.

roundings. The Committee shall consider settings, relative size of buildings and structures, but shall not consider detailed designs, interior arrangement and other building features not subject to public view. The Committee shall not make any recommendations or requirements except for the purpose of preventing changes in exterior architectural features obviously incongruous to the purpose set forth in this Act. The Committee shall consider the energy advantage of any proposed solar or wind device.

Any person aggrieved by the determination of the Town Committee has the right of appeal to the Commission within ten (10) days of the filing of notice of the determination with the Town Clerk. A person aggrieved by the action of the Commission has a further right of review in the District Court having jurisdiction over the town where the application was originally filed. If the District Court finds that the Commission exceeded its authority, the court may modify, either by way of amendment, substitution or revocation, the decision of the Commission and may issue such superseding approval or denial of the application with such conditions as said District Court, in its discretion, deems appropriate. The court has all of the powers to act in the matter that are available to a court having general equity jurisdiction. Any findings of fact by the District Court are final and conclusive upon the parties.

Based upon the report of the trial judge, including his detailed findings of fact, it appears that the plaintiffs acquired the subject property in 1970. The structure in question is an authentic wood frame two-story full colonial building erected in 1703 at the site of the First Cape Cod Settlement. The building contains many of its original exterior architectural features, including a large center chimney, a steep pitched roof, simple trim, wooden pegging and a clapboard front with shingles on the sides and rear. A shingled ell was added at the rear of the building during the late 1800's. The building is listed in the National Register of Historical Places, and was a tory meeting place in the days of the Revolution, known as "Newcomb's Tavern". In the words of the trial judge, "[O]f all the areas of the entire historic district few can compare with the area within which appellant's home is located. The mill pond serves as the center of focus with the structures arranged around like lesser jewels around a giant gem. Historically and aesthetically the Town Hall Square serves as a paradigm for the entire district"

The Town Hall Square Historical District, in which the plaintiffs building is located, is a nationally recognized part of the Old King's Highway Regional Historical District which focuses on the pre-1800 era of Sandwich's history and which contains many fine examples of early Colonial architecture. The majority of the buildings in the District (including the plaintiffs') date to the period before the Industrial Revolution, and their exterior architectural features still reflect the characteristics of the earlier period.

Apparently, after purchase of the property, the plaintiffs experienced difficulty in maintaining the shingles due to the fact that the paint constantly peeled. Without seeking the approval of the Sandwich Town Committee, the plaintiffs had white vinyl clapboards installed over the side of the rear ell. Upon being advised that a permit was required, they made an application for approval of the vinyl clapboards already installed and for authority to install vinyl clapboards to the two (2) adjacent walls. The location of the proposed vinyl clapboards is not visible from the front of the building, but is visible, at least in part, from a little used side road. The matter was taken up at a regular meeting of the Sandwich Historic District Committee on October 13, 1982, and the plaintiffs request was denied, principally because the long range effect of

the use of vinyl siding would be detrimental to the District. They appealed to the Commission, which heard the matter on November 7, 1982, and affirmed the Town Committee's denial of the application. The plaintiffs then sought judicial review of the Commission's decision under the provisions of Section 11, Chapter 470, St. 1973.

In the instant case, three issues appear to be presented on appeal. There is, however, no dispute that in order to disturb the ruling of the commission, the trial court must have found its actions to be " . . . based upon a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Gumley* v. *Board of Selectmen of Nantucket*, 371 Mass. 718 (1977); *MacGibbon* v. *Board of Appeals of Duxbury*, 369 Mass. 512 (1976). The first issue for consideration is whether, as a matter of law, the placement of white vinyl clapboard siding over the shingles on the rear and sides of the building in question is an inappropriate change in the exterior architectural features of the building under Section 10, of Statutes of 1973, Chapter 470, as amended. this is essentially a question of fact. The five criteria which govern this determination are: (a) the historical value of the building; (b) the general design arrangement, texture, material and color; (c) the relationship of the proposed change to the immediate surroundings; (d) the setting of the area; and (e) the relative sizes of the structures involved.

As to (a), the defendant argues the change will drastically affect the historic value of the building. It notes that all the local buildings which have clapboard on either side or rear walls were built in the nineteenth or twentieth century. The placement of vinyl clapboard siding on the side and rear portions of the building will virtually destroy its colonial character. The plaintiffs counter this by arguing that only the front portion of the building has been dated as colonial, so that the siding would not cover any of the older sections of the building. They further imply that since the doors, windows and gutters are aluminum, any harm done by the use of aluminum has already occurred. Certainly, this last assumption is legally inaccurate. *Sleeper* v. *Bourne*, 1980 Mass. App. Div. 13, stated that one of the purposes of this act is to prevent additional harm to the historic character of the Old King's Highway district.

With respect to (b), the defendant argues that the design, texture, and material of the siding will decrease the historical value of the building. The smooth, even texture of vinyl serves as a strong contrast to the rough shingling traditionally appearing on colonial era homes. The siding would create clean, orderly vertical lines on the house. The placement of the shingles is far less precise, an indication of the lack of technology available at the time of construction. The plaintiffs again state that the appearance would closely resemble other buildings in the area. Additionally, the judge, in finding for the plaintiffs, found that changes in texture would only be apparent to the eye of an expert, and therefore not within the commission's authority to regulate.

(c) (d) (e). The defendants claim that the siding will destroy the structure's place in the historic district. The building represents an important role in the settlement of the colonies, as well as in the American Revolution. Although other buildings in the area have been sided, those are of a different historical and architectural era. The Commission also found that the large area to be covered by the siding would negatively affect the appearance of the building, drawing attention to the non-colonial improvements. Again, the plaintiffs argue that the change in appearance will not be drastic, since the facade of the house will remain intact. They also argue that the siding will not be apparent, except from a rarely used road.

Although the plaintiffs advance some valid arguments, the facts presented on the first issue merely go to the sufficiency of the evidence. Since the evidence would support the Commission's decision either way, its determination was not arbitrary or capricious.

The trial judge denied the following Request for Ruling by the defendant:

> That, as a matter of law, the placement of white vinyl clapboard siding over the shingles on the rear and sides of a prominent colonial building that is listed in the National Register of Historic Places is an inappropriate change in the exterior architectural features under Section 10 of St. 1973 Chapter 470, as amended.

Since we have concluded that this is question of fact, his ruling was correct.

The second issue arises out of this denial by the trial judge of the defendant's third Request for Ruling, which is as follows:

> That, as a matter of law, it is not obviously incongruous with the intent and purpose of St. 1973 Chapter 470, as amended, for a committee to deny a change from painted wooden shingles to white vinyl clapboard on the rear and sides of a colonial building that is listed on the National Register of Historic Places.

As the plaintiffs point out, this issue was not well phrased by the defendant. The Acts of 1973, Chapter 470, Section 10, as amended, states in part: "The Committee shall not make any recommendations or requirement except for the purpose of preventing changes in the exterior . . . architectural features obviously incongruent to the purposes set forth in this Act." The basic purpose of the act is to " . . . preseve and maintain . . . the regional district as a contemporary landmark compatible with the historic, cultural, literary and aesthetic tradition of Barnstable County, as it existed in the early days. . . . " *Id*, § 1. Therefore, a better statement of the issue at hand would be whether the placement of the siding on the structure would be "obviously incongruous to the purposes" of the act.

The case law in the Commonwealth is scant regarding specific exercise of historial commission powers. It is, however, clear that the town historical district have broad regulatory powers to preserve such areas. The earliest cases dealing with historic preservation in the Commonwealth are two *Opinions of the Justices to the Senate* at 333 Mass. 773 and 333 Mass. 783 (1955). In those opinions, the Supreme Judicial Court found that legislation creating the historical districts of Beacon Hill and Nantucket would indeed be constitutional if passed. The major question presented in those opinions are not in issue here; namely, whether the legislation constituted a taking of property. (Although the court held that the regulation would not constitute a taking, it noted that in cases in which the regulation of the structure would cause extreme hardship, the application of the statute could be found unconstitutional.) The court, recognizing the strong public interest in preserving historic areas, noted that "[i]t is not difficult to imagine how the erection of a few wholly incongruous structures might destroy one of the principal assets of the town. . . ." *Opinion of the Justices, supra*, at 780.

The Nantucket Historical District was the subject of one of the two (leading) cases in the Commonwealth. In *Gumley* v. *Board of Selectmen of Nantucket*, 371 Mass. 718 (1977), a developer challenged the denial of a building permit for multiple unit dwellings. The town reasoned that open spaces were an integral part of the historic culture of the island, and that the development would destroy too much open space. In addition, the Board of Appeals added that the buildings were so long as to conflict with the traditional appearance of the locale. The Supreme Judicial Court held that historical preservation did

ırrant the denial of the permit on the grounds that the structures would me too much open space. The statute in question, like the one before the in the case at hand, addressed the preservation of "exterior architectural es". Since open space is not relative to architectural features, that is not grounds for denial under the law. The court noted, as it remanded the hat the permit could be denied on the basis of length of the buildings. ng size is clearly an "exterior architectural feature," subject to regulation the statute. As long as the denial of the permit does not fall under the ary or capricious standard, it will be upheld. The court implied that, lered in the context of the larger community, requiring a maximum ng length would be fully congruent with the goal of maintaining the ic character of the area. *Gumley* provides a good framework for defining ope of power of the local historical commission (although the powers are d by a different statute than one before this court, they are similar). the holding in *Gumley* was in the landowner's favor, the commission's owers were definitely affirmed. In stating that the length of the buildings be regulated, the court is allowing much more subtle regulation than y dictating style. Further, it demonstrates the broad powers of a ical commission through the regulation of structures which are not, in f themselves, of historical significance.

only other (published) case on point in Massachusetts is *Sleeper* v. *Old 's Highway Historical District Commission*, 11 Mass. App. Ct. 571 (1981) Appellate Division case is *Sleeper* v. *Borne*, 1980 Mass. App. Div. 13). In case, the plaintiff appealed the denial of a permit to erect a 60 foot ham antenna in a historical district (the district is the one in question here, *leeper* dealt with a different section of different historical significance). ugh there were no radio antennae in the vicinity, there were quite a few ic and telephone poles, as well as television poles located on rooftops, reached up to 20 feet. Sleeper's home was located in a subdivision of rn ranch homes. The neighborhood was located within the historic ct, and was near the situs of an ancient Indian legend. The Appeals Court ned the Appellate Division's affirmation of the denial of the permit. The found that the denial was neither arbitrary nor capricious. The llate Division evaluated the commission's decision by " . . . balancing . . . ompeting interest of the individual seeking to use his property in a ner which might offend the purposes of the statute with the interest of the bitants of the region to enjoy unimpaired heritage of the area." Mass. App. Div. at 19. In its affirmation, the higher court noted that, even ne of the existing poles were as incongruous with the area as the proposed the goal of the creation and regulation of the district was to prevent ner ham of the historic value of the vicinity. Therefore, even though some ding structures were in existence, this particular offender could be d a permit. This situation can be distinguished from one at hand nuch as the buildings that are presently sided were done with permission e town.

ere are three trial level cases which have been decided in the Common- th on the issue. In *Forg* v. *Jaquith*, Superior Court Equity #35391, *llesex Superior Court* (December 16, 1974), a Superior Court judge ld the denial of an application to place vinyl siding on a house in the ngton Historic District. The petitioners argued that, since other buildings been sided with the Commission's permission, the buildings in question ld be treated in the same manner. The court, in refusing to accept this ment, found that the structures at issue had greater historical significance

than the other sided homes. The other homes were tucked well into the district. The houses involved in that litigation fronted on the Lexington Battle Green. It was held that the Historical Commission had acted reasonably, and could not be overruled on the basis of arbitrariness or capriciousness. A similar result ensued when the owner of a nineteenth century clapboard and shingle home in Springfield attempted to install siding. *The Hampden County Housing Court*, in *Wolerzak* v. *Gagnon, et al.*, #LE-651-S-76T (November 19, 1976), found that substantial evidence supported the Historical Commission's decision not to permit the home to be sided.

Finally in *Sears* v. *Historic District Commission of Bedford*, Superior Court #75-3849 (September 25, 1979), the Middlesex Superior Court held that the Bedford Historical Commission had not exceeded its authority in denying a certificate of appropriateness to the plaintiffs who wanted to remove a section of a stone wall to allow construction of a walkway. Even though the wall itself was not of historical significance, in that it was not in the same condition as colonial times, it was considered to be an important part of the setting for other historic buildings and structures. Therefore, it was held that the Commission had authority to prohibit even its partial removal. The court noted that there is almost "a presumption against visible changes". In cases of this nature, the court further noted that "[i]n these circumstances, there is room for discretion by the Commission but little room for arbitrariness or caprice. The case was appealed to the Appeals Court, which affirmed the judgment of the trial court in the rescript opinion, *Sears* v. *Historic District Commission*, No. 79-1044, entered April 30, 1980.

Although there are few Massachusetts cases directly on point (except Superior and Housing court cases in unpublished form), a 1981 Maryland case dealt with precisely the same issue as is raised in the pending case (although, of course, under slightly different statutory language). In *Faulkner* v. *Town of Chestertown*, 428 A. 2d. 879 (Court of Appeals, 1981), the owner of a contemporary building located within a historic district sought to install vinyl siding on that structure. The owner had not applied for a permit, but had brought suit to invalidate the statute which would require one. Like the Old King's Highway district, the Maryland district dates back to the seventeenth century. The court held that the house in question was subject to regulation. It further held that a determination of whether siding would be appropriate in light of the district as a whole (as well as the structure itself) was well within the purview of the historic commission.

In this case, the trial judge defined "obviously" to be ". . . manifestly, plainly, or evidently . . . " (see p. 5 of the order of judgment). "Incongruous" was found to mean " . . . lack of harmony, consistency or compatibility." *Id.* The judge noted that the term incongruous is not a technical term. The trial judge went on to find that the plain meaning of the term "obviously incongruent" ". . . makes clear that the Committee should not examine proposed changes through the eyes of a highly trained and experienced architect specializing in the field of preservation and restoration or [of?] historical buildings but rather through the eyes of the ordinary person." *Id.* at pp 5-6. Much of the testimony opposing the siding at trial and at the administrative hearings was propounded by such an expert.

The defendants persuasively argue that the judge misinterpreted the application of the phrase in question. Clearly the legislature must have intended some technical and architectural factors to be considered, as evidenced by the requirement of an architect (if available) on the five member town committee (§ 5, Para. 1 of the Act). Section one of the Act also indicates

that its purpose includes the preservation of the area's historic and aesthetic tradition. In the statutory context, it is obvious that the statute requires that any regulatory actions taken by the town be for the prevention of exterior structural changes "obviously incongruent" with the purpose of the Act. In short, this means that if the placement of siding on the house is "obviously incongruent" with the historic or aesthetic tradition of the area, the action of the town (and hence, the Commission) is appropriate. At trial, the plaintiffs successfully argued that only a professional could notice the distinction between the value of a sided and a shingled house. If this were true, one might logically ask how the public could ever become educated, or indeed, how experts will become so, without the existence of the more traditional building styles.

The final issue raised by this appeal is whether the decision of the Commission was arbitrary, capricious or clear erroneous. In essence, this calls for a determination of the sufficiency of the evidence. Without reiterating the evidentiary arguments that have been advanced by the respective parties, it is sufficient to say that in our opinion there was ample evidence before the Commission to support its finding that placement of vinyl siding on the building in question was "obviously incongruous" with the purpose of the act.

Accordingly, the decision of the trial judge in overturning the decision of the Commission upholding the Sandwich Committee's denial of the plaintiffs Certificate of Appropriateness is hereby reversed and the Commission's decision is affirmed. It is further ordered that the vinyl siding already placed upon the building by the plaintiffs without the approval of the Sandwich Town Committee be removed within one hundred and twenty days from the certification of this decision. Failure to comply with the provisions of this order shall be subject to the enforcement provisions of the aforesaid act.

ALBERT ANDERSON & another[1] *vs.* OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION.

Barnstable. March 4, 1986. — May 21, 1986.

Present: HENNESSEY, C.J., WILKINS, NOLAN, LYNCH, & O'CONNOR, JJ.

Historic District Commissions, Decision, Appeal. *Practice, Civil,* Historic district appeal.

Discussion of the respective functions under St. 1973, c. 470, as amended, of local committees, the regional commission, the District Court, the Appellate Division, and this court in determining the appropriateness of proposed changes in exterior architectural features of buildings or structures in the Old King's Highway Regional Historic District. [610-611]

On appeal to a District Court from a decision of the Old King's Highway Regional Historic District Commission approving a local committee's decision to deny the owners of a house built in 1703 a certificate of appropriateness for the installation of vinyl clapboards over the painted shingles of an ell added to the house in the nineteenth century, the judge erred in reversing the decision of the commission largely on the ground that only a trained eye at close range could distinguish vinyl clapboards from wooden clapboards. [612-613]

CIVIL ACTION commenced in the Barnstable Division of the District Court Department on December 29, 1982.

The case was heard by *Richard O. Staff,* J.

Michael D. Ford for the plaintiffs.

James R. Wilson for the defendant.

WILKINS, J. The Andersons own an old house on Grove Street in Sandwich within the Old King's Highway Regional Historic District (historic district).[2] Built in 1703 and known as Newcomb's Tavern, the house was a Tory meeting place

[1] Yvonne Anderson.

[2] The act creating the historic district and the defendant commission is St. 1973, c. 470. That act has been amended by St. 1975, c. 298 and c. 845; St. 1976, c. 273; St. 1977, c. 38 and c. 503; St. 1978, c. 436; St. 1979, c. 631; and St. 1982, c. 338.

during the Revolution. It is located in Town Hall Square, a most significant part of the historic district. The structure, a wood-framed Colonial retaining many of its original architectural features, has a clapboard front and painted shingles on the sides and rear. Approximately one hundred years ago, an ell was added in the rear.

The Sandwich historic district committee (local committee) denied the Andersons a certificate of appropriateness for the installation of vinyl clapboards over the painted shingles of the ell. The defendant regional commission rejected the Andersons' appeal and affirmed the local committee's decision. A judge of the District Court heard the Andersons' appeal, found facts, and concluded that the committee should have issued a certificate of appropriateness. The Appellate Division reversed the trial judge's decision and affirmed the regional commission's decision. The Andersons have sought review by this court. We agree with the action of the Appellate Division.

We discuss first the roles of the local committee, the regional commission, the District Court, the Appellate Division, and this court. The Old King's Highway act required the Andersons to obtain from the local committee "a certificate of appropriateness" as to the proposed change in exterior architectural features before installing vinyl clapboards on their house. St. 1973, c. 470, §§ 6 & 8, as amended. To determine the appropriateness of any such change, the committee is instructed by the act to consider such factors as (a) the historical value and significance of the building; (b) the general design, texture, material, and color of the proposed feature; and (c) the relation of such elements to similar factors, exposed to public view, in nearby buildings. St. 1973, c. 470, § 10, as amended. "The committee shall not make any recommendations or requirements except for the purpose of preventing changes in exterior architectural features obviously incongruous to the purposes set forth in this act." *Id.*[3]

[3] Unlike the Historic Districts Act (see G. L. c. 40C, §§ 7 and 10 [*a*] & [*g*] [1984 ed]), the Old King's Highway act does not explicitly call for the municipal committee to make recommendations or requirements. A determination of appropriateness or inappropriateness is not, in normal parlance,

Any person aggrieved by a local committee's determination may appeal to the regional commission, which must hold a hearing and determine the facts. St. 1973, c. 470, § 11, as amended. If the local committee "exceeded its authority or exercised poor judgment, was arbitrary, capricious, or erroneous in its action," the commission must annul or revise the local committee's determination. *Id.* The regional commission's initial function is not to exercise its independent judgment on the facts, but rather to determine whether the local committee erred in some respect. See *Gumley* v. *Selectmen of Nantucket,* 371 Mass. 718, 723 (1977).

Any person who, in turn, is aggrieved by the action of the regional commission may appeal to the local District Court, where the judge "may hear all pertinent evidence and determine the facts." § 11, as amended. The judge's findings of fact are "final and conclusive." *Id.* The standard of review by the District Court judge is "analogous to that governing exercise of the power to grant or deny special permits" under local zoning regulations. *Gumley* v. *Selectmen of Nantucket, supra* at 719, 724. See *Opinion of the Justices,* 333 Mass. 773, 775 (1955). Thus the judge must affirm the regional commission's decision unless, on the facts found by the judge, the commission should have concluded that the local committee exceeded its authority, exercised poor judgment, or was arbitrary, capricious, or erroneous in its action. *Gumley* v. *Selectmen of Nantucket, supra* at 723-724.

The act permits an appeal from the District Court to the Appellate Division only on issues of law. St. 1973, c. 470, § 11, as amended.[4] This court's review is on the District Court report just as was the review by the Appellate Division.

the making of requirements. We need not decide whether the quoted language applies to the committee's action in this case because, in context, as applied to what the committee did here, appropriateness and obvious incongruity have the same meaning.

[4] An appeal based on a District Court report presents an unsatisfactory record for review of such cases, which principally involve equitable considerations based on all the evidence. See *Walker* v. *Board of Appeals of Harwich,* 388 Mass. 42, 45-46 (1983). When adopted in 1973, the act provided for an appeal to the Barnstable Superior Court "sitting in

The local committee denied the Andersons' application for a certificate of appropriateness stating its reasons. The house "is very historic, very visible, and located in the heart of the Sandwich Historic district." The Andersons put the vinyl on the back of the house without the committee's approval. Shingling and repainting are good alternatives to the use of vinyl. The regional commission's guidelines advised of "the potential practical long-term effects of vinyl siding applied to older houses." The committee stated that "[a]side from the possible aesthetic problems created by vinyl siding on the sides and back of this house, the long-term practical consequences would be markedly detrimental to the District."

We construe the local committee as saying that (a) the application involved a house of substantial historic significance in an important part of the historic district; (b) the Andersons applied vinyl siding to the rear of the house without the committee's permission, although they were on notice that the regional commission had issued guidelines pointing to the problem of vinyl siding on old houses; (c) there would be no hardship to the Andersons in denying the application because there were reasonable alternatives to vinyl clapboards; and (d) a detrimental precedent would be set if the owners of this significant property were allowed to change the siding on the ell from shingles to vinyl clapboards.

The regional commission held a hearing on the Andersons' appeal and concluded that, because the local committee's decision had a reasonable, factual basis, the local committee had acted appropriately.

The District Court judge explicitly or implicitly found the facts on which the local committee relied, but found further that only a trained eye at close range could distinguish vinyl

equity." St. 1973, c. 470, § 11. The current provision for appeal to the District Court was enacted in 1975. St. 1975, c. 845, § 13. Appellate consideration of the denial of requests for rulings fails to assure the kind of review that a case of this sort should have. That is particularly apparent where the report recites evidence before the judge but contains no findings on the relevant factual issues presented by that evidence. We leave open the possibility that errors of law not arising from the denial of requests for rulings could be presented on appeal in a case of this sort.

clapboards from wooden clapboards. Largely on this ground, he concluded that the architectural change was not inappropriate ("is not obviously incongruous") to the purposes set forth in the act.[5] The problem with this conclusion is that it did not compare vinyl clapboards with painted shingles. Although we doubt that the act supports the judge's reliance on the untrained eye as the measure of appropriateness, the difference between vinyl clapboards and painted shingles is obvious both to the trained and the untrained eye.[6] The judge thus relied on an inappropriate ground for reversing the commission's decision. On the facts found, the judge would not have been warranted in deciding that the decision of the regional commission exceeded its authority.[7]

Decision of the Appellate Division affirmed.

[5] The judge found that the local committee had permitted vinyl clapboards on at least three other structures in the vicinity. The report recites evidence that these structures were built in the nineteenth century, "the Industrial or Glass Factory Age," when smooth textured white clapboard was a typical feature. The judge should have made findings of fact and not recitations of evidence concerning these other houses. We construe the judge's recitation of evidence of this character as presenting the unchallenged historical background in which the local committee acted. The inclusion in the report of evidence of conflicting opinions about the use of vinyl is less explicable.

[6] If, as the Appellate Division construed the judge's findings, the judge thought that only a trained eye could distinguish between a clapboard-sided and a shingled house, the judge's conclusion is simply unwarranted as a matter of law.

[7] The judge denied the following requests (with the notation: "See Findings"): "3. That, as a matter of law, it is not obviously incongruous with the intent and purposes of St. 1973 c. 470, as amended, for a committee to deny a change from painted wooden shingles to white vinyl clapboard on the rear and sides of a colonial building that is listed on the National Register of Historic Places."

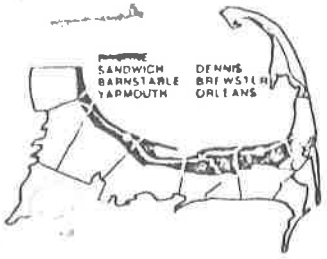
"7. That there is insufficient evidence in the record to show that the Commission acted in an arbitrary, capricious or erroneous manner in examining the local Committee's denial of a Certificate of Appropriateness for the placement of white vinyl clapboards on a prominent colonial building."

The seventh numbered request should have been allowed. The third numbered request, although not directly focused, as it should have been, on the proposed architectural change, stated the general principle properly applicable on the facts found by the judge.

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION
P.O. Box 140, Barnstable, Massachusetts 02630-0140

STANDARDS FOR APPROPRIATENESS

"Solar Panels"



Old King's Highway Regional Historic District Commission
First District Courthouse, Barnstable, Mass. 02630 Telephone: 617-362-4092

TOWN CLERK
BARNSTABLE, MASS.
'80 APR 17 PM 2 24

Betty E. Allen et als

Appellants

vs.

Old King's Highway Regional Historic District Committee in the Town of Barnstable

Appellee

DECISION ON APPEAL TO THE ABOVE COMMISSION

A hearing was held on April 14, 1980, by the above Commission upon an appeal by the above appellants from two decisions of the Barnstable Historic District Committee granting a Certificate of Exemption for a pair of skylights and the granting of a Certificate of Appropriateness for six solar panels, all to be located on property owned by George Roehlk, Lot 17, Holway Drive, West Barnstable, Mass.

Present were: Mr. MacSwan, Barnstable, Mr. Hanger, Dennis, Mr. Long, Yarmouth, Mr. Ivers, Brewster, Mr. Leonard, Sandwich, Attorney James R. Wilson, counsel for the Commission, Mrs. Allen, appellant, Mrs. Bates, appellant, Mr. Street, appellant, Mrs. Rudy, appellant and Attorney Robert Donahue, appearing for the appellants.(Neither the applicant nor his agent appeared).

A plan of the building with the proposed solar panels, photographs of the installed skylights and subject building, neighboring buildings of the area, letters from neighbors, a copy of the Barnstable Committee's minutes, the Certificates of Exemption andAppropriateness, deed restrictions for the sub-division, testimony by interested persons and a prior

viewing of the site were considered by the Commission prior to rendering its decision.

The applicant filed and received a Certificate of Exemption for the two skylights located on his garage. The Certificate of Exemption was dated June 20, 1979 and approved June 25, 1979. The applicant certified that the proposed construction would not be visible from any public street or way or public place. The viewing of the site indicated that the skylights were visible from Holway Drive. Based upon this information, the Commission found as a fact that the Town Committee had no authority to issue the Certificate of Exemption and that a Certificate of Appropriateness would be necessary in order to bring the skylights into proper compliance with the Act. The Commission voted on motion by Mr. Ivers, seconded by Mr. Leonard, to annul the Certificate of Exemption and advise the applicant to file a new application for a Certificate of Appropriateness with the Barnstable Committee. Adopted 4-0-1

The original decision by the Barnstable Committee on the application for solar panels was filed with the Town Clerk on March 24, 1980 and the appeal to the Commission was filed on March 25, 1980, within the 10-day period as required under the Act.

Attorney Robert Donahue appeared as counsel for the Point Hill Realty Trust and stated that the sub-division had been created with a strict intent to preserve the area as an historically significant community that reproduced

older houses and preserves the design, tradition and characteristics of 200 years ago. He stated that the selection of buildings and building design was tightly regulated through restrictive covenants and that the proposed solar panels would destroy the character of the neighborhood. Mr. Street testified that no evidence was presented to indicate that the proposed solar panels would be energy efficient or that the design was going to furnish the amount of heat allegedly needed by the Applicant. Mrs. Allen testified that she had lost a number of sales in the sub-division because of her insistence of strict compliance with the traditional design characteristics that the present buildings exhibited. Mr. MacSwan testified that his Committee felt because the sub-division was a new sub-division and there was such a need for energy conservation and the experimentalization of solar and wind power, that the allowance of the solar panels would be in the public interest. He stated further that the Committee felt that the sub-division lacked historical significance.

Based upon the evidence before the Commission, it makes the following findings:

1. The Town Committee erroneously determined that the sub-division lacked historical significance.

2. That the Point Hill sub-division has historical significance because of the quality of the historical reproduction characteristics applied to the various designs built and being built within the area.

Old King's Highway Regional Historic District Commission
First District Courthouse, Barnstable, Mass. 02630 Telephone: 617-362-4092

3. That the solar panels when placed on the roof would contrast sharply with the cedar shingl roofs that presently exist on all buildings within the sub-division.

4. That the proposed solar panels when placed on the roof are inappropriate and that the Certificate of Appropriateness issued by the Barnstable Town Committee should be annuled and that an order be entered denying a Certificate of Appropriateness to the applicant.

The parties are advised that they may appeal this decision by filing an appeal with the First District Court of Barnstable within 20 days of the date of the filing of this decision.

Respectfully submitted

William G. Hanger

William G. Hanger
Vice-Chairman

Filed: 4/17/80

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

BARNSTABLE DISTRICT COURT
No. 15887

GEORGE ROEHLK,
Plaintiff

v.

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION,
Defendants

FINDINGS, RULINGS AND DECISION

The act, popularly known as the Old King's Highway Regional Historic District Act[1], establishes a district encompassing a substantial area of Barnstable County within which the exterior features of buildings constructed or changed are regulated.

The purpose of the act is ..." to promote the general welfare of the inhabitants ... through the promotion of the educational, cultural, economic, aesthetic and literary significance, through the preservation and protection of buildings, settings and places ..., and through the development and maintenance of appropriate settings, the exterior appearance of such buildings and places, so as to preserve and maintain it as a contemporary landmark compatible with the historic, cultural literary and aesthetic tradition of Barnstable County, as it existed in the early days of Cape Cod, and through the promotion of these past historic associations of Barnstable County," (Section 1 of the act).

[1]Chapter 470 of Acts of 1973 and amended by Chapters 298 and 845 of the Acts of 1975; Chapter 273 of Acts of 1976; Chapters 38 and 503 of Acts of 1977; Chapter 436 of Acts of 1978; and Chapter 631 of the Acts of 1979.

The mechanism created by the statute for regulating construction and alteration begins with an application to a historic district committee (the committee), set up within each town. Except for certain exclusions and exceptions, the committee passes upon the "appropriateness" of the proposed construction or change. (See Section of the act for the complete text of what the committee should consider in passing upon the "appropriateness" of the proposed construction or alteration). Before deciding whether or not to issue a certificate of appropriateness, the committee conducts a hearing after publishing notice in a newspaper and notifying abutters and others deemed entitled to notice.

A person feeling aggrieved by a decision of the committee may appeal to a second administrative body, the Old King's Highway Regional Historic District Commission (the commission) which hears the evidence, determines the facts, and if, upon the facts determined the commission finds that the committee exceeded its authority or exercised poor judgment, was arbitrary, capricious or erroneous in its action, the commission should annul the committee determination.

A person aggrieved by the action of the commission may then appeal to this Court which again hears the evidence, determines the facts, and determines whether or not the commission's action exceeded its authority.

In this case, the Plaintiff's property is within a subdivision built within the past ten years in which all or nearly all of the houses are of the style variously described as cape cod, salt box, garrison, or colonial. The Court is of the opinion that the properties may not properly be considered

replicas of early houses since nearly all have modern features, such as garages, paved driveways, television antennas, and pictured windows.

Needless to say, the subdivision itself presents an extremely pleasing appearance with none of the extreme features found in some modern designs.

No facts have been brought to the Court's attention to indicate that the area has any particular historic significance, nor are there any structures in the immediate area of ny historic significance. (See Sleeper v. Old King's Highway Regional Historic District Commission[2] in which case the committee, commission, and reviewing court all attributed historic significance to the area within which Sleeper property was located).

Although there was testimony by several of Defendants' witnesses that the locus had "historical significance," I am unable to find any subsidiary facts to support this conclusion.

The assertion that the subdivision "preserves the design, tradition and characteristics of 200 years ago" is not exactly so, except in a very general way. Supposedly the houses within the subdivision comply in design with covenants contained in the deeds requiring that the houses be of "architectural colonial design."

Though this be so, this is not enough to give the buildings or area historical value and significance.

If the subdivision were an attempt to replicate a colonial village, this might be a factor adding historical value and significance.

[2]1981 Appeals Court Advance Sheets 609

The Plaintiff's request is to be permitted to install six solar heat collectors on the roof of his house. These collectors are each four feet wide by eight feet long, and though called flush to roof, would actually project from the roof about five inches. The surface of the collector would be of low reflectance glass, and the panels would be dark in color. The solar heat collectors would supplement the domestic water heater and electrical heating system of the house.

After a hearing, the local committee voted unanimously to grant a certificate of appropriateness to the Plaintiff.

Reading the statute as a whole, and inasmuch as no exact guidelines are established, it appears that the statute and rules confer upon the local committee a substantial measure of discretionary power with respect to their findings as to appropriateness and congruity.

It would appear that the provision for appeals to the commission is not intended to transfer that discretionary power to the commission, but rather to confine the power of the committee within authorized limits, or to prevent its abuse.

The supervisory power of the commission exercised on appeal does not import a power to reverse a decision of the committee honestly made upon evidence which appears to an unprejudicial mind sufficient to warrant the decision made. This is so even though the commission might well reach a different result after hearing the exact same evidence on a fresh basis.

As to the standard of review to be utilized by the commission, it appears to the Court that, unless the decision of the committee is based upon a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary, it should not

be disturbed. The words contained in the statute, apparently intended to amplify the reviewing power of the commission, "or exercised poor judgment," are so vague that the phrase should not be permitted to be used as a means to destroy a well considered, legally tenable decision of the local committee.

The Court viewed the Plaintiff's property, the immediate surroundings, and the area of the district between the courthouse and the subdivision.

I find that what the Plaintiff proposes to add is such a small insult to the architectural integrity of his home and environs that the committee was well within the scope of the statute, and the commissioner's own rules and regulations in passing favorably on Plaintiff's application as appropriate.

The Plaintiff, Roehk, filed nine requests for rulings of law which I deem waived in view of my findings.

The Defendant filed a request for three rulings upon which I act as follows:

1. Allowed in part and denied in part. The committee is entitled to and should give weight to the evidence of the surroundings, including the quality and style of the houses built and being built within the subdivision. However, as the decision points out, the fact that the houses are of colonial style and of high quality does not give them historical significance. If the subdivision had been built as a replica of a colonial village, the result might be otherwise.

2. Denied. See the special findings.

3. Denied. See the special findings.

Accordingly, the decision of the commission is determined to exceed its authority, and is hereby revoked. An order approving

the application shall issue.

Richard O. Staff

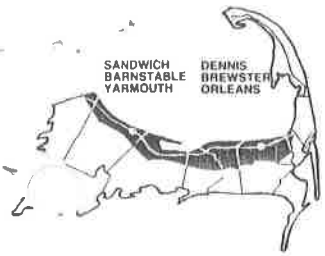
Richard O. Staff, Justice

Dated: May 7, 1981

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION
P.O. Box 140, Barnstable, Massachusetts 02630-0140

BOUNDARY OF DISTRICT

(Brewster)



Old King's Highway Regional Historic District Commission
P.O. Box 279, Hyannis Mass. 02601 Telephone: 617-775-1766

LESLIE MORELAND and
CRAIG PANACCIONE

v. Decision #87-6

OLD KING'S HIGHWAY REGIONAL HISTORIC
DISTRICT COMMITTEE FOR THE TOWN OF
BREWSTER

On Tuesday, May 26, 1987 the Commission held a hearing on Appeal #87-6 filed by Leslie Moreland and Craig Panaccione seeking review of a decision by the Brewster Historic District Committee which had denied a Certificate of Appropriateness for a sign on property located at 56 Underpass Road, Brewster, Massachusetts.

Present were Barbara Hart, Dennis; Allen Abrahamson, Sandwich; Milton Smith, Yarmouth; Kevin Ordway, Brewster; Peter Freeman, Barnstable; Robert G. Brown, Commission Counsel; Ms. Moreland, Applicant; and Attorney Neil Roberts for the Applicants.

The Committee's decision had been filed with the Town Clerk on April 7, 1987, and the appeal entered with the Commission on April 17, 1987 within the ten day appeal period. The 30 day time limit for Commission consideration was extended by agreement of the parties.

Attorney Roberts appeared before the Commission on behalf of the Applicants and distributed photos and a small locus map of the area. He stated that the site was in a business zone in Brewster and that the Applicants had originally been informed that the lot was 530 feet from Route 6A and therefore within the exempt area of Brewster's District. The Applicants constructed a building and sign on the premises in reliance upon that opinion. A prospective tenant of the Applicants sought approval for a sign and was told that the area was within the jurisdiction of the Brewster Historic District Committee. Attorney Roberts stated that their argument was twofold: 1. the lot is within the exempt area of the District; and 2. the structure and sign are both within the exempt area of the District. He cited various sections of the Historic District Act which state that the purpose of the Act is to deal with buildings and structures within the District, and that this is not within the District.

Kevin Ordway, representing the Brewster Committee, addressed the Commission to explain the Brewster Committee's reasons for denial. He stated that the Brewster Building Inspector had admitted making a mistake in originally ruling that the structure did not fall within the jurisdiction of the Brewster Historic District Committee. He stated that the building had come before the Committee and that the Committee felt that a tremendous hardship would occur if the building were disapproved. The Committee felt, however that there would not be great hardship in disapproving the sign. He stated that the sign was far in excess of the 12 square feet allowed. He further stated that it was the consistent policy of the Brewster Committee to exercise jurisdiction over all projects if part of the lot is within the non-exempt area of the District.

Michael Shay, a member of the Brewster Committee addressed the Commission and spoke in support of the Brewster Committee's decision stating that the project would be classified as a mini-mall and that it originally should have come before the Committee.

Attorney Roberts addressed the Commission and questioned the policy of exercising jurisdiction over buildings and structures if only a portion of the lot upon which they stand is within the District. Kevin Ordway replied that this was the consistent practice in Brewster.

Leslie Moreland, one of the Applicants addressed the Commission and stated that the case was very unusual, that the building was well built and that the sign was in keeping with others in the area.

After lengthy discussion, the Commission made the following determination.

1. That the Brewster Committe did not act in an arbitray, capricious and erroneous manner in denying the Applicants' Certificate of Appropriateness. 4-0-1

Any person aggrieved by this decision has a right to appeal to the District Court Department, Orleans Division, within 20 days of the filing of this decision with the Brewster Town Clerk.

Peter L. Freeman (v)
Peter L. Freeman
Chairman

Leslie Moreland and another[1] *vs.* Old King's Highway Regional Historic District Commission

Southern District — September 28, 1990.
Present: Dolan, P.J., Shubow & Lombardo, JJ.

Administrative, Denial of "certificate of appropriateness" for business sign by town historic committee and regional historic district commission.

Report of court's reversal of trial judge's decision and affirmance of ruling by regional historic district commission. Action heard in the Orleans Division by Robert A. Welsh, Jr., J.

Neil J. Roberts for plaintiff Leslie Moreland.
Robert G. Brown for the defendant.

Lombardo, J. This is an appeal by the Old King's Highway Regional Historic District Commission (hereinafter referred to as "the Regional Commission"), from a District Court trial judge's overturning of a decision of the Regional Commission upholding a denial by the Brewster Historic Committee (hereinafter referred to as "the Town Committee") of the plaintiff's application for a Certificate of Appropriateness for a business sign plaintiff sought to erect on her property.

This case comes to us for review under the provisions of Chapter 470 of the Acts of 1973 (hereinafter referred to as "the Act") which provides specially for an appeal to this Division. Under the provisions of the Act, each of the member towns has its own Historical District Committee which has authority to review applications for a Certificate of Appropriateness. If the work sought to be authorized is determined by a majority of the Town Committee to be inappropriate, the Committee is authorized by Section Ten of the Act to deny said application. Section 10(c) of the Act specifically addresses applications for the erection of signs:

> The Committee shall pass upon:—
>
> (c) The appropriateness of the erection or display of occupational, commercial or other signs and billboards within the District wherever a certificate of appropriateness for any such sign or billboard is required under Section Six.

Section Six sets out the limitations which can be imposed by the Committee. It states in relevant part that "[n]o ... sign, except as hereinafter provided ,... shall be erected on any lot or on ... any building or structure within the District, unless and until a certificate of exemption or certificate of appropriateness has been filed with the town clerk...." (emphasis supplied). The section goes on to state that:

> Except in cases excluded by Section Seven, no permit shall be issued by the building inspector for any building or structure to be erected within the District, unless the application for said permit shall be accompanied either by a Certificate of Appropriateness or a Certificate of Exemption which has been filed with the town clerk.

Section Seven of the Act allows the Regional Commission to establish a defined geographical area within a town's historic district (hereinafter referred to as "the exempt area") within which the activities otherwise limited by Section Six may be allowed without a hearing upon the issuance of a certificate of exemption.

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[1] Craig Panaccione.

The lot in question, upon which the sign was to be erected, lies within the Regional Commission's historic district. However, by a Certificate of Exemption granted to the Town of Brewster in 1981, pursuant to Section Seven of the Act, an exempt area was designated within the town's district within which the greater part of plaintiff's lot lies. The lot is partially in the exempt area and partially in the non-exempt area of the historic district. The lot's frontage and the building to which the sign would be attached are located entirely within the exempt area.

The trial judge found that both commissions (Town and Regional) had no jurisdiction over the plaintiff's structure, and therefore that said commissions acted in an arbitrary and capricious manner. Accordingly, the decision of the Regional Commission upholding the Town Committee's denial of plaintiff's Certificate of Appropriateness was reversed. The Regional Commission filed a Request for Draft Report and Draft Report which, after a hearing, was allowed by the trial judge.

The issue presented is whether the Regional Historic Commission and Town Historic Committee acted in an unreasonable or erroneous manner in their interpretation of Section Seven by their assertion of jurisdiction over plaintiff's property which lies partially within an exempt area. In order to disturb the ruling of the Commission, the trial court must have found its actions to be "... based upon a legally untenable ground, or as unreasonable, whimsical, capricious or arbitrary." *Anderson et al.* v. *Old King's Highway Regional Historic District Commission,* 1985 Mass. App. Div. 128 (citing *Gumley* v. *Board of Selectmen of Nantucket,* 371 Mass. 718 (1977); *MacGibbon* v. *Board of Appeals of Duxbury,* 369 Mass. 512 (1976)).

The Regional Commission in this case was required to interpret the provisions of the Act creating the Regional Commission and provisions within the Certificate of Exemption which allowed the Town of Brewster to create an area exempt from historical restrictions. The Act does not address in particular how properties which overlap the boundaries of exempt areas are to be treated. However, Section One, setting forth the purpose of the Act, does state that its historical restrictions extend to those buildings, settings and places within the boundaries of the regional district. Similarly, Sections Six and Ten mandate restriction of signs, structures and lots within the District (emphasis supplied).

The Certificate of Exemption granted to the Town of Brewster by the Regional Commission also addresses this particular issue of overlapping lots. The Certificate states that a property owner can obtain a building permit without having to appear before the Historic District Committee only when he or she can prove beyond a reasonable doubt that his or her property is not in the Historic District (i.e., property within the exempt area). The Town Committee and the Regional Commission have interpreted this language to mean that any property in the exempt area having any portion extending beyond the boundary of the exempt area into the Historic District is subject fully to historic district restrictions.

The meanings of "in" and "within" are subject to reasonable interpretation by the Commission. They are generally regarded as being synonymous and both may refer to lots entirely in a boundary or to those lying partially within. The Act does allow restriction of signs on lots within the District and, therefore, it cannot be said that the Act definitively restricts only signs which are themselves erected within the boundary of the District. The Town Committee did not act arbitrarily in restricting the erection of a sign which although not itself within the District is located on a lot which is partially in (i.e., extends into) the District.

This is especially so where evidence presented[2] to the Town Committee would support its finding that the questioned activity or structure would be incongruent with the purpose of the Act. *Anderson, supra* at 134. In addition, the Town Committee may

[2] The sign to be erected is twelve square feet in area.

deny the erection of a new structure even where similarly incongruous structures already exist in the area. *Sleeper* v. *Old King's Highway Historical District Commission*, 11 Mass. App. Ct. 571 (1981). The goal of the creation and regulation of the district was to prevent further harm of the historic value of the vicinity. Therefore, even though signs of equivalent size existed in the area of plaintiff, he could be denied a Certificate of Appropriateness. *Anderson, supra* at 132.

Accordingly, the decision of the trial judge in overturning the decision of the Commission upholding the Brewster Committee's denial of the plaintiff's Certificate of Appropriateness is hereby reversed and the Commission's decision is affirmed. It is further ordered that the sign in question be removed within sixty days from the certification of this decision. Failure to comply with the provisions of this order shall be subject to the enforcement provisions of the aforesaid Act.

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION
P.O. Box 140, Barnstable, Massachusetts 02630-0140

STANDARDS FOR APPROPRIATENESS

"Windows in Boat House"

SANDWICH DENNIS
BARNSTABLE BREWSTER
YARMOUTH ORLEANS

Old King's Highway Regional Historic District Commission
P.O. Box 279, Hyannis Mass. 02601 Telephone: 617-775-1766

SALLY MACROBBIE

v. Decision #87-25

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMITTEE FOR THE TOWN OF BARNSTABLE

On Tuesday, September 15, 1987 the Commission held a hearing on Appeal #87-25 filed by Sally MacRobbie seeking revision of a decision by the Barnstable Historic District Committee which had allowed a Certificate of Appropriateness for revised plans, subject to conditions, for alteration and restoration of a boathouse located at Lot #4, Rendevous Lane, Barnstable, Mass.

Present were Barbara Hart, Dennis; Milton Smith, Yarmouth; Michael Shay, Brewster; Peter Freeman, Barnstable; John Blaisdell, Sandwich; Robert G. Brown, Commission Counsel; Sally MacRobbie, Applicant; and Charles McLaughlin, Esquire, Attorney for the Applicant.

The Committee's decision had been filed with the Town Clerk on August 24, 1987, and the appeal entered with the Commission on September 2, 1987, within the ten day appeal period.

Attorney Charles McLaughlin appeared before the Commission on behalf of the Applicant. He questioned the fact that no written decision of the Barnstable Committee had been filed with the Town Clerk and that it might be proper for the Commission to remand the matter to the Barnstable Committee in order for them to draft a written decision. The Chairman replied that although written decisions are recommended in cases of denial, this was an approval not a denial. Commission Counsel responded that the Historic District Act did not require a written decision to be filed by a local committee in either an approval or denial. The Commission voted to proceed with the hearing.

Attorney McLaughlin distributed photos of the building in question, describing it as the Cobb boathouse. He stated that the appeal basically dealt with the request of Sally Cobb MacRobbie, the current owner of the boathouse to restore and make certain alterations to the boathouse, including the installation of six windows in the boathouse as there are now no windows. He described the boathouse as being in deplorable condition, was tilting badly and needed much restorative work done to it.

George Blakeley addressed the Commission in order to describe the current state to the boathouse. He reiterated the comments of Attorney McLaughlin and added that the original building was yellow with a red roof while the building, as improved, would have red shingles and a red cedar roof. He stated that the appeal was essentially about the six windows and that the Applicant had no objection to the rest of the plan.

Both Attorney McLaughlin and Mr. Blakeley presented many pictures of boathouses on Cape Cod. Attorney McLaughlin stated that many boathouses on Cape Cod through the years have had windows as they provide light and ventilation for those working on boats. Attorney McLaughlin said that there appeared to be a desire on the part of some in the local community to see no change at all in the boathouse. He said that those who desired to see no change at all were misinpreting the statute. He also stated that there are some who are concerned with the possible uses the building could be put to, and that this is not within the jurisdiction of the Committee or Commission. He stated that the building is unique, that there is no other in Barnstable Harbor like it, and that it should be judged on its own merits.

Peter Freeman, representing the Barnstable Committee, addressed the Commission to explain the Barnstable Committee's reasons for denial. He stated that the Committee is not concerned with use but only with aesthetics. He agreed that the building had its own unique aspects but stated that what made the building unique and significant is the way it looks now. He stated that the Committee is not opposed to change or felt that the boathouse should remain forever unchanged and the Committee had allowed many changes which were in accordance with the purposes of the Act. He stated that the fact that other boathouses in that area have windows does not dictate that this boathouse should have windows.

After listening to many members of the public express their opinions regarding the application and after lengthy discussion the Commission made the following determination.

1. That the Barnstable Historic District Committee did not act in an arbitrary, capricious and erroneous manner in approving the Applicant's Certificate of Appropriateness subject to conditions and that the Applicant's Petition for Appeal be denied. 4-0-1

Any person aggrieved by this decision has a right to appeal to the District Court Department, Barnstable Division, within 20 days of the filing of this decision with the Barnstable Town Clerk.

Peter L. Freeman
Chairman

Peter L. Freeman
10-21-87

'87 OCT 21 P2:38

TOWN CLERK
BARNSTABLE, MASS.

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

DISTRICT COURT DEPARTMENT
BARNSTABLE DIVISION
Docket No. 87-CV-1547

SALLY MacROBBIE,
Plaintiff

vs.

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION,
Defendant

FINDINGS, RULINGS, and

ORDER FOR JUDGMENT

This complaint seeks judicial review of a decision of the Old King's Highway Regional Historic District Commission (hereinafter, the Commission) affirming a decision by the Barnstable Town Committee denying an application for a Certificate of Appropriateness to renovate and remodel a boat house.

The building in question was constructed in 1900 for the purpose of housing dorys, skiffs, and appurtenant nautical equipment. Its dimensions are 32 feet by 22 feet, with a large door facing the marsh. The building has not been used for some time and is rather dilapitated. The proposal is to install three windows containing six-over-six panes in each side of the structure to permit light and ventilation.

There are two other boat houses in the village of Barnstable. One is about a half-mile away and the other is about three-quarters of a mile away. Both of these contain windows.

To date the plaintiff has expended some $25,000 to preserve the building. It would cost approximately another $35,000 to complete the restoration without windows.

The evidence is that the great majority, if not virtually all, boat houses on the Cape were constructed with windows. This particular one was not so constructed because of the fact that it was in a relatively isolated location in 1900, and hence the need for security. The second reason was economic.

There is no evidence that in 1900, or thereabouts, boat houses were constructed without

dows. In fact, this particular structure is a singularity in this respect.

With the exception of the proposed windows, the restoration proposal would not offend the mandates of the Commission.

There was no evidence that a boat house without windows is a structure of historical significance.

While it may be conceded that there are cases in which the very unusual aspect of construction may itself create the occasion for its preservation in that particular form, this is not the case here. The need for light and ventilation was supported by evidence in this case. Neither the type nor the arrangement of windows involved would be incongruous or historically inappropriate.

While conceding that the Commission and the local town committee have broad discretion in these matters, it seems an abuse of that discretion to mandate the perpetuation of a windowless structure simply because it was originally constructed in that way, given the fact that other buildings of the same sort are windowed.

The local town committee did not render a written decision in this case. While the Commission, upon review, sought to draw a distinction between cases of a denial and an approval with restrictions or conditions, it is my view that a written decision as to its reasons was more than merely warranted or recommended. Although couched in terms of a conditional approval, it is, in essence, a denial of an essential feature of the application, to wit, the windows.

While some deference is to be accorded to the decisions of the local committee and the Commission, the language of the act permits the court to issue superseding approvals when warranted. Black's Law Dictionary defines "arbitrary" as some action taken without adequate determining principle; not founded in the nature of things; stemming from the will rather than the intellect; non-rational. There is no evidence before this court that the interests of the Act would be furthered by denying this applicant permission to install windows of the sort and in the manner proposed. While there is no suggestion that the denial was motivated by ill will or any improper motive, I conclude that it is unreasonable and therefore arbitrary. The fact (if it be a fact) that the boat house may have been constructed improvidently without windows or other adequate ventilation in 1900 does not require the conclusion that such improvidence be

perpetuated in futuro.

I conclude that, in the circumstances present, the denial by the Committee (as ratified by the Commission) exceeds the scope of authority granted by the Commission. The inclusion of windows in the rehabilitation of this boat house cannot be pronounced "obviously incongruous" with the purposes of the Act.

A judgment is to enter (1) that the decision of the local committee, as ratified by the Commission, is in excess of its authority in that it is arbitrary, and not in accordance with the purposes of the Act; (2) that the decision be, and hereby is, annulled; and (3) that a Certificate of Appropriateness be issued allowing the windows as proposed in the application.

SO ORDERED

March 20, 1991

Robert A. Welsh, Jr.
Robert A. Welsh, Jr., Justice

The Commission filed requests for rulings of law that are disposed of, as follows:

1. Allowed
2. Allowed
3. Allowed
4. Denied. I rule that a decision was required in the circumstances.
5. Allowed.
6. Denied. I rule that the Committee and the Commission exceeded their authority in the circumstances.

Sally MacRobbie *vs.* Old Kings Highway Historic District Commission

Southern District — March 19, 1992.
Present: Dolan, P.J., and Martin, J.*

Real Property, Installation of windows in boat house; Certificate of appropriateness.

Report of court's dismissal of defendant's report. Action heard in the Barnstable Division by Robert A. Welsh, J.

Charles S. McLaughlin, Jr., for the plaintiff.
Robert G. Brown for the defendant.

Martin, J. This appeal concerns Chapter 470 of The Acts of 1973, as amended, otherwise known as the "Old Kings Highway Regional Historic District Act" (the Act). Jurisdiction of the Barnstable District Court and of this division is pursuant to §11 of the Act. This appeal is premised upon the trial court's reversal of the Old King's Highway Regional Historic District Commissions's (commission) denial of Sally MacRobbie's (owner) application to install windows in a boat house situated in the historic region of Barnstable, Massachusetts.

*Judge Robert J. Kane did not participate in this opinion.

The owner applied to the Barnstable Historic District Committee (committee) for a certificate of appropriateness to make alterations on a boat house owned by her and located in Barnstable, Massachusetts. The boat house had been built by her grandfather in approximately 1900. The proposed alterations consisted of, among other things, installing windows in a windowless boat house. The committee approved the renovations except for the windows, but did not follow its guidelines which provided that if the committee made a determination against the applicant, the specific reasons for denial shall be stated in writing.[1]

The owner appealed the committee's decision to the commission pursuant to §11 of the Act. The commission ratified the committee's decision and the owner appealed to the court. The court ordered that a certificate of appropriateness be issued allowing the windows to be installed and the commission appealed to this division.

The function of the court is to determine if the commission exceeded it's authority. In doing so, the court must determine if the commission acted in accordance with the purpose of the Act, and reached its decision in accordance with the factors to be considered under the Act. In making this determination, the court may hear all pertinent evidence and determine the facts and if, upon the facts so determined, the court finds that the commission exceeded its authority, the court may modify the decision of the commission and may issue such superceding approval or denial of the application with such conditions as the court in its discretion deems appropriate.

In passing upon the appropriateness of installing windows in the windowless boat house, the commission had no authority to prohibit their installation unless the windows would be obviously incongruous to the purposes of the Act.[2] The purposes are primarily to preserve historical landmarks and insure compatibility with other structures.[3] The trial judge found that the windows would not be incongruous or historically inappropriate. These findings of fact are final and conclusive[4] if these findings are supported by substantial evidence.

There was evidence that the boat house had been constructed in approximately 1900, was approximately 32 feet long by 22 feet wide, and was in a highly deteriorated condition. Expenses involved in stabilizing the building were in excess of $25,000, and it would take $30,000 to $35,000 to complete the restorations. The boat house had been used to store up to 3-4 boats during the winter and had also been used to store gear, tackle and other fishing related items as well as also having some recreational

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[1] In the circumstances of this case, the failure of the committee to give reasons for the denial does not require a remand.

[2] Act, Section 10. "In passing upon appropriateness, the Committee shall consider, among other things, the historical value and significance of the building or structure, the general design, arrangement, texture, material and color of the features, sign or billboard involved and the relation of such factors to similar factors of buildings and structures in the immediate surroundings. The Committee shall consider settings, relative size of buildings and structures, but shall not consider detailed designs, interior arrangement and other building features not subject to public view. The Committee shall not make any recommendations or requirements except for the purposes of preventing changes in exterior architectural features obviously incongruous to the purposes set forth in this Act. The Committee shall consider the energy advantage of any proposed solar or wind device." (Emphasis added.)

[3] Act, Section 1. "The purpose of this Act is to promote the general welfare of the inhabitants of the applicable regional member towns so included, through the promotion of the educational, cultural, economic, aesthetic and literary significance through the preservation and protection of buildings, settings and places within the boundaries of the regional district and through the development and maintenance of appropriate settings and the exterior appearance of such buildings and places, so as to preserve and maintain such regional district as a contemporary landmark compatible with the historic, cultural, literary and aesthetic tradition of Barnstable County, as it existed in the early days of Cape Cod, and through the promotion of its heritage." (Emphasis added.)

[4] Act, Section 11.

use. No windows were placed in the building because, at the time of construction, the location of the building was very isolated, and the expense of installing windows at that time was a consideration. There are two other boat houses in the Barnstable Village area, both of which have windows. This boat house was unique in that it was the only one the various witnesses could recall anywhere on Cape Cod that had no windows.[5] The addition of windows would provide both light and ventilation to the boat house which is very hot in the summer. The windows would be compatible with the appearances of the present day neighborhood.

Based on this evidence, we find no error in the trial judge's determination that the installation of the windows is not incongruous with the purpose of the Act.

Report dismissed.

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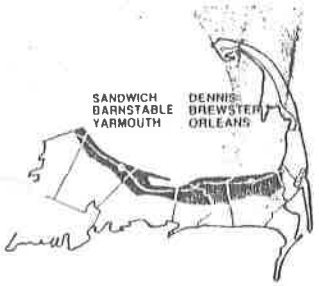
[5] The commission also seeks review of the admission into evidence of various photographs and pictures from books showing other boat houses in other areas of Cape Cod, on the grounds that they are not relevant. If there was in existence a written statement of reasons given for the rejection of the owner's application, these photographs and pictures might very well be irrelevant. Absent such statement of reasons and the corresponding narrowing of issues, we find no error in the allowance of these photographs into evidence.

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION
P.O. Box 140, Barnstable, Massachusetts 02630-0140

STANDARDS FOR APPROPRIATENESS

"Appearance of Massiveness"



Old King's Highway Regional Historic District Commission
P.O. Box 279, Hyannis Mass. 02601 Telephone: 617-775-1766

JOHN MCMULLEN and
SUSAN MCMULLEN

v. Decision #87-27

OLD KING'S HIGHWAY REGIONAL HISTORIC
DISTRICT COMMITTEE FOR THE TOWN OF
BREWSTER

On Tuesday, September 29, 1987 the Commission held a hearing on Appeal #87-27 filed by John McMullen and Susan McMullen seeking review of a decision by the Brewster Historic District Committee which had denied a Certificate of Appropriateness for a new building at 2655 Main Street, Brewster, Massachusetts.

Present were Ron Lindholm, Dennis; Milton Smith, Yarmouth; Michael Shay, Brewster; John Blaisdell, Barnstable; Robert G. Brown, Commission Counsel; John McMullen and Susan McMullen, Applicants; John Ingwerson, Architect for the Applicants; and Attorney Adrienne Blair for the Applicants.

The Committee's decision had been filed with the Town Clerk on September 10, 1987, and the appeal entered with the Commission on September 15, 1987, within the ten day appeal period.

John Ingwerson of Architectural Design, Inc. addressed the Commission on behalf of the Applicants and presented a model of the proposed building. He explained that the property is currently used as a Cumberland Farms convenience store. He stated that although the building would be twice the size of the existing building he did not consider it to be a large development. He described the structure to be built as being of wood with shingles and white trim. He stated that the windows would be divided windows and compared this to other buildings in the area that are small and with boxed windows. In answer to a question from Commissioner Milton Smith of Yarmouth, Mr. Ingwerson stated that the roofline would extend about ninety feet.

John McMullen, Applicant and Adrienne Blair, Attorney for the Applicants both addressed the Commission and stated that the Applicants had appeared before the Brewster Committee two weeks before the hearing and that no opposition was heard from the Committee members and that the Committee members had not familiarized themselves with the site.

Michael Shay, representing the Brewster Committee, addressed the Commission to explain the Brewster Committee's reasons for denial. He directed the Commission to the Brewster Committee's reasons for denial. Additionally he said that at the hearing there was no indication as to how the building would sit on the lot. Although the building in isolation may look compatible it is not compatible when evaluated according to the purposes of the Historic District Act. He stated that although the building does cover only 15% of the site other factors, such as the color of the building, need to be taken into consideration. In answer to the assertion that the Committee members had not familiarized themselves with the site, he stated that the Committee members were very familiar with the site as it is prominent in Brewster.

After lengthy discussion the Commission made the following determination.

1. That the Brewster Historic District Committee did not act in an arbitrary, capricious and erroneous manner in denying the Applicants' Certificate of Appropriateness and that the Appeal be denied. 3-0-1

Any person aggrieved by this decision has a right to appeal to the District Court Department, Orleans Division, within 20 days of the filing of this decision with the Brewster Town Clerk.

Peter L. Freeman (r)

Peter L. Freeman
Chairman

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE,SS.

DISTRICT COURT DEPARTMENT
ORLEANS DIVISION
Civil Docket No. 28175

JOHN P. McMULLEN and
SUSAN M. McMULLEN,
Plaintiffs

vs.

THE OLD KING'S HIGHWAY REGIONAL
HISTORIC DISTRICT COMMISSION,
Defendant

FINDINGS, RULINGS and

ORDER FOR JUDGMENT

This is an appeal under Section 11 of the Old King's Highway Regional Historic District Act (Ch. 47 of the Acts of 1973, as amended).

The Brewster Historic District Committee (hereinafter the town committee) conducted a hearing as required by the Act and filed a decision denying the application for permit.

There were essentially three basis for the denial of the permit: First, in terms of massiveness, the proposal is approximately twice the size and scope of the existing buildings on the site; Secondly, the size and length of the proposed roof, unbroken except by small dormers was a problem, creating incongruity vis a vis the surrounding neighborhood; Thirdly, in terms of color, the design was rather monochromatic which enhanced the appearance of massiveness. The paucity of fenestration on one side makes it appear massive.

I heard the evidence de novo, and I find that the denial was not unreasonable, arbitrary or capricious. The Committee may properly consider the general design, arrangement, texture material and color of the structure in relation to the surrounding neighborhood. The findings in relation to massiveness, color and design were substantiated in the evidence introduced before me. I find no evidence of substantial hardship so as to warrant a variance under Section 10 of the Act.

I order that judgment enter that the Committee's denial of the application did not exceed its statutory authority, and was not arbitrary or capricious, and is therefor affirmed.

The appellant argues that the reasons for the denial were not related to the purpose of the Act. I conclude otherwise. Size, structure and color are within the purpose of the Act. I further rule that the Committee was not in error in declining to find a variance. I rule that the burden of raising the issue of hardship is upon the applicant.

The court declines to act upon Request For Findings of Fact. See Rule 52, Dist./Mun. Cts. R. Civ. P. The applicants' Request for Rulings are disposed of as follows:

Allowed: 6, 7

Denied: 1, 2, 3, 4, 5

JUDGMENT

The cause came on for hearing before the court (Welsh, J.) and was argued by counsel. Whereupon, in consideration thereof, it is adjudged and ordered that:

1. The Commission's action affirming the decision of the town committee is within the scope of its authority, and;
2. Said action was neither arbitrary, capricious, or erroneous, and;
3. Said action be, and hereby is, affirmed.

By the Court (Welsh, J.)

Acting Clerk

Approved as to form:

Robert A. Welsh, Jr.
Presiding Justice

June 21, 1988

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION
P.O. Box 140, Barnstable, Massachusetts 02630-0140

STANDARDS FOR APPROPRIATENESS

"Wind Mill House Structure"

Old King's Highway Regional Historic District Commission
P.O. Box 279, Hyannis Mass. 02601 Telephone: 617-775-1766

EVERETT PAANANEN and
MARY PAANANEN

v.

Decision #89-3

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMITTEE FOR THE TOWN OF BARNSTABLE

TOWN CLERK
BARNSTABLE, MASS.
'89 MAR 3 A10:28

On Tuesday, March 28, 1989 the Commission held a hearing Appeal #89-3 filed by Everett Paananen and Mary Paananen seeking reversal of a decision by the Barnstable Historic District Committee which had denied a Certificate of Appropriateness for the construction of a dwelling to be located adjacent to 139 West Main Street, West Barnstable, Massachusetts.

Present were Janet Francis, Brewster; Paul McGuinness, Dennis; Bill Sheppard, Yarmouth; Peter Freeman, Barnstable; Robert G. Brown, Commission Counsel; Peter A. Sundelin, Attorney for Everett and Mary Paananen; and Everett Paananen.

The Committee's decision had been filed with the Town Clerk on February 23, 1989, and the appeal entered with the Commission on March 3, 1989.

Prior to the start of the hearing, Peter Freeman relinquished the duties of Chairman to Paul McGuinness who chaired the hearing as Chairman Pro Tem.

Attorney Peter Sundelin addressed the Commission after distributing a packet of informational materials relating to his presentation. He stated that there were three areas of disagreement with the Committee's decision. He stated that there was disagreement with the Committee's opinion that the design would be a mimicry of older designs in that this can be said about nearly every new structure built in the District. He then said there was disagreement with the Committee's contention that windmills were not historic to the area, citing articles mentioning the existence of windmills in the general area in the 17th, 18th and early 19th century, specifically the Scorton Mill which was located near the Applicants' building site and also the mills located at Cobb's Hill in Barnstable and mills in Hyannis. Finally, he stated there was disagreement with the Committee's opinion that the structure would clash with others in the area. He stated this would be true but that it would not be such a bad thing in that there is a tendency towards too much homogenization in the District.

Everett Paananen, Applicant, addressed the Commission and explained the surrounding area, describing the structures on the abutting lots and said that the abutters were not concerned so much about the structure as they were about the location of the driveway. Attorney Sundelin added that those that had objected did so out of personal taste and not on historic criteria.

Peter Freeman, representing the Barnstable Committee, addressed the Commission to explain the Barnstable Committee's reasons for denial. He cited the minutes of the Committee hearing which had earlier been mailed to all of the Commissioners. He said the Committee agreed that homogenization is not a good thing for the District but also stated that in this case there were matters of design and compatibility. He stated that the homes that are built now are the result of continuity and that this is not continuity as there is a 200 year gap in the existence of windmills. He added that windmills are not historically indigenous to the area. With regard to design and compatibility, he described the proposed structure as a long box with a mill in an area where the homes were not of such massive size.

After lengthy discussion the Commission made the following determinations:

1. That the Barnstable Historic District Committee did not act in an arbitrary, capricious and erroneous manner in denying the Applicants' Certificate of Appropriateness. 3-0-1

2. That the appeal be denied. 3-0-1

Any person aggrieved by this decision has a right to appeal to the District Court Department, Barnstable Division, within 20 days of the filing of this decision with the Barnstable Town Clerk.

Paul McGuinness
Chairman Pro Tem

'89 APR -3 A10:28

TOWN CLERK
BARNSTABLE, MASS.

Everett Paananen, and another[1] *vs.* Old King's Highway Regional Historic District Commission

Southern District — September 16, 1991.
Present: Dolan, P.J., Hurley & Martin, JJ.

Administrative, Historic district committee; Certificate of appropriateness.

Report of court's reversal of trial court decision and denial of plaintiffs' application for certificate of appropriateness. Action heard in the Barnstable Division by Richard O. Staff, J.

Peter Sundelin for the plaintiffs.
Robert G. Brown for the defendant.

Dolan, P.J. Plaintiffs own vacant land in West Barnstable that is within the Old King's Highway Regional Historic District ("historic district"). In order to obtain the certificate of appropriateness required for new construction in the historic district, plaintiffs applied to the Barnstable Old King's Highway Historic District Committee ("committee") for permission to build a windmill style new house. The committee denied the application and plaintiffs appealed to the Old King's Highway Regional Historic District Commission ("commission"). The commission rejected the appeal and plaintiffs appealed to the Barnstable District Court. The court ruled that plaintiffs should receive a certificate of appropriateness for their proposed house and the commission appealed to this division. We reverse the decision of the district court for the reason that, as a matter of law, plaintiffs did not sustain their burden of proof on the issue of whether the committee exceeded its authority, exercised poor judgment, or was arbitrary, capricious, or erroneous in its action. *Gumley* v. *Board of Selectmen of Nantucket*, 871 Mass. 718, 723-724 (1977). *Marr* v. *Back Bay Architectural Commission*, 23 Mass. App. Ct. 679, 681-682 (1987).

The Old King's Highway Regional Historic District Act, St. 1973, c. 470 as amended, (the Act) requires a committee to pass upon the appropriateness of exterior architectural features of buildings and structures to be erected or renovated within the historic district. Each town within the historic district has such a committee. In passing upon appropriateness, the committees shall consider, among other things, the historical value and significance of the building or structure, the general design, arrangement, texture, material and color of the features involved and the relation of such factors to similar factors of buildings and structures in the immediate surroundings. The committees shall consider settings, relative size of buildings and structures, but shall not consider detailed designs, interior arrangements and other building features not subject to public view. The requirements of the Act are not too indefinite or lacking in sufficient standards. *Opinion of the Justices*, 333 Mass. 773, 780 (1955).

Plaintiffs' proposed windmill style house is approximately 45 feet in length and 21 feet in depth at its deepest point. It is approximately 25 feet in height, with the windmill blades extending somewhat further above the roof. Plaintiffs evolved the windmill style design by visiting historical windmills situated in various locations on Cape Cod. They testified that the design was based upon the dimensions of two of the existing windmills.

The committee denied the plaintiffs' application for the reasons that "A more traditional house would be appropriate. ... Although there certainly were windmills in the past on various parts of the Cape ... there weren't any historically in this area. The proposal has an element of mimicking the past as opposed to promoting Cape Cod

[1] Mary Paananen.

heritage. The building, both because it's a windmill and because it's relatively narrow, would clash with the homes in the area. It would call attention to itself by not fitting in, to the detriment of the area."

The regional commission reviewed the committee's decision to determine if the committee "exceeded its authority or exercised poor judgment, was arbitrary, capricious or erroneous in its action," and rejected plaintiffs' appeal. Under the terms of the Act, plaintiffs then appealed to the district court for the court to "hear all pertinent evidence and determine the facts and if, upon the facts so determined, such determination or approval is found to exceed the authority of the Commission ... modify either by way of amendment, substitution or revocation, the decision of the Commission, and may issue such superceding approval or denial of the application ... with such conditions as ... appropriate." Under this review, the judge must affirm the regional commission's decision unless, on the facts found by the judge, the commission should have concluded that the local committee exceeded its authority, exercised poor judgment, or was arbitrary, capricious, or erroneous in its action. *Anderson* v. *Old King's Highway Regional Historic District Commission*, 397 Mass. 609, 611 (1986).

The court found that wind driven mills were a part of the landscape in the area which is now the historic district. Although no mills now exist in the immediate area where the plaintiffs live, a mill built in 1796 was located less than two miles from the location. The court also found that the proposed structure is not massive. The court determined that the local committee was erroneous and arbitrary, and should have approved plaintiffs' plan. The court then ruled that the decision of the regional committee was erroneous.

The Act provides a right of appeal to this division on matters of law. The commission appealed, alleging error in the court's denial of the request for a ruling that there was insufficient evidence in the record to show that the denial of plaintiffs' application was arbitrary, capricious or erroneous.[2] All other requests for rulings of law were allowed by the court.

The commission's position is that, without any basis in evidence, the trial judge determined that the decision of the local committee was erroneous and arbitrary. The committee gave several reasons for denying plaintiffs' application. If any reason given by that local committee in support of its decision presents a valid basis for its decision, all other reasons for its decision become immaterial. *S. Volpe & Co., Inc.* v. *Board of Appeals of Wareham*, 4 Mass. App. Ct. 357, 358-359 (1976). We consider only the reason that the proposed house "would clash with the homes in the area" because we believe that it is dispositive of this case.

A factor to be considered by the committee is the relation of the proposed house to buildings and structures in the immediate surroundings. If the proposed house would clash with homes in the area, denial of the application would be appropriate. *Marr, supra* at 683. It is not too difficult to imagine how the erection of a few wholly incongruous structures might destroy one of the principal assets of a town. *Opinion of the Justices, supra* at 780.

The report contains no evidence concerning other homes in the area. Without evidence of the size, shape or distance of other homes from plaintiffs' proposed house, the trial judge could not have concluded that the committee was erroneous and arbitrary in determining that plaintiffs' house would clash with other homes in the area. The report states that it "Contains all evidence material to the question reported." While there may in fact have been evidence presented at trial not included in the report, we cannot speculate or assume that any such evidence was before the

[2] The actual request was "That, as a matter of law, there is insufficient evidence in the record to show that the Commission acted in an arbitrary, capricious or erroneous manner in affirming the local Historic District Committee's denial of a Certificate of Appropriateness for the proposed construction on Plaintiffs' property. Denied." We interpret Commission to mean committee. In any event, requests for rulings may not be necessary in a case of this sort. *Anderson, supra* at 611. n.4.

trial judge. *Coco* v. *Lenfest*, 37 Mass. App. Dec. 97, 101 (1967). That the trial judge took a view of the place in question does not add the evidence that the report does not contain. Information acquired at a view is not evidence in a strict and narrow sense, but is of assistance to understand better the testimony that has been or may be presented. *Keeney* v. *Ciborowski*, 304 Mass. 371 (1939).

The person seeking a certificate of appropriateness has the burden of proof on the question of whether the decision should be annulled. *Marr, supra* at 681-682. Absent the required evidence, plaintiffs' case fails. The decision of the trial court is reversed. Plaintiffs' application is denied. So ordered.

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION
P.O. Box 140, Barnstable, Massachusetts 02630-0140

STANDARD OF REVIEW

(Part 2)

"Court Review"

John H. Harris *vs.* Old King's Highway Regional Historic District Commission

Southern District—September 20, 1993.
Present: Dolan, P.J., Hurley & Aguiar, JJ.

Administrative, Regional historic district commission; Order requiring removal of outbuilding.

Report of court's dismissal of plaintiff's report. Action heard in the Barnstable Division by W. James O'Neill, Jr., J.

Michele C. Morley and Robert A. Bianchi for the plaintiff.
Robert G. Brown for the defendant.

Aguiar, J. This appeal raises the issue of whether the trial judge was correct in ruling that a decision of the Old King's Highway Regional Historic District Commission ("Commission") that required plaintiff to remove an outbuilding from his property was arbitrary. There is no error in the Court's ruling.

Plaintiff received approval from the Commission to demolish a small home, a detached garage and a detached shed/studio on his property located on Harris Meadow Lane in Barnstable, and to thereafter construct a larger home with a three car attached garage. During the project, plaintiff determined that the shed/studio was in good condition and applied for a certificate of appropriateness from the Local Town Committee ("Committee") to retain the detached shed/studio. The Committee denied the application and plaintiff appealed to the Commission which also denied the application.

The evidence before the Commission included the testimony of the Commission's chairman, who was also a member of the Committee, that the "bulk, scale and massing" of the new home with attached garage and the shed/studio was too large to be in conformity with the mandate of this Historic District. At the trial, a Ms. Candace Jerkins testified on behalf of the Commission. She testified that she had specialized knowledge and training in architectural history. She stated that she first viewed the subject property on the day of the trial and in her opinion, the shed/studio does not meet the Commission's mandate. She indicated that the proposal of a detached shed/studio along with a house with an attached three car garage was out of character with the locus in question.

The plaintiff's evidence was different. Timothy J. Luff, an architectural designer, testified for the plaintiff that the word "massing" cannot be defined architecturally, but that he understood it to be a building's three dimensional qualities such as height, width and length as well as a building's articulation, configuration and fenestration. He stated that in his opinion, the mass of this property would not be out of keeping with other's in the area. He also testified that numerous other properties in the immediate area have accessory outbuildings.

The trial judge took a view and made findings. He found that the shed/studio is not visible from historic Route 6A. As viewed from Harris Meadow Lane, the entire project cloes not appear any larger than the other houses in the immediate area. Although the house is large, its visual impact from the road was significantly reduced by plaintiff from what it would otherwise appear because he reduced the grade by six feet during construction in order to give his neighbors a better view of the harbor. The true size of the house and the largest visual impact becomes apparent only if one walks past the property going North on Harris Meadow Lane and looks back at the rear area of the house. At this point, the shed/studio is not visible. On the view, the court noted the adjoining property to the East to be an older residence with several outbuildings. As one walks along Route 6A in the area of Harris Meadow Lane, there are numerous

older houses which have several detached outbuildings. As one views all of the Old King's Highway, the court found that it appears to be more of a characteristic of the older homes to have an outbuilding, than not to have an outbuilding.

The trial judge correctly dismissed the contention that the entire project is too big as to its visual impact because he specifically found that it is no larger than some adjacent properties. He also found that it was a characteristic of the area homes to have an outbuilding. While conceding that the Commission and the Committee have broad discretion in these matters, and that deference is to be accorded to the decisions of the Committee and the Commission, the trial judge ruled that the action taken here was taken without any determining principles and therefore can only be described as arbitrary. *Anderson* v. *Old King's Highway Regional Historic District Commission*, 397 Mass. 609, 611 (1986). A denial based upon a subjective determination that the application should be denied because the property consists of a home with an attached garage and a detached outbuilding was arbitrary and an abuse of discretion.

The trial judge denied the Commission's request for ruling of law "That as a matter of law the proceedings before the committee and the commission did not deny the plaintiff of any rights of due process and fundamental fairness." However, the judge stated that any such perceived unfairness did not affect his decision. Because the judge's perceived unfairness in the Commission's procedures did not affect his decision, we do not review the issue of possible unfairness associated with the Commission's chairman testifying before the Commission on behalf of the committee's decision.

Report dismissed.

JOHN H. HARRIS vs. OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION & others. [Note 1]

38 Mass. App. Ct. 447

September 23, 1994 - April 26, 1995

Barnstable County

Present: WARNER, C.J. DREBEN, & GREENBERG, JJ.

Related Cases:

- 421 Mass. 612

Further appellate review granted, 420 Mass. 1107 (1995).

The findings of a District Court judge reviewing a decision of the Old King's Highway Regional Historic District Commission pursuant to the authority granted by St. 1973, c. 470, as amended by St. 1975, c. 845, Section 11, supported his conclusion that the local district committee of the town in question had no rational basis to deny a property owner's application for a certificate of appropriateness to convert a garage into a shed or studio. [451-452] DREBEN, J., dissenting.

CIVIL ACTION commenced in the Barnstable Division of the District Court Department on February 5, 1992.

The case was heard by W. James O'Neill, J.

Robert G. Brown for the defendants.

Robert A. Bianchi for the plaintiff.

GREENBERG, J. This dispute between a landowner and the historic district committee of Barnstable (local committee) has already encompassed two administrative hearings, a review by a judge of the District Court, and an appeal to the Appellate Division of the District Court.

The landowner -- John H. Harris -- wanted to demolish several older buildings on his acre lot and build a new residence. The existing buildings, none of which, by common consent of the parties, has any historical significance, consist of a residential house, a detached garage and another out-building.

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The one acre lot is situated on Harris Meadow Lane, a part of the Old King's Highway Regional Historic District located in Barnstable, created twenty-one years ago by St. 1973, c.

470, as amended by St. 1975, c. 298 and 845; St. 1976, c. 273; St. 1977, c. 38 and c. 503; St. 1979, c. 631; and St. 1982, c. 338 (hereinafter the Act).

Harris applied to the local committee for a certificate of demolition to remove the old buildings and for permission to build a new Cape Cod style home with an attached three car garage. The committee approved both applications. During the reconstruction, Harris determined that the old garage was structurally sound and decided to convert it into a shed or studio. After a public hearing, the local committee denied Harris a certificate of appropriateness that would have enabled him to keep the shed on his lot. It also disallowed two design features of the house: a sky light and the garage doors.

Harris then exercised his rights under Section 11 of the Act by appealing the local committee's decision to the regional historic commission (commission). After a hearing, the commission reversed the local committee's decision regarding the skylight and the garage doors. As to the shed, Harris did not fare as well: the commission found that the local committee "did not act in an arbitrary, capricious or erroneous manner" by denying Harris' application for a certificate of appropriateness.

Thereafter, Harris exercised his rights under the second paragraph of Section 11 of the Act by appealing to the District Court of Barnstable. A judge of that court found facts and concluded that the local committee wrongly denied Harris the certificate of appropriateness for the shed.

The same judge who had heard the case reported it to the appellate division, which, finding no error of law, dismissed the report. The commission appeals from the judgment of the appellate division. [Note 2]

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We begin with a brief overview of the mission of the agency. [Note 3] A principal role of the commission is to "promote the general welfare of the inhabitants [of the district] through preservation and protection of buildings, settings and places within [its] boundaries . . . through the development and maintenance of appropriate settings and exterior appearance of such buildings." St. 1982, c. 338, Section 1. Under Section 5 of the Act, each member town of the historical district is authorized to appoint a district committee consisting of five persons. Their role is to receive and evaluate applications for certificates of appropriateness. To assist the district committees, the commission -- in 1983 -- promulgated guidelines which are contained in a bulletin included in the record. According to the commission's guidelines, each application "shall be judged on the criteria set forth in the Act under Section 10 [Note 4] including therein, but not limited to, historic value and significance, general design, arrangement . . . , relative size and settings."

At the heart of the dispute between Harris and the local committee is whether the size of Harris' new home combined with the shed, as an accessory building, was too large compared

to other homes in the district. [Note 5] The local committee failed to follow the commission's rule published in the Old King's Highway Regional Historic District Bulletin, by neglecting to "state in writing the specific reasons for its [refusal to issue a certificate of appropriateness]." However, as noted in the judge's decision, the committee determined that the "sizing, massing, bulk, and scale" of the new home combined with the shed worked against the issuance of a certificate of appropriateness. The judge reversed the commission's decision, ruling in part that the decision of the local committee was in excess of its authority. In careful findings, he rejected the commission's position that the entire project was too big. Based largely on a view taken of Harris' property and other homes around the locus, he found that the project was no larger than the other homes in the immediate area. He also found that it was characteristic of the older homes in the district to have outbuildings. That finding runs contrary to the testimony of the commission's consultant, who opined at trial that such structures detracted from the historical character of the area.

As might be expected, Harris' evidence on the point differed from that of the commission. An architectural designer testified that the word "massing" cannot be defined architecturally, but that he understood the term to mean a building's three dimensional qualities such as height, width and length as well as a building's articulation, configuration and fenestration. He rendered an opinion that the mass of this property would not be inconsistent with other older buildings in the area. He also testified that numerous other properties in the immediate area have accessory buildings.

After observing the property from the vantage point of Old King's Highway (Route 6A), the judge found the house barely noticeable and the shed completely hidden from view. From Harris Meadow Lane, he found that the lower grade of the lot minimized the visual impact of the house. The old

garage had been moved to the rear side of the lot, and was not visible from the front of the house.

The authority of a District Court judge when reviewing the commission's decision is "analogous to that governing exercise of the power to grant or deny special permits" under local zoning regulations. See and compare Gumley v. Selectmen of Nantucket, 371 Mass. 718 , 719 (1977). [Note 6] The District Court judge must affirm the commission's decision unless on the facts found by the judge, the commission "should have concluded that the local committee exceeded its authority, exercised poor judgment, or was arbitrary, capricious, or erroneous in its action." Anderson v. Old King's Hy. Regional Historic Dist. Commn., 397 Mass. 609 , 611 (1986). [Note 7] As noted, the judge found that it was a feature of the homes in the area to have outbuildings. None of the experts' conclusions, of course, is binding on the

trier of fact, and they may be rejected in whole or in part. Dodge v. Sawyer, 288 Mass. 402 , 408 (1934).

Further, he found that there was "little indication at the appeal hearing (and nothing in writing from the [local] Committee) as to how the shed/studio did not conform to the Historic District Commission Mandate." "[F]indings which rest on a view are sometimes unassailable, unless the record is made to reflect the particular observances which underlie the findings." Consiglio v. Carey, 12 Mass. App. Ct. 135 , 138 (1981). We conclude that the judge's findings have adequate support in the record.

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Substantial deference ought to be afforded to the determination of appropriateness or lack thereof by the commission. However, the discretion of the commission and of the town committee is not without bounds. Section 11 of the Act permits the court to "issue such superceding approval or denial of the application with such condition as said district court in its discretion deems appropriate, and [the court] shall have all of the powers to act in the matter that are available to a court of general equity jurisdiction."

A principal purpose of the Act is to harmonize buildings located in the historic area and to suppress the obviously incongruous. Sleeper v. Old King's Hy. Regional Historic Dist. Commn., 11 Mass. App. Ct. 571 , 574 (1981). We do not construe the Act as requiring that the architectural and cultural motif be frozen at a particular moment in the history of Cape Cod. The mandate of the Act is not that one sort of design or configuration be preserved to the exclusion of another, but that the cultural heritage in its entirety be preserved.

We conclude, therefore, that there is no rational basis for the district committee's decision. See Howe v. Health Facilities Appeals Bd., 20 Mass. App. Ct. 531 , 534 (1985).

Order dismissing report affirmed.

DREBEN, J. (dissenting). Before setting out my reasons for disagreeing with the majority's conclusion that "[t]here seems no rational basis for the committee's decision in this instance," it is important to consider the roles of the committee, the commission, and the District Court in determining whether the plaintiff may keep his shed.

As mandated by section 10 of the Act, "In passing upon appropriateness, demolition or removal, the committee shall determine whether the size, features, demolition or removal . . . involved will be appropriate for the purposes of this [A]ct." That purpose, as set forth in section 1, is to promote the general welfare through "the preservation and protection

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of buildings, settings and places . . . and through the development and maintenance of appropriate settings and the exterior appearance of such buildings and places, so as to preserve and maintain such regional district as a contemporary landmark compatible with the historic, cultural, literary and aesthetic tradition of Barnstable county, *as it existed in the early days of Cape Cod*, and through the promotion of its heritage." (Emphasis supplied.) [Note Dissent-1]

The committee had originally approved the demolition of a detached shed and the construction of a new house with an attached three car garage. After the fact, that is, after the house and garage were built, the plaintiff wanted to retain the shed, but the committee refused permission.

As a person aggrieved by a local committee's determination, the plaintiff appealed to the regional commission. Recognizing that its "initial function is not to exercise its independent judgment on the facts, but rather to determine whether the local committee erred in some respect," Anderson v. Old King's Hy. Regional Historic Dist. Commn., 397 Mass. 609 , 611 (1986), the commission, after hearing, upheld the committee with regard to the shed. In its decision, the commission noted that the committee had explained its denial by pointing out that the original plan "de-emphasized the massing and size of the home," that, in any event, new construction of three car garages are discouraged, and that the three car garage and additional outbuilding were "just too much." The representative of the committee also testified before the commission that the "ultimate issue was not design, per se, but historic compatibility."

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Aggrieved again, the plaintiff appealed to the local District Court. That court is to hear evidence and determine the facts using a standard of review "analogous to that governing exercise of the power to grant or deny special permits." Anderson, supra, at 611. "Thus the judge must affirm the regional commission's decision unless, on the facts found by the judge, the commission should have concluded that the local committee exceeded its authority, exercised poor judgment, or was arbitrary, capricious, or erroneous in its action." Ibid. It is the committee's evaluation, and not the judges's, of the historic compatibility of the buildings with the tradition of the county as it existed in the early days of Cape Cod which is controlling. See Subaru of New England v. Board of Appeals of Canton, 8 Mass. App. Ct. 483 , 488 (1979).

As stated in the report to the Appellate Division, there was evidence before the judge from a consultant in historic preservation that outbuildings were built in the post-World War II period and that such buildings did not exist at the turn of the century. The consultant noted that the original application was for the demolition of a single-family house with detached outbuildings and their replacement with a single-family house with an attached garage. Now sought, was a single-family house with an attached garage and with a detached outbuilding. In her opinion, this design was not appropriate to the historic character of the area.

The District Court judge did not dispute the consultant's testimony. Indeed in his report setting forth the relevant evidence, he indicated that the evidence "tended to show" what he summarized as the consultant's testimony. In his findings, which under section 11 of the act are conclusive, the judge primarily discussed the limited visual impact of the shed-studio and noted that "it appears to be more of a characteristic of the older homes to have an outbuilding." The judge did not explain what his reference to "older homes" meant, and, except for noting the consultant's testimony, he did not in any way discuss the historic compatibility of the lot's buildings with the tradition of the county in the early days.

Since on the evidence found by the judge there was a basis for the committee's determination of historic incompatibility, and since such a decision is for the committee and not the district judge, I disagree with the majority's conclusion that there was no rational basis for the committee's denial of the certificate of appropriateness. Accordingly, I would reverse the decision of the district judge that the decision of the local committee, as ratified by the commission, was "in excess of its authority in that it is arbitrary, and in accordance with the purposes of the Old King's Highway Regional Historic District Act." [Note Dissent-2]

FOOTNOTES

[Note 1] Peter Freeman, chairman of the commission, Avard Craig, Janet Francis, David Moeller and Christopher Miner, individual members.

[Note 2] "This court's review is on the District Court report," Anderson v. Old King's Hy. Regional Historic Dist. Commn., 397 Mass. 609 , 611 (1986), including the written decision and findings of the trial judge and pleadings necessary for an understanding of the questions involved. See Worldwide Commodities, Inc. v. Amicone, Co., 36 Mass. App. Ct. 304 , 306 & n.3 (1994).

[Note 3] For a more detailed discussion of the function and procedures of the commission, see Sleeper v. Old King's Hy. Regional Historic Dist. Commn., 11 Mass. App. Ct. 571 (1981).

[Note 4] Section 10, in pertinent part, reads as follows:

"In passing upon appropriateness, the committee shall consider, among other things, the historical value and significance of the building or structure, the general design, arrangement, texture, material and color of the features, sign or billboard involved and the relation of such factors to similar factors of buildings and structures in the immediate surroundings. The committee shall consider settings, relative size of buildings and structures, but shall not consider detailed designs, interior arrangement and other building features not subject to public view. The committee shall not make any recommendations or requirements except for

the purpose of preventing changes in the exterior architectural features obviously incongruous to the purposes set forth in this act."

[Note 5] A building is incidental or accessory if it is (1) subordinate and minor in significance and (2) attendant or concomitant to the principal structure. Harvard v. Maxant, 360 Mass. 432 , 438 (1971).

[Note 6] The Nantucket Act provides: "Any person or the Historic District Commission, aggrieved by a decision of the board of selectmen, may appeal to the Superior Court sitting in equity for the County of Nantucket; . . . The court shall hear all pertinent evidence and determine the facts and upon the facts so determined, annul such decision if found to exceed the authority of the board or make such other decree as justice and equity may require." St. 1970, c. 395, Section 12.

[Note 7] The Old King's Highway Act seems to go further by giving the District Court power to "modify either by way of amendment, substitution, or revocation, the decision of the commission and . . . issue such superceding approval or denial of the application with such condition as said district court in its discretion deems appropriate. . . ." St. 1973, c. 470, Section 11, as amended by St. 1975, c. 845.

[Note Dissent-1] In its entirety, section 1 of the Act entitled "purpose" reads as follows: "The purpose of this [A]ct is to promote the general welfare of the inhabitants of the applicable regional member towns so included, through the promotion of the educational, cultural, economic, aesthetic and literary significance through the preservation and protection of buildings, settings and places within the boundaries of the regional district and through the development and maintenance of appropriate settings and the exterior appearance of such buildings and places, so as to preserve and maintain such regional district as a contemporary landmark compatible with the historic, cultural, literary and aesthetic tradition of Barnstable county, as it existed in the early days of Cape Cod, and through the promotion of its heritage."

[Note Dissent-2] "This court's review is on the District Court report just as was the review by the Appellate Division." Anderson v. Old King's Hy. Regional Historic Dist. Commn., 397 Mass. 609 , 611 (1986).

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JOHN H. HARRIS *vs.* OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION.

Barnstable. December 7, 1995. - January 5, 1996.

Present: LIACOS, C.J., ABRAMS, O'CONNOR, GREANEY, & FRIED, JJ.

Historic District Commission, Decision, Appeal. *Practice, Civil*, Historic district appeal.

Discussion of the standards of review applicable to appeals to the Old King's Highway Regional Historic District Commission and to the District Court under the provisions of St. 1973, c. 470, as amended by St. 1975, c. 845, and to the Appellate Division of the District Court and to the Appeals Court and the Supreme Judicial Court, respectively, from a decision of the Barnstable historic district committee. [614-616]

The Barnstable historic district committee had a rational basis for its denial of a certificate of appropriateness for the proposed conversion of a garage to a shed or studio and the Old King's Highway Regional Historic Commission correctly upheld the committee's decision; a judge of the District Court, reviewing the commission's decision, erred in concluding that the committee's determination was arbitrary. [616-618]

CIVIL ACTION commenced in the Barnstable Division of the District Court Department on February 5, 1992.

The case was heard by *W. James O'Neill*, J.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Robert G. Brown for the defendant.

Robert A. Bianchi for the plaintiff.

GREANEY, J. This case is here on further appellate review and requires us to decide whether a District Court judge, who reviewed a decision of the Old King's Highway Regional Historic District Commission (regional commission), properly concluded that the Barnstable historic district committee (local committee) had no rational basis for denying the plaintiff, John H. Harris, a certificate of appropriateness to

convert a garage on his property into a shed or studio. The judge reported his decision to the Appellate Division of the District Courts which discharged the report. The regional commission appealed. A divided panel of the Appeals Court concluded that the judge had ruled correctly and affirmed the Appellate Division's dismissing the report and sustaining the judge's decision. 38 Mass. App. Ct. 447 (1995). We granted the regional commission's application for further appellate review. We conclude that the regional commission acted properly in upholding the local committee's decision. Consequently, we reverse the order of the Appellate Division and direct the entry of a judgment in the regional commission's favor.

The background of the case is as follows. The plaintiff owns a one-acre parcel of land on Harris Meadow Lane in Barnstable. The plaintiff's land lies within the Old King's Highway Regional Historic District created by St. 1973, c. 470 (Act).[1] The plaintiff applied to the local committee for a certificate of demolition which would allow him to demolish a residential house, a garage, and an outbuilding on his land. (None of the three buildings had any historical significance.) The plaintiff also applied for a certificate of appropriateness which would authorize the construction of a new home with an attached three-car garage. The local committee held a hearing and approved both certificates with minor revisions not in issue on this appeal.

The plaintiff constructed the new house, but, in the course of construction, decided not to tear down the old garage and instead sought to convert it into a shed or studio. The plaintiff applied to the local committee for a certificate of appropriateness for this purpose, which was denied after hearing. The plaintiff appealed under § 11 of the Act, as amended, to the regional commission which, after hearing, upheld the local committee's decision denying the plaintiff a certificate to

[1]The Act has been subsequently amended by St. 1975, c. 298 and c. 845; St. 1976, c. 273; St. 1977, c. 38 and c. 503; St. 1978, c. 436; St. 1979, c. 631; and St. 1982, c. 338.

keep the garage and to convert it into a shed or studio.[2] The plaintiff next appealed under the second paragraph of § 11 of the Act, as amended, to the Barnstable District Court, where a judge found facts and concluded that the regional commission had erred in upholding the local committee's denial of the certificate of appropriateness for retention of the old garage. The judge reported the case to the Appellate Division which, finding no prejudicial error, dismissed the report. An appeal to the Appeals Court ensued, with our subsequent grant of the regional commission's application for further appellate review.

We now turn to the merits by first outlining the governing law. The plaintiff was required by the Act, as amended, to apply to the local committee for certificates of appropriateness approving the demolition of the buildings on his land, the construction of a new home and three-car garage, and, ultimately, the retention and conversion of the old garage. The local committee is instructed by § 10 of the Act, as amended, to consider such factors as the historical value and significance of the buildings involved and whether the size, features, demolition, removal, or construction of the buildings will further the purpose of the historic district. Section 1 of the Act, as amended, sets forth its purpose in terms of the promotion of the welfare of the historic district through "the preservation and protection of buildings, settings and places . . . and through the development and maintenance of appropriate settings and the exterior appearance of such buildings and places, so as to preserve and maintain such regional district as a contemporary landmark compatible with the historic, cultural, literary and aesthetic tradition of Barnstable county, as it existed in the early days of Cape Cod, and

[2]The regional commission reversed the local committee's decision which had disallowed two design features of the plaintiff's house: a skylight and the design of the garage doors. These are the items previously referred to which are not in issue.

through the promotion of its heritage."[3]

A person aggrieved by a local committee's decision may appeal to the regional commission under § 11 of the Act, as amended. The regional commission can annul or revise the local committee's determination only if the local committee "exceeded its authority or exercised poor judgment, was arbitrary, capricious, or erroneous in its action." *Id.* "The regional commission's initial function is not to exercise its independent judgment on the facts, but rather to determine whether the local committee erred in some respect. See *Gumley* v. *Selectmen of Nantucket*, 371 Mass. 718, 723 (1977)." *Anderson* v. *Old King's Highway Regional Historic Dist. Comm'n*, 397 Mass. 609, 611 (1986).

A person who, in turn, is aggrieved by the regional commission's decision may appeal under the second paragraph of § 11 of the Act, as amended, to the local District Court. The judge is directed to hear the pertinent evidence and to find the facts which are considered "final and conclusive." *Id.* The standard of review governing the judge is "analogous to that governing exercise of the power to grant or deny special permits" under a local zoning bylaw. *Gumley* v. *Selectmen of Nantucket*, *supra* at 719, 724. The judge is required to affirm the regional commission's decision unless, on the facts found by the judge, the regional commission should have concluded that the local committee exceeded its authority, exercised poor judgment, or was arbitrary, capricious, or er-

[3]In its entirety, § 1 of the Act, as amended, entitled "purpose" reads as follows:

> "The purpose of this act is to promote the general welfare of the inhabitants of the applicable regional member towns so included, through the promotion of the educational, cultural, economic, aesthetic and literary significance through the preservation and protection of buildings, settings and places within the boundaries of the regional district and through the development and maintenance of appropriate settings and the exterior appearance of such buildings and places, so as to preserve and maintain such regional district as a contemporary landmark compatible with the historic, cultural, literary and aesthetic tradition of Barnstable county, as it existed in the early days of Cape Cod, and through the promotion of its heritage."

roneous in its action. *Gumley* v. *Selectmen of Nantucket*, *supra* at 723-724. See § 11 of the Act, as amended. Appeals from the final judgment entered in the District Court may be pursued to the Appellate Division and to the Appeals Court. These appeals concern only issues of law.[4] See *Anderson* v. *Old King's Highway Regional Historic Dist. Comm'n*, *supra* at 611.

The chairman of the local committee explained to the regional commission that the local committee had denied the final certificate sought by the plaintiff because (1) the local committee had already approved a new three-car garage on the site despite the fact that construction of three-car garages was discouraged; (2) the "sizing, massing and scale" of the plaintiff's final proposed project were "just too much"; (3) "most of the buildings cited by [the plaintiff as similar to his completed project] make very different statements as they address Route 6A [Old King's Highway]"; and (4) "[m]ost of the homes depicted do not have a three car garage with an additional outbuilding." The chairman of the local committee also described plans that had been previously approved by the regional commission and stated that, "while there may be similarities with other houses in the [d]istrict, each house is different, and the ultimate issue [with respect to the plaintiff's completed project] was not design, per se, but historic compatibility."[5] We construe the local committee as

[4]The Appeals Court's, and this court's, review is of the report made in the District Court. *Anderson* v. *Old King's Highway Regional Historic Dist. Comm'n*, 397 Mass. 609, 611 (1986).

[5]The dissenting Justice in the Appeals Court noted in her separate opinion that there was additional expert evidence before the judge on the historic incompatibility of the outbuilding. "As stated in the report to the Appellate Division, there was evidence before the judge from a consultant in historic preservation that outbuildings were built in the post-World War II period and that such buildings did not exist at the turn of the century. The consultant noted that the original application was for the demolition of a single-family house with detached outbuildings and their replacement with a single-family house with an attached garage. Now sought, was a single-family house with an attached garage and with a detached outbuilding. In her opinion, this design was not appropriate to the historic character of the area." 38 Mass. App. Ct. 447, 454 (1995) (Dreben, J., dissent-

saying that (1) it had approved the three-car garage with reluctance because of the size and nonhistoric character of the resulting main structure; (2) they would not also have approved the retention of the old garage had this been presented as part of the initial plan because it would result in a large freestanding outbuilding and a large attached outbuilding (three-car garage) on a comparatively small site; and (3) in addition to size, the configuration of the resulting project was an essentially modern one which was not in keeping with the over-all character of the historic district.

The judge took a view of the plaintiff's property and the general area. The judge stated that, although the plaintiff's house was large, a reduction in grade reduced the visual impact of the building from the road. He also stated that the entire project (house, garage, and shed or studio), viewed from Harris Meadow Lane, did not appear any larger than other homes in the immediate area. The judge noted as well that "the adjacent property to the [e]ast [is] an older residence with several out-buildings" and that "along Route 6A in the area of Harris Meadow Lane, there are numerous older homes which have several detached outbuildings." The judge concluded that the action taken by the local committee was "done without any determining principles and therefore can only be described as arbitrary."

We conclude that the basis for the local committee's determination outlined above was reasonable, and that the committee could conclude that, with the addition of the shed or studio, the plaintiff's project went beyond what had been generally permitted (and was desired) in the historic district and was incompatible with the district. The local committee possessed a substantial measure of discretion in deciding whether the plaintiff's applications for certificates of appropriateness were in congruity with the historic district. The local committee was required to balance the conflicting interests of the plaintiff to use his property as he saw fit with the

ing). This testimony supports the local committee's decision as upheld by the regional commission.

rights of others in the district to have the heritage, culture, and physical environment therein (as encompassed in the words "early days of Cape Cod" used in § 1 of the Act, as amended), preserved reasonably intact. Since the local committee's decision had a rational basis, the judge should not have set it aside.

The order of the Appellate Division dismissing the report is reversed. A new order is to be entered in the Appellate Division reversing the judgment of the District Court and directing the entry of a judgment in the District Court affirming the decision of the regional commission.

So ordered.

SANDWICH BARNSTABLE YARMOUTH DENNIS BREWSTER ORLEANS

Old King's Highway Regional Historic District Commission

P.O. Box 279, Hyannis Mass. 02601 Telephone: 617-775-1766

TOWN CLERK

BARNSTABLE HOUSING AUTHORITY

v.

Decision #90-7

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMITTEE FOR THE TOWN OF BARNSTABLE

On Tuesday, May 15, 1990 the Commission held a hearing on Appeal #90-7 filed by the Barnstable Housing Authority seeking reversal of decisions by the Barnstable Historic District Committee which had denied a Request for an Amendedment of a Certificate of Appropriateness and had determined that a Certificate of Appropriateness had previously issued had lapsed regarding property located at Route 149, West Barnstable, Massachusetts.

Present were Lee C. Davis, Barnstable; Christopher Miner, Orleans; Brendan Joyce, Dennis; Willard Sheppard, Yarmouth; Allen Abrahamson, Sandwich;Robert G. Brown, Commission Counsel; Jane Davis, Esquire, Attorney for the Barnstable Housing Authority and C. Michael Toner, Executive Director of the Barnstable Housing Authority.

The Committee's decision had been filed with the Town Clerk on April 10, 1990, and the appeal entered with the Commission on April 19, 1990, within the ten day appeal period.

Prior to the start of the hearing, Peter L. Freeman relinquished the duties of Chairman to Christopher Miner, Vice-Chairman, who proceeded to preside as Chairman. Mr. Freeman also recused himself from the hearing and left the hearing room. Lee C. Davis replaced Mr. Freeman as the Barnstable representative.

Attorney Jane Davis addressed the Commission and stated that a Certificate of Appropriateness had been issued for the proposed project in December of 1986. She stated that there were a number of meetings regarding the projectand that a minor modification had been allowed in 1987 and that a Comprehensive Permit, pursuant to M.G.L. c. 40B had been issued by the Town of Barnstable Zoning Board of Appeals in January of 1988. In February of 1988 the Barnstable Housing Authority applied for a minor modification and it was approved in March of 1988. She stated that the Certificate in question was still valid in that a Certificate is valid for one year or until the expiration of a building permit, whichever is later. She proceeded to go through the entire chronological history of the project and stated that, due to the action by the Barnstable Committee, bids for the project had been withdrawn. She introduced C. Michael Toner, the Executive Director of the Barnstable Housing Authority who reiterated the fact that the bids for the project had been withdrawn.

Lee C. Davis, representing the Barnstable Committee, addressed the Commission to explain the Barnstable Committee's reasons for denial and determination. He stated that the Committee had requested the advice of the Counsel of the Regional Commission. He read extensively from the opinions of the Counsel to the Regional Commission which are attached hereto and marked Exhibit "A" and "B" respectively. He stated that it was the position of the Barnstable Committee that the Certificate of Appropriateness had expired and that the Barnstable Housing Authority should reapply.

After very lengthy discussion, the Commission made the following determinations.

1. That the Barnstable Committee did not act in an arbitrary, capricious or erroneous manner in denying the Request for an Amendment of the Certificate of Appropriateness. 3-0-2.

2. That the Barnstable Committee did not act in an arbitrary, capricious or erroneous manner in determining that the Certificate of Appropriateness had expired. 3-0-2.

3. That the appeal be denied. 3-0-2.

Any person aggrieved by this decision has a right to appeal to the District Court Department, Barnstable Division, within 20 days of the filing of this decision with the Barnstable Town Clerk.

Christopher Miner
Vice-Chairman

Exhibit "A"

ROBERT G. BROWN
ATTORNEY AND COUNSELLOR AT LAW
HYANNIS, MASSACHUSETTS 02601

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(508) 775-9248

POST OFFICE BOX 2187
160 BASSETT LANE

March 20, 1990

Mr. Robert Stewart, Chairman Pro Tem
Barnstable Historic District Committee
Old King's Highway Regional Historic District
367 Main Street
Hyannis, Massachusetts 02601

RE: Barnstable Housing Authority
Meetinghouse Way & Lombard Road
West Barnstable, Massachusetts

Dear Mr. Stewart:

I have read your memorandum of March 14, 1990 (a copy of which is attached to this letter) and am pleased to answer as follows:

1. You have asked whether the Certificate of Appropriateness which was issued in December of 1986 expired. It appears from your statement of facts that the applicant did not take any action other than requesting a minor modification pursuant to Section E of the guidelines of the Old King's Highway Regional Historic District. This office would be of the opinion that minor modifications, which are approved without the filing of a new application or a public hearing, do not affect the one (1) year "window" as set forth in Paragraph 5 of Section 6 of Chapter 470 of the Acts of 1973, as amended. As such, in answer to the question "Did the original Certificate of Appropriateness issued in December of 1986 expire?", I would answer yes.

2. You have next asked whether a minor modification which was approved in February of 1988 in any way extended or revived the Certificate of Appropriateness. As stated above, this office is of the opinion that the Certificate of Appropriateness which was issued in December of 1986 expired without the applicant's obtaining a building permit. When a Certificate of Appropriateness expires, the only statutory method to revive the Certificate is to make a new application to the appropriate town committee. As such, in answer to the question "Did the fact that a minor modification was approved in February of 1988 in any way extend or revive the Certificate of Appropriateness?", I would answer no.

3. In light of the answers to the previous two questions, it would appear as though your third question is now not applicable.

4. In your final question you ask if a Comprehensive Permit issued under M.G.L. c. 40B is to be considered a Building Permit under c. 470 of the Acts of 1973 as Amended. The process for the issuance of a comprehensive permit consists of a combined hearing before the city of town zoning board of appeals, at which time the zoning board of appeals, "shall have the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application" (M.G.L. c. 40B, Section 21). As such, the zoning board of appeals effectively takes the place of the building inspector and the comprehensive building permit issued by the town becomes the building permit. An applicant with a comprehensive permit from the town and a Certificate of Appropriateness your the Old King's Highway Regional Historic District (a state agency independent of cabinet authority) would, in this office's opinion fulfill the requirements as set forth in Section 6 of c. 470 of the Acts of 1973, as amended. As such, in answer to the question, "Is a 'Comprehensive Permit' under 40B a 'Building Permit' under OKH statute?", I would answer yes.

If you have any further questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Robert G. Brown

Robert G. Brown

RGB/lk

cc: Old King's Highway Regional
Historic District Commission

Exhibit "B"

ROBERT G. BROWN
ATTORNEY AND COUNSELLOR AT LAW
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160 BASSETT LANE

April 3, 1990

Mr. Robert Stewart, Chairman Pro Tem
Barnstable Historic District Committee
Old King's Highway Regional Historic District
367 Main Street
Hyannis, Massachusetts 02601

RE: Barnstable Housing Authority
Meetinghouse Way & Lombard Road
West Barnstable, Massachusetts

Dear Mr. Stewart:

Please be advised that I have, since my last communication with you, had a chance to speak with Attorney Jane Davis, Counsel to the Barnstable Housing Authority. At that time we discussed the above project. Attorney Davis raised various issues regarding interpretation of the Historic District Act, c. 470 of the Acts of 1973, as amended, which I shall now address.

Attorney Davis inquired as to the interpretation of the last paragraph of Section 6 of the Historic District Act which states:

> "All certificates issued pursuant to this Act shall expire one year from the date of issue, or upon the date of expiration of any building permet issue as to the work authorized by said certificate, whichever expiration date shall be later. The Committee may renew any certificate for an additional term or terms of not over one year provided application for such renewal is received prior to the expiration of said certificate." Id. (emphasis added)

The basic contention, as I understand it, being that the lawful period for action pursuant to a Certificate of Appropriateness will continue to the expiration of a building permit, notwithstanding the fact that the permit may have been obtained after the passing of the one year period mentioned in Section 6. I would disagree with this contention and would be of the opinion that, once the one year period mentioned in Section 6 has passed, no valid building permit may be issued.

Section 6 of the Historic District Act follows closely the wording found in M.G.L. c. 40A, Section 10 which relates to zoning variances and states:

> "If the rights authorized by a variance are not exercised within one year of the date of the grant of such variance they shall lapse, any may be reestablished only after notice and a new hearing pursuant to this section." Id.

The section of c. 40A was discussed in the matter of Hunter's Brook Realty Corporation v. Zoning Board of Appeals of Bourne, 14 Mass.App. 76, 436 N.E.2d 978 (1982) which involved a similar situation. The Massachusetts Appeals Court found that the words in Section 10 were to be construed according to their "common and approved usage", 436 N.E. 2d at 981, and found that "the words used in the last paragraph of Section 10, read in context with the rest of the statute, convey the clear impression that variance rights which are not seasonably exercised will automatically become void;" Id. at 982.

The Historic District Act uses the term "expire" rather than "lapse." "Expire" is defined as meaning "to come to an end; terminate; cease" Webster's NewWorld Dictionary 493 (1982). Its legal definition signifies a "termination from mere lapse of time." Black's Law Dictionary 689 (4th ed. 1957).

Based on these definitions I would conclude and be of the opinion that authorization granted pursuant to a Certificate of Appropriateness becomes automatically void if not exercised within one year and that any building permit issued outside of the one year period (other than authorizations extended pursuant to Section 6) are without force or effect.

Attorney Davis and I also discussed the effect of the meeting which occured between the Barnstable Housing Authority and the Barnstable Historic District Committee in 1988. I would reiterate my earlier opinion to you that your actions did not in any way extend or revive the Certificate of Appropriateness which had been granted by your Committee

in 1986. This opinion is, of course, subject to review by the Old King's Highway Regional Historic District Commission, however, any applicant would first have to exhaust their administrative remedies (in this case filing for a Certificate of Appropriateness through your Committee) before an appeal could be taken to the Regional Commission, assuming the applicant was ultimately aggrieved by the decision of the local committee.

If you have any further questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Robert G. Brown

Robert G. Brown

RGB/lk

cc: Old King's Highway Regional
Historic District Commission

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION
P.O. Box 140, Barnstable, Massachusetts 02630-0140

TOWN COMMITTEE LACKS STANDING TO APPEAL REGIONAL COMMISSION DECISION

ATTORNEY GENERAL & another [Note 1] vs. BARNSTABLE COMMITTEE OF THE OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT.

416 Mass. 1009

December 14, 1993

John C. Creney for the defendant.

Robert D. Smith (Ruth J. Weil with him) for the plaintiffs.

We affirm the summary judgment ordered by a single justice of this court declaring that the defendant has no authority to appeal from a decision of the Old King's Highway Regional Historic District Commission (commission) for the reasons set forth by the single justice.

The narrow issue is whether the Attorney General is entitled to an order in the nature of quo warranto (see Attorney Gen. v. Town Clerk of Hudson, 408 Mass. 1006 [1990]; Mass. R. Civ. P. 81 (b), 365 Mass. 841 [1974]), that the defendant committee has usurped "the franchises and prerogatives of" the town, Attorney Gen. v. Methuen, 236 Mass. 564 , 569 (1921), in appealing to the Barnstable District Court from the commission's reversal of the defendant committee's denial of a new certificate of

appropriateness in connection with a proposed new housing complex of the Barnstable Housing Authority. The town manager of Barnstable acting under the authority granted him by c. II, art. IV, Section 9, of the Barnstable General Ordinances ordered the defendant committee to withdraw from the appeal. The defendant committee voted to continue the litigation.

Members of the defendant committee are "town officer[s]" within Section 9 for the reasons advanced by the single justice. Accordingly, the defendant committee is subject to the authority of the town manager in this context.

Judgment affirmed.

FOOTNOTES

[Note 1] Town manager of Barnstable.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. 92-0127

ATTORNEY GENERAL & another [1]

v.

BARNSTABLE COMMITTEE OF THE OLD KING'S HIGHWAY REGIONAL HISTORICAL DISTRICT

MEMORANDUM OF DECISION

The plaintiffs seek enforcement of an order of the Town Manager of Barnstable (town manager), made pursuant to chapter II, art. IV, §§ 9 through 13 of the General Ordinances of Barnstable. They ask for (1) a declaration that the defendant Barnstable committee (town committee) of the Old King's Highway Regional Historic District (Regional District) has no authority to appeal a decision of the Regional District to the Barnstable District Court, (2) an injunction ordering the defendant to desist from maintaining the appeal, and (3) an order under the general superintendence powers of the court (G. L. c. 211, § 4A) dismissing the District Court action. The plaintiffs have moved for summary judgment.

The Regional District was created pursuant to the Old King's Highway Regional Historic District Act. St. 1973, c. 470, as amended by St. 1975, c. 298, c. 245; St. 1976, c. 273; St. 1977,

[1]Warren J. Rutherford, Town Manager of the Town of Barnstable.

c. 38, 503; St. 1978, c. 436; St. 1979, c. 631; St. 1982, c. 338 (Act). The Act designated a district consisting of those portions of the towns of Sandwich, Barnstable, Yarmouth, Dennis, Brewster, and Orleans lying between State route 6 and Cape Cod Bay. § 2. Within each town in the district a town historic committee was established, consisting of an architect or building contractor and four members elected by those citizens of the town residing within the district. § 5. With some exclusions (§ 7), no building or sign may be erected or displayed within the district without first obtaining a certificate of appropriateness from the town committee. § 6.

The Act states that "[a]ny person aggrieved by the determination of the Committee" may appeal to the Regional Commission. § 11. The Regional Commission consists of the chairs of the six town committees; in addition to hearing appeals from the determinations of town committees and making findings, it sets rules and regulations for the administration of the district by town committees and recommends changes in the Act to the Legislature. § 4. "Any person aggrieved" by the ruling on appeal of the regional commission may appeal to the District Court having jurisdiction over "the affected town." § 11.

The undisputed material facts are as follows. The site in issue in this case lies within the area regulated by the town committee of Barnstable. In 1986, the Barnstable Housing Authority (authority) obtained funding to build a housing complex of thirty-six subsidized apartments for the poor and elderly, and the

Barnstable selectmen agreed to lease an eight-acre parcel to the authority as the site of the complex. In December, 1986, the town committee approved the authority's application for a certificate of appropriateness, and in March, 1988, approved a modification in the authority's plans. In April, 1990, the authority requested approval of another modification in its plans. The town committee denied the application, determining that the original certificate of appropriateness had lapsed because the authority had not obtained a building permit within one year of its issuance. See Act, § 6, par. 5. The authority appealed to both the Regional Commission and the District Court, each of which affirmed the decision of the town committee.

In May, 1990, the authority applied unsuccessfully to the town committee for a new certificate of appropriateness, but, on appeal, the Regional Commission reversed the town committee's determination, finding it arbitrary and capricious, and issued the certificate of appropriateness. The town committee then requested that the town provide funds to pay for an outside attorney so that the town committee could appeal the Regional Commission's decision to the District Court. The town manager, while doubting whether § 14 of the Act (providing for apportionment of district expenses among the member towns) required the town to do so, agreed, and the town committee initiated an action in the Barnstable District Court. The town manager sought to mediate the differences between the town committee and the authority. Unable to resolve these differences, in June, 1991, the town manager, pursuant to his authority under

c. II, art. IV, § 9, of the General Ordinances of the town, ordered the town committee to withdraw from the litigation. In July, 1991, the town committee voted to continue the litigation.

The issue is whether the Attorney General is entitled to an order in the nature of quo warranto directing the town committee that it has usurped "the franchises and prerogatives of" the town. Attorney Gen. v. Methuen, 236 Mass. 564, 569 (1921).[2] He is entitled to such an order unless the town committee has authority to initiate and prosecute litigation in its own behalf independent of the control of the town. In general, the litigation control ordinance under which the town manager sought to order the town committee to drop the litigation is a valid exercise of the town's powers under the Home Rule amendment. Mass. Const. Amend. art. 89, § 6. It has long been recognized that, absent statutory authority to the contrary (see, e.g., G. L. c. 71, § 37F), no department of a city or town has authority to employ its own counsel or bring suit without specific authorization from the town or its agents. Board of Pub. Works of Wellesley v. Selectmen of Wellesley, 377 Mass. 621, 624 (1979), and cases cited. O'Reilly v. Scituate, 328 Mass. 154, 154-155 (1951).

Section 9 provides in part that the town manager shall be the agent of the town to prosecute and defend all suits and proceedings "to which the town or any town officer in his official capacity, is

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[2]Although the writ of quo warranto was abolished, the relief formerly provided under the writ is still available. Mass. R. Civ. P. 81 (b), 365 Mass. 841 (1974). See Attorney Gen. v. Town Clerk of Hudson, 408 Mass. 1006 (1990).

a party." The town committee argues that its members are not town officers within the meaning of the words in § 9, and that, even if they are, the Act overrides the ordinance and gives them independent authority to appeal from a decision of the Regional Commission. I disagree on both points.

The operations of the town committee suggest that it is an agency of the town. Its offices are located in the town office complex. Its clerical staff person is a town employee. It uses letterhead paid for by the town bearing the name of the town and the town seal. Applications for certificates of appropriateness are accepted and processed by a town employee, and the filing fees are paid to the town. But the crucial question is whether the Legislature intended that the town committee not be viewed as town officers. In my opinion, they are town officers under general principles. See Commonwealth v. Dowe, 315 Mass. 217, 223-224 (1943); Attorney Gen. v. Tillinghast, 203 Mass. 539, 543-544 (1909).

The Act creates two different entities: the Regional Commission that represents the interests of the entire district, and in each town a town committee that is intended to see that the goals of the Act are provided for in that part of the district located in the town. The two bodies are separate; they perform separate functions and are funded separately; and their members are chosen separately. The Regional Commission is empowered to apportion expenses among the six towns of the district, and the towns are required to pay their apportioned share. Act, § 14. The

Regional Commission serves as the appeals board for determinations of the town committees and sets rules and regulations for the town committees.

The town committee consists of members elected by the voters of the town residing in the district. Apart from the architect member, at least three of the committee members must be residents of the district. Committee members may be removed for cause by the selectmen, and the selectmen may fill vacancies for unexpired terms. The committee only "may expend such funds as may be appropriated annually" by the town. § 5. It reviews and passes on all applications for certificates within the town. The building inspector in each town has the power and duty to enforce the provisions of the Act. § 12.

From the structure of the Act, it is clear that the committee is an agency of the town, like other statutorily-created agencies. See, e.g., G. L. c. 40, § 8C (conservation commission); G. L. c. 41, § 81A (planning board); G. L. c. 111, § 26 (board of health); Board of Pub. Works of Wellesley v. Selectmen of Wellesley, supra at 625-628 (board of public works). The fact that the committee members may also be "public officers" does not make them immune from municipal control. "It is now well established that officers who have the obligations and immunities of public officers may nonetheless be officers of a municipality." Kaczmarski v. Mayor of Springfield, 346 Mass. 432, 435 (1968).

My conclusion that the town committee members are town officers is consistent with the legislative scheme of town and

regional historic districts and the Home Rule Amendment. Although a town is empowered to create its own town historic district (G. L. c. 40C, § 3), it is obligated by that statute to respect the provisions of special acts creating historic districts within their boundaries (G. L. c. 40C, § 16). Thus, regional and town historic districts may exist side-by-side within a single town. While the town is obliged to respect the provisions of the Act concerning town committees, nothing in the Act is inconsistent with the town's exercising control over the town committee's bringing litigation in the District Court.

Even if the town committee members were not officers of the town, they would have the authority to challenge a decision of the Regional Commission. As a board subordinate to the Regional Commission, it is bound by any decision of the Regional Commission. In essence, to permit the town committee to challenge the Regional Commission would allow the subordinate entity to contest a decision of its superior authority. No statute (certainly not the Act) gives the town committee authority to appeal a decision of the Regional Commission.

Indeed, it would appear that this matter could have been resolved by a motion by the Regional Commission (or any other party) to dismiss the town committee's appeal because it was not a person "aggrieved" by the action of the Regional Commission. See Act, § 11. [3]

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[3]I note but need not discuss the issue of whether G. L. c. 40B, §§ 21-23, relieves the authority of any obligation to appear at all before the town committee.

Summary judgment shall be entered declaring that the Barnstable Committee of the Old King's Highway Regional Historic District Commission has no authority to appeal a decision of the Old King's Highway Regional Historic District Commission and that the Barnstable Committee should dismiss its purported appeal in Barnstable Historic District Comm. v. Old King's Highway Regional Historic Dist. Comm'n, Barnstable District Court No. 90CV-1802. I assume that the town committee as responsible public officials will comply with the law as now defined and will withdraw its appeal promptly. Hence, I shall not order it to do so.

Herbert P. Wilkins

Herbert P. Wilkins
Associate Justice

DATED: March 15, 1993

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-92-0127

ATTORNEY GENERAL & another

vs.

LEE DAVIS & others

JUDGMENT

This matter came before the Court, Wilkins, J., presiding, and in accordance with the Memorandum of Decision of this date:

It is ORDERED and ADJUDGED that the Barnstable Committee of the Old King's Highway Regional Historic District Commission has no authority to appeal a decision of the Old King's Highway Regional Historic District Commission and that the Barnstable Committee should dismiss its purported appeal in Barnstable Historic District Comm. v. Old King's Highway Regional Historic Dist. Comm'n, Barnstable District court No. 90CV-1802.

By the Court (Wilkins, J.),

Susan Keller
Asst. Clerk

Entered: March 15, 1993

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION
P.O. Box 140, Barnstable, Massachusetts 02630-0140

STANDARDS FOR APPROPRIATENESS

"Size of Project"

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS.

DISTRICT COURT DEPARTMENT
BARNSTABLE DIVISION
DOCKET NOS. 9025CV1802 AND
9025CV1809

ROBERT D. STEWART ET AL
PLAINTIFFS

V.

OLD KING'S HIGHWAY REGIONAL
HISTORIC DISTRICT COMMISSION ET AL
DEFENDANTS

FINDINGS OF FACT, RULINGS AND JUDGMENT

LITIGATION BACKGROUND

This is an appeal from a decision of the Old King's Highway Regional Historic District Commission[1] brought pursuant to the second paragraph of Section 11 of the Act. (See Exhibit 1)

The parties to the action preceding this present appeal were the defendant Town of Barnstable Housing Authority, the original applicant for a certificate of appropriateness (See Exhibit 13) requested pursuant to Sections 6 and 8 of the Act, as amended, and, the Town of Barnstable Old King's Highway Historic District Committee, the original plaintiff in this case and

[1]The Old King's Highway Regional Historic District was created by St. 1973, c. 470; amended by St. 1975, c. 298 and c. 845; St. 1976, c. 273; St. 1977, c. 38 and c. 503; St. 1978, c. 436; St. 1979, c. 631; and St. 1982, c. 338.

the agency that acted upon the said application by way of a vote of denial on May 3, 1990. (See Exhibits 8 and 13).

Subsequent to the Committee action denying the application, the Authority appealed the decision to the Commission where the appeal was allowed by annulment of the decision of the Committee and the issuance of a superseding Certificate of Appropriateness (See Exhibit 11).

The Committee thereafter appealed the Commission decision to this Court on August 24, 1990.[2] Several other aggrieved parties also appealed the decision to this Court on August 24, 1990.[3]

The Authority moved to intervene as a real party in interest in 9025CV1809 and Ungerman et al. moved to intervene as real parties in interest in 9025CV1802. The record shows that the Ungerman et al. motion was allowed March 26, 1991. The record is silent on the Authority motion but it clearly was deemed by all to be allowed in view of the record thereafter. Also on March 26, 1991 a joint motion to consolidate these two cases was allowed and the cases are being heard together as one case.

Thereafter the Barnstable Town Manager ordered the Committee to withdraw from the litigation in 9025CV1802. The Committee refused. The Attorney General and the Town

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[2]The Committee appealed the decision of the Commission to this Court in the case of Robert D. Stewart, Virginia Wollard and Doak Martin as they are members of Barnstable Historic District Committee vs. Brendon Joyce, Jan Francis, Robert A. DiMartile, Christopher R. Miner and Allen W. Abrahamson, as they are members of Old King's Highway Regional Historic District Commission, Docket No. 9025CV1802, entered August 27, 1990.

[3]See Walter H. Ungerman, Jane M. Burke, Mary B. Carlson, Bonnie B. Hinckley, Diane Philos-Jensen, H.C. Marshall, Lucille B. McCallum, Evald H. Nilsson, Lincoln D. Scott, Karen E. Scott, Patti Ann Sundelin, Mark S. Wirtanen, Martin E. Wirtanen vs. Old King's Highway Regional Historic District Commission, Docket No. 9025CV1809.

Manager brought an action before a single justice of the Supreme Judicial Court and summary judgment was entered declaring that the Committee had no authority to appeal the decision of the Commission and therefore should dismiss its appeal.[4]

There is no express pleading on record or entry set forth on the docket pages of 9025CV1802 or 9025CV1809 showing a voluntary dismissal by the Committee but all counsel at trial indicated that the Committee had withdrawn as a result of the order of the Supreme Judicial Court and I therefore deem that the Committee is not a party to this action.

Case 9025CV1802 proceeded thereafter with the intervenors as the sole party plaintiff.

ADMINISTRATIVE HEARING BACKGROUND

On May 2, 1990 the Authority filed with the Committee an Application for Certificate of Appropriateness for a proposed development composed of 26 elderly units, elderly congregate for six people, a community center and two duplexes for families. (See Exhibit 13)

The site of the proposed development was a portion of the Lombard Farm, at Meetinghouse Way (Rte. 149) and Lombard Road, West Barnstable. This land is owned and/or controlled by the Trustee(s) under the will of Parker Lombard and has been leased by the Authority subject to the caveat that the lease will become void if the Authority "fails to receive a comprehensive permit pursuant to Mass. Gen. L. c. 40B, §20 through §22" and "any other required state or local approvals" or "required federal, state, regional or municipal approvals." (See Exhibit 3)

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[4] Attorney General and Warren J. Rutherford, Town Manager of Barnstable vs. Barnstable Committee of the Old King's Highway Regional Historic District, 416 Mass. 1009 (1993).

The Committee held public hearings on May 16, 1990 and May 30, 1990 (See Exhibits 6 and 7) and voted to deny the application. The vote of denial was set forth in a writing signed by the Chairman pro tem on June 21, 1990 and recorded with the Barnstable Town Clerk on June 22, 1990. (See Exhibit 8)

The reason for the denial was a finding by the Committee that the development project was too massive for the area. The Committee felt that the construction would overwhelm the site, that the configuration of the grouping on ten (10) buildings appeared as one since they were interconnected and were barracks-like in nature and appearance, that the layout of the buildings in relation to the 8.17 acre parcel of land was that the structures were and appeared to be all crowded together on three (3) acres, that these units as proposed would make a tremendous impact to the area and be quite visible from Route 149 due to its location on the rise of a knoll and the fact that, for the most part, the buildings were all two stories in height, that the proposed structures would be directly next to the Old Selectmen's Building which is a contributing element in the National Regional District known as Meetinghouse Way (Route 149) which is a Designated Scenic Highway and the Old King's Highway Historic District and the historic Old Selectmen's Building are each listed in both the National and Massachusetts Registers of Historic Places. The Committee felt that the proposed project was too massive for the area and that the intensity of the buildings configuration, though permitted under Mass. Gen. L. c. 40B of the state's Affordable Housing Law, is incongruous with the purposes of the Old King's Highway District which was established by the state legislature with its own specific mandate, the preservation of the heritage and tradition of the Historic District. The Committee felt that the massive appearance of the proposed structures would be contrary to the intent of the Act which was instituted for the

notwithstanding that the appeal was taken before notice was recorded with the Town Clerk.[5] The Commission decision indicates the appeal was entered with it June 4, 1990. (See Exhibit 11)

The Commission held a public hearing on July 10, 1990. At the conclusion of the public part of the hearing it was noted in discussion by member DiMartile to the Commission that it did not have authority to review the plans as a Committee and say if they were appropriate or not and that the authority of the Commission was to decide whether the Committee erred in their decision.

Member Joyce referred to a prior 1986 approval by the Committee.[6] Member Francis stated that whether the decision was capricious and arbitrary and erroneous is beside the point. Member DiMartile stated that he failed to see that the local Committee acted arbitrarily or capriciously or exceeded their authority or ignored the hardship issue. Member Abrahamson noted very few changes made in the project from 1986 to 1990 and that he felt the local Committee made an arbitrary decision although not capriciously and in excess of authority. The Commission voted by a 3 to 2 margin to adopt a motion by member Abrahamson to reverse the Committee and issue a certificate on the grounds that the Committee acted in an arbitrary manner.

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[5]Section 9 of the Act provides that "As soon as convenient after such public hearing, but in any event within forty-five (45) days after filing of application . . . the Committee shall be deemed to have approved the application." Section 11 of the Act provides that "Any person aggrieved by the determination of the Committee . . . may, within ten (10) days after the filing of a notice of such determination with the town clerk . . . appeal to the Commission."

[6]In 1986 the Committee had approved a proposed development project very similar in scope, massing and architectural style. (See Exhibit 12) This permission expired after renewal. Section 6 of the Act provides that "All certificates issued pursuant to this Act shall expire one year from the date of issue . . ..The Committee may renew any certificate for an additional term or terms of not over one year provided application for such removal is received prior to the expiration of said certificate." The Authority contested the applicability of the one year expiration date and this issue was resolved by a prior decision of this Court holding that the Committee was correct in declining to renew the certificate after it had expired and obliging the Authority to again apply for a Certificate.

(See Exhibit 10). The decision was reduced to writing and stated "that the Barnstable Committee did act in an arbitrary, capricious and erroneous manner in denying the applicant's application for a Certificate of Appropriateness." (See Exhibit 11).

FINDINGS OF FACT

In addition to adopting the foregoing Administrative Hearing Background and based upon all the believable and creditable evidence heard and believed by me, I make the following findings:

1. I find that all time requirements under the Act (see footnote 1) for appeal to the Commission and to this Court have been complied with and that a quorum of the Commission was present and voted.

2. I find that the Authority had a sufficient leasehold interest in the site to have standing to file the application for a Certificate of Appropriateness and further that the Authority is a governmental body subject to the act[7] and had standing to appeal to the Commission.

3. I find that the site of the proposed development is situated within the Old King's Highway Regional Historic District.

4. I find there is no similar massing or siting of interconnected buildings nor any similar sized siting or massing of a detached residential building on any one single-sized lot or parcel of land on Meetinghouse Way (Route 149) from Route 6 to Route 6A.

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[7]See Section 8 of the Act which provides that " . . . any person, including the member town, state, county and federal governmental bodies, who desires to erect . . . any building or structure within the District . . . shall file with the Committee an application for a certificate of appropriateness . . .." Section 3 defines a "person" as "an individual, a corporation, federal, state, county or municipal agency, or unincorporated organization or association." Section 11 provides that "Any person aggrieved by a determination of the Committee. . ., may, . . . appeal to the Commission."

5. I find there is no similar massing or siting of interconnected building nor any similar sized siting or massing of a detached residential building on any one single-sized lot or parcel of land in the entire Old King's Highway Regional Historic District.

6. I find that the massing together or clustering of the proposed structures on three acres to accommodate twenty-six elderly housing units, an elderly congregate unit for six people and a community center, all attached to each other, and two separate detached two family duplex units constitutes a massing or clustering which is incongruous with the purposes of the Old King's Highway Regional Historic District and which has no precedent in the district.

7. I find that the massive size and nature of the proposed development would be clearly be visible from Meetinghouse Way to both pedestrians and motorists and abutters.

8. I find that the materials proposed to be used in the construction, the siting, the setting, the scale of the building and the architectural design of the exterior are incompatible and incongruous with the purposes of the District and with other structures located along Meetinghouse Way in that it would detract from the cohesiveness found among these other buildings. In particular the window designs, the entrance ways and doors, the wooden chimneys, the porch and stair railings, the use of vinyl lattice, the setting, the size of the buildings and the scale of the project are all at odds and incompatible with the purposes of the District and the vast majority of other structure located on Meetinghouse Way.

9. I find that the Old Selectman's Building has great historic value and significance both in terms of its past history of use as well as architecture, size, setting and appearance, and that the location, setting, size and massing of the proposed development would overwhelm this historic setting

and substantially detract from its historical value and is therefore incongruous and not in keeping with the purposes of the Act.

10. I find that Old Meetinghouse Way, particularly, from the so-called Rooster Church at Rte. 6 to the Railroad Station prior to Rte 6A has a clearly identifiable, unified and cohesive historical nature, history, architecture, style, setting of structures and exterior appearance of structures, all of which give rise to a historic, cultural, literary and aesthetic tradition of Barnstable County as it existed in the early days of Cape Cod.

11. I find that the architectural design, arrangement, texture, materials and colors are not cohesive with other structures in the district and would have the effect of damaging historic values protected by the Act. I further find that the architecture of most structures on Meetinghouse Way is extremely cohesive at the present and creates an overall aura of hand workmanship and that the proposed development would significantly detract from this quality.

12. I find that the proposed project as a whole does not evoke any educational, cultural, literary or aesthetic traditions or heritage associated with the Historic District or with Barnstable County as it existed in the early days of Cape Cod.

13. I find that the proposed development is not compatible with the historic, cultural, literary and aesthetic heritage or traditions of the Historic District or Barnstable County as it existed in the early days of Cape Cod.

14. I find that the decision of the local Committee was based upon findings of fact which can be viewed as reasonable and consistent with the statutory guidelines and principles set forth in the Act and that the decision to deny the certificate may be viewed as founded upon a rational basis as appears in the decision and which is sufficient to support the decision.

15. I find that the regional commission should have concluded that the local committee did not exceed its authority, had not exercised poor judgment, was not arbitrary, capricious or erroneous in its action denying the certificate.

16. I find that the regional commission was exercising its independent judgment on the facts instead of determining whether the local committee had erred in some respect and this constitutes error.

17. I find that the regional commission's determination that the local committee in 1990 acted in an arbitrary manner and therefore erred in denying the certificate in question because in 1986 it had approved a certificate for a similar project, is not sufficient to support its action reversing the local committee and clearly exceeded its authority.

18. I find that there is no hardship present owing to conditions specifically affecting the proposed buildings or structures but not affecting the District generally. I further find that the site would support the construction of a building or structure in keeping with the intent and purpose of the Historic District but that the proposal does not comply with said intent and purpose and further the proposed buildings and structure would be a substantial detriment to the public good as articulated in the said Historic District Act.

19. I find that at least two of the plaintiff intervenors, meaning the two executors of the Estate of Fred Conant and Jane Burke, have standing to pursue the appeal as these two parties own or speak for the owner of parcels directly abutting the locus and the defendants have failed to introduce or offer convincing evidence to rebut the presumption of standing arising out of abutting land ownership. I make no finding relative to the standing of the non abutter plaintiff intervenors as the same is not necessary to this decision in view of the above finding.

JUDGMENT

The decision of the Old Kings Highway Regional Historic District Commission is vacated and the certificate of appropriateness issued by it is set aside. The action of the Barnstable Old King's Highway Committee in denying the certificate of appropriateness is affirmed. Accordingly, judgment is to enter for the Plaintiff.

REQUESTS FOR RULINGS

Request for Rulings filed by plaintiff intervenors are deemed waived in view of the findings made.

The defendant Commission filed 5 requests for rulings upon which I act as follows:

1. Allowed.

2. I decline to act upon this request as the same is not relevant to the issue presented. See findings made.

3. Denied. See findings made.

4. Denied. See findings made.

5. Denied. See findings made.

The defendant Barnstable Housing Authority filed 17 requests for rulings upon which I act as follows:

1. Denied as this calls for a finding of fact. See findings.

2. Denied as this calls for a finding of fact. See findings.

3. Denied. See findings.

4. Denied as this calls for a finding of fact.

5. Denied. This is not a request for a ruling of law. Not relevant. See facts found.

6. Denied. See facts found.

7. Denied as this calls for a finding of fact. See facts found.

8. Denied as this calls for a finding of fact. See facts found.

9. Denied as this calls for a finding of fact. See facts found.

10. Denied as this calls for a finding of fact. See facts found.

11. Denied as this calls for a finding of fact. See facts found.

12. Denied as this calls for a finding of fact. See facts found.

13. Denied as this calls for a finding of fact. See facts found.

14. Denied as this calls for a finding of fact. See facts found.

15. Denied as this calls for a finding of fact. See facts found.

16. Denied as this calls for a finding of fact. See facts found.

17. Allowed.

Dated: October 4, 1996

Joseph J. Reardon, Presiding Justice

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION
P.O. Box 140, Barnstable, Massachusetts 02630-0140

FAILURE OF COMMISSION TO HAVE A QUORUM

JAMES MASON & SANDRA MASON

v. **Decision #97-12**

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMITTEE FOR THE TOWN OF DENNIS

On Tuesday, August 5, 1997 and August 12, 1997, the Commission attempted to hold a hearing on Appeal #97-12 filed by James Mason and Sandra Mason, seeking review of a decision by the Dennis Historic District Committee which had granted a Certificate of Appropriateness to Patrick Hayes and Susan Hayes for a new dwelling to be located at 102 Scargo Hill Road, Dennis, Massachusetts.

NO HEARING OR ACTION TAKEN DUE TO A LACK OF A Quorum!

DETERMINATION:

Based on the failure of the quorum of the Commission to either affirm, reverse, or remand the matter, the determination of the Dennis Committee is annulled.

Any person aggrieved by this decision has a right to appeal to the District Court Department, Barnstable Division, within 20 days of the filing of this decision with the Dennis Town Clerk.

Peter L. Freeman
Chairman

See District Court Ruling

97-12

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

DISTRICT COURT DEPARTMENT
ORLEANS DIVISION
Docket No. 9726 CV 0375

PATRICK HAYES, et al [1]
Plaintiffs

vs

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION,
Defendant

MEMORANDUM and ORDER

Plaintiffs are owners of a residentially zoned vacant lot at 102 Scargo Hill Road in Dennis, Mass. Agreeable to Sec. 8 of St. 1973, c. 470, the plaintiffs filed an application seeking a Certificate of Appropriateness for construction of a single family residence and attached garage. The Town Committee conducted a public hearing and voted 5 - 0 to grant the Certificate of Appropriateness. The vote was taken on June 26, 1997. The Certificate was filed with the Town Clerk on June 30, 1997.

An appeal was taken by James and Sandra Mason, neither of whom are abutters to the property in question, nor do they own property opposite to the subject property on any public or private way, nor do they own property within three hundred feet of the subject property. The appeal was filed on July 10, 1997. The appeal was timely filed.

The Commission scheduled a hearing on the appeal for August 5, 1997. The hearing could not proceed due to a lack of a quorum. The Commission again attempted to conduct a hearing on the appeal on August 12, 1997. This second attempt was thwarted due to lack of a quorum.

Second 11 of the Act requires the Commission to conduct an appeal within 30 days after receipt of notice of the appeal. The Act further provides that failure to conduct a hearing on the appeal within 30 days shall be deemed an annulment of the granting of a Certificate of Appropriateness.

The plaintiffs contend that the decision of the Town Committee to grant the Certificate of Appropriateness should be affirmed in the absence of facts which would tend to support a conclusion that the Committee exceeded its authority, exercised poor

1 / The other plaintiff is Susan Hayes.

judgment, or was arbitrary, capricious or erroneous in its action.

In support of this contention, the plaintiffs rely upon the principle enunciated in **Kourouvacilis v. General Motors Corp.**, 410 Mass. 706 (1991). Specifically, where the moving party demonstrates through the pleadings, affidavits and other papers of record in the case that the other party has no reasonable expectation of proving an essential element of its case, the opposing party has the burden of showing specific facts tending to establish that element. Id at 716; **Pederson v. Time, Inc.**, 404 Mass. 14, 17 (1989).

The plaintiffs cite **Paquin v. Board of Appeals of Barnstable,** 27 Mass. App. Ct. 577 (1989) in support of the contention that failure of the Commission to conduct a hearing within 30 days of the notice of the appeal results in a "constructive" grant of the Certificate of Appropriateness issued by the Town Committee. That case is inappositesite for several reasons. The **Paquin** case held that the constructive grant provisions of G. L. c. 40A, §15 do not apply to repetitive petitions where relief had been previously and finally denied. See G. L. c. 40A, §16. The court pointed out that if the petition had been an original one, as opposed to a repetitive case, the constructive grant provision of G. L. c. 40A, §15 would apply, so that inaction by the Board of Appeals would constitute a constructive allowance of the petition. Id at 579. The court did not reach the question whether the judge's alternative finding that the variance requested was beyond the authority of the Board to grant. Id at 581.

In the instant case the Town Committee acted promptly on the application. An appeal was timely claimed, albeit by persons who were neither abutters nor owners of land sufficiently proximate to the parcel for which the variance was sought. The Commission promptly scheduled a hearing and when a quorum was not obtained, a second hearing was scheduled which also failed for lack of a quorum.

Unlike zoning appeals under G. L. c. 40A, §15, the Old King's Highway Regional Historic District Act St. 1973, c. 470, envisions a two tiered administrative process before any judicial review occurs. At the second tier the Commission's mandate is to hear all pertinent evidence and determine the facts and if on the facts found the Commission concludes that the Town Committee exceeded its authority or exercised poor judgment or was arbitrary, capricious or erroneous in its action, the Commission is to annul the Committee determination or approval and remand the case to said Committee for further action, or revise the determination of the Town Committee and issue or deny the certificate of appropriateness.

This two-tiered administrative process was analyzed to some extent in **Anderson v. Old King's Highway Reginal Historic District Commission,** 397 Mass. 609 (1986). The

Commission's initial function is not to exercise its independent judgment on the facts, but rather to determine whether the Town Committee erred in some respect. **Id** at 611: See **Gumley v. Selectmen of Nantucket,** 371 Mass. 718, 723 (1977). As was pointed out in the **Anderson** case, the function of the District Court judge on review is analogous to the sort of review granted in zoning cases. It involves equitable considerations and, but for the express language of this Act, would normally be reviewed on direct appeal in the Appeals Court. See **Walker v. Board of Appeals of Harwich,** 388 Mass. 42, 45-46 (1983). By way of dicta, the author of the **Anderson** opinion commented that the review by report procedure then in effect in the Appellate Division was a particularly inapt vehicle for judicial review in cases like this. **Anderson, supra,** p. 611 n. 4.

Essentially what is being sought in this action is a declaratory judgment. See G. L. c. 231 A. The plaintiffs ask this court to declare that the failure to afford a hearing on the appeal within the time limits amounts to a constructive award of the Certificate of Appropriateness. Controversies of this sort are often the subject matter of Declaratory Judgment actions in the Superior Court. See **Stow v. Pugsley,** 349 Mass. 329, 331 (1965). The fact that c. 470 of St. 1973 provides a remedy for parties aggrieved in proceedings under the Old King's Highway Regional Historic Act does not preclude declaratory relief. See **Madden v. State Tax Commission,** 333 Mass. 734, 737 (1956). Such declaratory judgment action is appropriately brought in the Superior Court. The enabling statute authorizes judicial review of the decision of the Commission. In this case there is no Commission decision to review.

The Motion for Summary Judgment is DENIED.

SO ORDERED

November 17, 1997

Robert A. Welsh, Jr.
Robert A. Welsh, Jr.
Presiding Justice

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION
P.O. Box 140, Barnstable, Massachusetts 02630-0140

HISTORIC DISTRICT ACT

does not give jurisdiction to
REGIONAL HISTORIC DISTRICT COMMISSION
over
Massachusetts Highway Department
repair and reconstruction projects for Route 6A

A state highway is not a "structure" and "public safety" gives MHD exclusive control over state highway.

COMMONWEALTH OF MASSACHUSETTS
MASSACHUSETTS APPEALS COURT

Barnstable, ss: DOCKET #98-P-0757

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION,

Plaintiff/ Appellant

v.

MASSACHUSETTS HIGHWAY DEPARTMENT,

Defendant/ Appellee

EMERGENCY PETITION FOR INJUNCTIVE RELIEF

Now comes the plaintiff in the above matter and moves this Honorable Court, pursuant to Mass. R. App. P. 6, for Injunctive Relief against the defendant in this matter barring the defendant from continuing work on its "reconstruction and rehabilitation" of Route 6A (the Old King's Highway) until such time as a decision is rendered in Old King's Highway Regional Historic District Commission v. Massachusetts Highway Department, Massachusetts Appeals Court, Docket #98-P-0757.

For reason, the plaintiff states that irreparable harm will result in the absence of injunctive relief. The plaintiff also relies on the attached Memorandum in Favor of Injunctive Relief.

OLD KING'S HIGHWAY REGIONAL
HISTORIC DISTRICT COMMISSION,
By its Attorney

Robert G. Brown

Robert G. Brown
P.O. Box 2187
Hyannis, Massachusetts 02601
(508) 775-5793
BBO#061030

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

98-P-757

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION

vs.

MASSACHUSETTS HIGHWAY DEPARTMENT.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

For substantially the reasons set out in the brief of the Massachusetts Highway Department at pages twelve through twenty-eight, we affirm the judgment entered below.

Judgment affirmed.

By the Court (Armstrong, Kass, & Rapoza, JJ.),

Ashley Rhea

Clerk

Entered: January 18, 2000.

COMMONWEALTH OF MASSACHUSETTS

The Appeals Court

BARNSTABLE COUNTY

No. 98-P-0757

OLD KING'S HIGHWAY REGIONAL
HISTORIC DISTRICT COMMISSION,
Plaintiff-Appellant,

v.

MASSACHUSETTS HIGHWAY DEPARTMENT,
Defendant-Appellee.

ON APPEAL FROM A JUDGMENT OF
THE BARNSTABLE SUPERIOR COURT

BRIEF OF THE DEFENDANT-APPELLEE MASSACHUSETTS HIGHWAY DEPARTMENT

SCOTT HARSHBARGER
Attorney General

Mary Murphy-Hensley
Assistant Attorney General
Government Bureau
One Ashburton Place, Room 2019
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BBO # 552599

impacts would have occurred;

-all sidewalks will have either vertical granite curb or sloped granite edging to provide a vertical separation between pedestrian and vehicular traffic;

-replacing existing galvanized highway guardrail with weathering steel highway guardrail and wood posts;

-installation of traffic signs; and

-placement of pavement markings.

(Supp. R. 21-36). The MHD intends to begin construction on the project in the fall of 1998.

SUMMARY OF ARGUMENT

Under a comprehensive statutory scheme governing state highways, the Legislature has given the MHD a mandate to maintain and rebuild highways across the state, no other authority can be permitted to regulate or interfere with state highway projects. Pursuant to its statutory mandate, the MHD has been in the planning and design phase of a state highway construction project along Route 6A in the town of Sandwich.

The project runs through an area that has been designated by the Old King's Highway Regional Historic District Act as an historic area. The Superior Court correctly decided that because the comprehensive statewide statutes governing state highways supersedes the Act, the MHD's project does not fall within the jurisdiction of the Act and therefore, the MHD was not required to seek approval from the Old King's Highway Regional Historic District Commission for its project. (pp. 12-20).

Even assuming that the MHD is subject to the jurisdiction of the Act in a general sense, the Act by its terms does not govern the project that is at issue in this case. The Act requires any person who desires to erect, move or demolish or remove or change the exterior architectural features of any building or structure within the District to file an application for certificate of appropriateness with the local historic district committee. Repaving Route 6A, installing sidewalks, traffic signals and guardrails does not

implicate changes to the exterior architectural features of structures within the meaning of the Act. Route 6A does not have exterior architectural features, it is a "way." Therefore, the MHD's project does not fall within the scope of the Act and the Commission lacks jurisdiction over the project. (pp. 20-28).

ARGUMENT

I. THE MHD'S ROUTE 6A PROJECT DOES NOT FALL WITHIN THE JURISDICTION OF THE OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION.

Where the Legislature has enacted a comprehensive statutory scheme that governs a particular subject area, the general legislation will supersede a special act. See Salem and Beverly Water Supply Board v. Commissioner of Revenue, 26 Mass. App. Ct. 74, 78 (1988)(comprehensive statutory scheme of property taxation supersedes special act). A "statute designed to deal uniformly with a Statewide problem 'displays on its face an intent to supersede local and special laws and to repeal

inconsistent special statutes.'" Boston Teachers Union, Local 66 v. Boston, 382 Mass. 553, 564 (1981); See also Board of Health of North Adams v. Mayor of North Adams, 368 Mass. 554, 567-58 (1975)(city official could not frustrate goal of comprehensive statute governing water fluoridation). In its brief the Commission contends that the Act is "specific" and that the MHD's enabling legislation is "general," and that the general statute must yield to the specific. Commission's brief at 4. The principle of statutory construction relied upon by the Commission is inapplicable here; where the more general statute was enacted to provide a comprehensive coverage of the subject matter, the general statute will prevail over the more specific statute. Boston Housing Authority v. Labor Relations Commission, 398 Mass. 715, 719 (1986). It is therefore the Old King's Highway Regional Historic District Act which must yield.

Here, in G.L. c. 81 and G.L. c. 85, the Legislature has enacted statutes that are designed

to give the MHD the authority to deal uniformly and comprehensively with statewide public safety issues related to highway construction and maintenance. Under G.L. c. 81, § 13, the MHD is required to maintain and keep in good condition state highways. The MHD is also required to erect and maintain on state highways uniform direction signs, warning signs, lights and traffic signals. G.L. c. 85, § 2. Because the Legislature has given the Department a comprehensive mandate to maintain and rebuild highways across the state, no other authority can be permitted to regulate or interfere with state highway projects.

If this Court were to declare that the MHD must obtain the local historic district committee's approval for the project, it would give the local committee and the Commission the power to veto highway maintenance and safety initiatives. Indeed, different sections of the same highway might go through different treatment due to different committees imposing different rules. Such a result is impermissible, given the

Legislature's grant of comprehensive statutory authority to the MHD regarding state highways.

The principle that comprehensive, statewide statutes supersede special statutes is especially compelling where, as in this case, public safety is at stake. It is clear here, that Route 6A had several safety problems. Here, the MHD is the state agency with the expertise to deal with public safety issues. G.L. c. 81, § 1. The MHD conducted several traffic and accident studies which revealed that both the Route 6A/Tupper Road and Route 6A/Merchants Way intersections are heavily traveled and have a high incidence of accidents, one of which resulted in a pedestrian fatality. (Supp. R. 1-4, 6-22). The MHD concluded that due to high traffic volumes and the high number of automobile accidents, two traffic lights should be installed at the Route 6A/Tupper Road intersection and the Route 6A/Merchants Way intersection for public safety reasons. (Supp. R. 3). Taking the Commission's argument to its logical conclusion, either the Commission or the

local District Committee could potentially thwart MHD's duty to install these traffic signals and make this area safe for the commuting public, pedestrians and bicyclists. The Legislature has established that the MHD has the expertise and duty to make state highways safe for the public, not the local historic district committees or the Commission. The Commission's argument ignores this statutory directive concerning ensuring public safety for state highways.

In its brief, the Commission argues that only "design, color and materials used" is at issue in this case, not public safety. Commission's brief at 7. But design, color and materials used in conjunction with construction and repair of state highways implicate public safety issues. The Commission further argues that in any event the local district committees function as a "public safety board." Although the Act gives the local district committees the authority to disprove projects that "pose a serious hazard to the health and safety of persons using the structure or

building," St. 1973, c. 470, as amended by St. 1982, c. 338 § 7, this language can hardly be construed as giving the local committees the authority to control highway safety projects. See Opinion of the Justices, 333 Mass. 773, 778 (1955)(act establishing Nantucket historic commission "can hardly be said in any ordinary sense to relate to public safety. . . .").

In addition, it is also important to note that the Commonwealth is potentially liable for damages where traffic accidents occur due to poor maintenance of state highways. See G.L. c. 81, § 18. Should an accident occur at these intersections, the MHD could be held liable for injuries that might result. Under these circumstances, where both public safety and state funds are involved, the legislative purpose of G.L. c. 81, et seq. and G.L. c. 85, et seq. would be frustrated if the Commission or the local District Committee were permitted to veto the MHD's important public safety initiatives.

The Commission also argues that the MHD is a "person" within the meaning of the Act. Under section 3 of the Act, "person" is defined as "an individual, a corporation, federal, state, county, or municipal agency, or unincorporated organization or association." St. 1973, c. 470, as amended by St. 1975, c. 845. The Commission thus contends that the Legislature explicitly intended to include the MHD within the scope of the Act, because the MHD is a state "agency." This contention lacks merit. The MHD is nowhere mentioned in the Act and there is no express language that the MHD's authority over state highways has been repealed. When construing two statutes together, the courts are "loath to find that a prior statute has been superseded in whole or in part in the absence of express words to that affect or of clear implication." Commonwealth v. Katsirubis, 45 Mass. App. Ct. 132, 135 (1998). Furthermore, the statutes governing state highway maintenance provide no exemption for state highways located within the Old King's Highway

Regional Historic District in Sandwich. By contrast, the Legislature specifically designated the Old King's Highway Regional Historic District Committee as the local authority to review projects that involve "cutting or removal of trees, or the tearing down or destruction of stone walls" on Route 6A. See St. 1992, c. 61; G.L. c. 40, § 15C.[4] The Legislature knew how to give the Commission jurisdiction over public safety but it clearly chose not to.

In this case, however, it is undisputed that

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[4] In St. 1992, c. 61, the Legislature designated Route 6A as a "scenic" state highway. This statutes provides in pertinent part: "[t]he Old King's Highway Regional Historic District Committee of each town within Barnstable county abutting said Route 6A . . . is hereby designated as the governmental body whose prior written consent must be obtained in accordance with the provisions of [G.L. c. 40, § 15C] for any proposed alterations within the respective towns. Section 15C of G.L. c. 40 states "[a]fter a road has been designated as a scenic road any repair, maintenance, reconstruction, or paving done with respect thereto shall not involve or include the cutting or removal of trees, or the tearing down or destruction of stone walls, or portions thereof, except with the prior written consent. . . ." of the Old King's Highway Regional Historic District Committee.

MHD's project does not involve "cutting or removal of trees, or the tearing down or destruction of stone walls" within the meaning of G.L. c. 40, § 15C. (Supp. R. 4, 37-38). Thus, because there is no "express" and unequivocal language in the Act which gives the Commission veto power over MHD's duty to maintain state highways and to keep them in good repair, the MHD's project is not subject to the Commission's review.[5]

II. THE ACT, BY ITS TERMS, DOES NOT GOVERN STATE HIGHWAY PROJECTS.

The Act requires any "person, including the member town, state, county and federal governmental bodies" to file a certificate of appropriateness with the local committee. St.

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[5] The Commission also apparently argues that the MHD's refusal to submit to its jurisdiction is inconsistent with the MHD's decision to appear before the Sandwich Conservation Commission pursuant to G.L. c. 131, § 40. Commission's brief at 9. The Wetlands Protection Act, G. L. c. 131, § 40, however, is different from the Old King's Highway Regional Historic District Act in that it is a comprehensive statute governing minimum Statewide standards for the protection of wetlands. The MHD's actions with respect to this comprehensive statute governing wetlands is not an issue in this case.

1973, c. 470 as amended by St. 1975, c. 845. The term "person" is defined as "an individual, a corporation, federal, state, county, or municipal agency, or unincorporated organization or association." St. 1973, c. 470, § 3 and as amended by St. 1975, c. 845. Although in a general sense the MHD falls within the Act's definition of "person," the Act does not apply to this particular MHD project. The project falls outside the scope of the Act because it does not fit within the terms or purpose of the Act.

A. Route 6A Is Not a "Structure" as Defined In the Act.

The Act provides, in pertinent part, that any person:

> who desires to erect, move or demolish or remove or change the exterior architectural features of any building or structure within the District . . . shall file with the Committee an application for a certificate of appropriateness.

St. 1973, c. 470, § 8 as amended by St. 1975,

c. 845 and St. 1977, c. 507. (emphasis added). The Commission argues that the project is subject to the Act because MHD'S proposal to repave Route 6A, install sidewalks, traffic signals and guardrails implicates changes to the "exterior architectural features" of "structures" within the meaning of the Act. Commission's brief at 10-12. The Commission's expansive interpretation of the scope of the Act is erroneous.

Section 10 of the Act sets forth the powers, functions and duties of the local historic district committee. The Act states:

> The Committee shall pass upon . . . the appropriateness of exterior architectural features of buildings and structures to be erected within the District.

St. 1973, c. 470, § 10. Section 3 of the Act defines the term "structure" as "a combination of materials other than a building, sign or billboard, but including stone walls, flagpoles, hedges, gates and fences." St. 1973, c. 470. The Act goes on to define "exterior architectural

features" as follows: "the architectural style and general arrangement of such portions of the exterior of a building or structure so designed to be subject to view from a way or public place." St. 1973, c. 470, as amended by St. 1982, c. 338. (emphasis added). Apart from the term "structure" the Act separately defines the term "way" as "a way owned, or normally maintained, or normally repaired by any federal, state, county or municipal entity. . . ." St. 1973, c. 470, as amended by St. 1975, c. 845. A common sense reading of these terms would exclude a roadway from the scope of the Act; Route 6A is essentially a use of land, not a structure. Route 6A has no "exterior architectural features," it is a "way." Indeed, the fact that Section 3 of the Act speaks of "exterior architectural features" "subject to view from a way" strongly suggests that the Legislature never intended to include the "way" itself within the scope of the Act.[6]

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[6] In St. 1966, c. 211, an act establishing an historic district commission for the town of

In a closely related case, the Supreme Judicial Court confirmed that a particular use of land such as a roadway should not be deemed a "structure." See Williams v. Inspector of Buildings of Belmont, 341 Mass. 188, 191 (1960). The specific holding of Williams was that a tennis court was a use of land and not a structure within the meaning of a local zoning by-law. The by-law provided in pertinent part: "no structure shall be erected, altered or used for any other purpose" other than those specifically enumerated in the by-law. In reaching its conclusion the Court stated:

> The work in making a tennis court is like that involved in making a driveway or road. The wire fence or ball guard and the net posts are incidents of the tennis court and are no more structures within the zoning law than is the court. Plainly the zoning by-law does not regulate the street boundary fence as a structure or otherwise. We are

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Petersham, the Legislature defined the term "structure" as "a combination of materials other than a building, including a sign, fence or masonry wall but not including a walk or driveway." (emphasis added).

> disinclined to stretch the zoning by-law meaning of 'structure' . . ."

Williams, 341 Mass. at 191 (emphasis added). [7] Similarly, in this case, Route 6A and its appurtenant traffic signs and guardrails is a use of land and does not constitute a "structure" with "exterior architectural features" as defined in the Act. Other states have interpreted the term "structure" in various contexts to exclude roadways. See, e.g., French v. Barber-Greene Company, 576 N.E.2d 193 (Ill. App. 1991)(street is not a structure for purposes of negligence

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[7] More recently, in Globe Newspaper Company v. Beacon Hill Architectural Commission, 421 Mass. 570, 579 (1996), the Supreme Judicial Court reaffirmed its ruling in the Williams case stating that a "tennis court was a use of land, not a structure." Moreover, the statute at issue in the Globe case was G.L. c. 143, § 1 of the State Building Code that defined the term "structure" as a "combination of materials assembled at a fixed location to give support or shelter, such as a building, framework, retaining wall, tent, reviewing stand, platform, bin, fence, sign, flagpole, recreational tramway, mast or radio antenna or the like. The word 'structure' shall be construed, where the context requires as though followed by the words 'or part or parts thereof.'" Globe at 574. (emphasis added). Certainly, a roadway does not fall within the meaning of the State Building Code definition of structure.

statute); Clo-Car Trucking Co., v. Clifflure Estates of South Carolina, Inc., 320 S.E.2d 51, 54 (S.C. Ct. App. 1984)(land cleared and graded does not constitute a structure within meaning of mechanic's lien statute); cf Achen-Garnder, Inc. v. Superior Court, 839 P.2d 1093, 1096 (Ariz. 1992)(structure includes road construction within meaning of competitive bidding statutes); Beyt v. Woodvale Place Apartments, 297 So.2d 448, 450 (La. Ct. App. 1974)(hard-surfaced boulevard was a structure for purposes of subdivision building restriction).

B. The Purpose of the Act is Strictly Aesthetic And It Cannot Apply to State Highway Projects Designed To Improve Public Safety.

The primary purpose of the Act is to preserve the "aesthetic" characteristics of "buildings" and "structures" within a designated historic area. Section one of St. 1973, c. 470 states the Act's purpose as follows:

> to promote the general welfare of the inhabitants . . . through the promotion of the educational, cultural, economic, aesthetic and literary significance

> through the preservation and protection of buildings, settings and places within the boundaries of the regional district and through the development and maintenance of appropriate settings and the exterior appearance of such buildings and places, so as to preserve and maintain such regional district as a contemporary landmark compatible with the historic, cultural, literary and aesthetic tradition . . .

(emphasis added). In this case, Route 6A is a heavily traveled state highway that has been in existence for many years. MHD is simply trying to carry out an essential governmental function --- maintaining this state highway in a safe condition for the general public. Where the State is involved in "performing an essential government function" it is also immune from local historic preservation laws. See also County Commissioners of Bristol v. Conservation Commission of Dartmouth, 380 Mass. 706, 709 (1980) ("It is not to be presumed that the Legislature intended to give to [a] local licensing board the authority to thwart the reasonably necessary efforts of [the State or its agents]."). Repair and maintenance of an existing state highway is not the type of

project that implicates a loss of "aesthetic" significance which the Act seeks to protect.

Accordingly, because MHD's project does not fall within the scope or purpose of the Act, the Superior Court correctly allowed the MHD's motion for summary judgment.

CONCLUSION

Based on the foregoing, the Massachusetts Highway Department respectfully requests that this Court affirm the decision of the Superior Court.

Respectfully submitted,

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Date: October 8, 1998

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION
P.O. Box 140, Barnstable, Massachusetts 02630-0140

ENFORCEMENT
BY
BUILDING INSPECTOR/COMMISSIONER

Commonwealth of Massachusetts

BARNSTABLE, ss.

SUPERIOR COURT
No. 98-111

RICHARD RUDDERS et al

vs.

BUILDING COMMISSIONER,
TOWN OF BARNSTABLE et al[1/]

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION TO STRIKE APPEAL OF DEFENDANT, BARNSTABLE OLD KING'S HIGHWAY COMMITTEE

The plaintiffs as prevailing parties in this litigation seek to strike the appeal of the defendant, Barnstable Old King's Highway Committee (hereinafter referred to as OKH) on the basis that the defendant, OKH, is not a party aggrieved and has no standing to claim an appeal. By way of background, the plaintiffs/homeowners instituted this action to appeal the issuance of a Stop Work Order on their home construction by the defendant building commissioner at the direction of OKH.

The defendant, OKH, filed a motion to dismiss plaintiffs' complaint alleging that the Court lacked jurisdiction over the subject matter because under the statute creating the Old King's Highway Regional Historic District jurisdiction is vested exclusively in the District Court by the provisions of §§ 11, 12. Moreover, the defendant alleges that neither an action in the nature of mandamus nor an action for declaratory relief can be used as a substitute for the exhaustion of administrative remedies and the plaintiffs have failed to exhaust their administrative remedies. This motion was never acted upon because in his decision on the plaintiffs' motion for an

[1/]Barnstable Old King's Highway Committee.

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order of mandamus and preliminary injunction, Justice Connon acknowledged the correctness of the defendant, OKH's position and declined to grant an injunction against OKH for lack of jurisdiction.

Judge Connon went on to find that the building commissioner determined that the height and location of the new house on the revised plan was substantially in conformance with zoning and the intent of the OKH act. Because OKH ordered the building inspector to issue a Stop Work Order subsequent to the building commissioner's determination that the project complied with OKH regulations, Judge Connon found that the attitude of the OKH committee was arbitrary and capricious in requesting the building commissioner to issue a Stop Work Order on grounds beyond the scope of its authority. It is from this Judgment that OKH seeks to appeal.

The problem with the defendant's position is as follows; the rules and regulations of Old King's Highway Regional Historic District Commission are by agreement contained in a bulletin dated December 1983 introduced as Exhibit 1 to the defendant's motion to dismiss. Section 11 of these regulations entitled "Enforcement" states in part, "[T]he local building inspectors are the watchdogs of the district and will not issue building permits without a demonstration of compliance with the act . . . The law goes on to state that, [T]he building inspector of the affected town shall have the power and duty to enforce the provisions of this law". The following paragraph begins, "While the local building inspectors are specifically charged with the responsibility of enforcing the act . . . ". In effect, what OKH is attempting to do is to appeal its own decision as promulgated by the building commissioner that the plaintiffs' home complies with the provisions of local zoning and the OKH act.

The position of OKH is that even though the Court may lack jurisdiction over them in this matter the decision affects their rights and therefore justice and equity require that they be permitted to appeal. The Court admits the validity of the principle expressed by OKH but need not reach that issue because the act of the building inspector in the present circumstance is the act of OKH. His determination that the project complies with the OKH regulations has been upheld by the Court and therefore there is nothing for the defendant OKH to appeal.[2/]

The plaintiffs' motion to strike the appeal of the defendant Barnstable Old King's Highway Committee is ALLOWED.

Gerald F. O'Neill, Jr.
Justice of the Superior Court

DATED: September 11, 1998

A true copy, Attest:
Clerk

[2/]The entire substance of this case is that the plaintiffs' foundation is 4.5 feet closer to the property line than shown on the plan provided to OKH. According to OKH this change somehow affects the "setting" of the house. This variation was the subject of meetings and discussions among the plaintiffs/owners, a neighbor, the building commissioner and OKH. There may or may not have been some agreement as to this site. In any event, the commissioner found that the foundation complied with zoning and OKH regulations. Judge Connon found OKH's action to be arbitrary and capricious. This attempted appeal might be likened to children foot-stomping for failure to get their way.

RICHARD RUDDERS & another [Note 1] vs. BUILDING COMMISSIONER OF BARNSTABLE & another [Note 2]

51 Mass. App. Ct. 108

January 16, 2001 - March 2, 2001

Barnstable County

Present: PERRETTA, KAPLAN, & GELINAS, JJ.

A Superior Court judge erred in striking a notice of appeal filed by the Old King's Highway Committee of Barnstable from a judgment against the committee, a party to the action. [110-111]

Where a house was being built not in conformance with a duly issued certificate of appropriateness, applicable to property in the Old King's Highway Regional Historic District, it was appropriate for the municipal building commissioner to issue a stop work order pending modification or issuance of a new certificate, and a Superior Court judge erred in ordering that the stop order be revoked. [111-113]

CIVIL ACTION commenced in the Superior Court Department on February 19, 1998.

The case was heard by Richard F Connon, J., and a motion to strike a notice of appeal was heard by Gerald F O'Neill, Jr, J.

Robert D. Smith, Town Counsel (Ruth J. Weil with him) for the defendants.

James H. Quirk, Jr. (Thomas J. Perrino with him) for the plaintiffs.

KAPLAN, J. Omitting various details, the case stands thus. Richard Rudders and Joan Rudders, his wife (plaintiffs), own

property at 36 Sunset Lane, Barnstable. Under the Old King's Highway Regional Historic District Act, St. 1973, c. 470, as amended (Historic Act), covering Barnstable and other areas, the plaintiffs on September 17, 1997, applied to the local Barnstable Old King's Highway Committee (Barnstable committee) for a "certificate of appropriateness" on the basis of a plot plan. A certificate issued on October 8, 1997, authorizing the demolition of the single-family house on Sunset Lane, and its replacement by a two-family house. Before demolition began, the plaintiffs recognized they had not intended the setting of the new house as shown on the plot plan, but a setting about 4.4 feet closer to the Sunset Lane line. The plaintiffs demolished the existing house and began construction of the new house with their desired setting [Note 3]. The Barnstable committee, in the face of the deviation from the granted certificate, on February 9, 1998, took formal action and requested the Barnstable building commissioner to

issue a stop work order to halt further construction. The building commissioner issued the order on February 10 [Note 4].

The plaintiffs protested the decision of the Barnstable committee resulting in the stop work order. They said that upon noting their certificate did not match their intention - a difficulty they seemed to attribute to their own mistake - they asked their contractor to consult the "building department," and he was told (by an unnamed person or persons) the deviation was acceptable so long as no zoning problem was created.

To overcome the stop work order, the plaintiffs commenced the present action in Superior Court against the defendants Barnstable committee and building commissioner demanding (i) an injunction enjoining the Barnstable committee from taking any action to prevent the plaintiffs from constructing the house with the change of setting, and (ii) an order of mandamus direct-

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ing the building commissioner to revoke the stop work order, thus authorizing construction pursuant to the building permit.

Upon the defendants' "Suggestion of Want of Jurisdiction [of the Superior Court] and Opposition to Plaintiffs' Motion for Preliminary Injunction" and "Motion to Dismiss Plaintiffs' Complaint," a judge of the Superior Court, effectively denying the defendants' motion to dismiss, refused the injunction against the Barnstable committee, holding that the Superior Court lacked jurisdiction to issue such process, which must come, if at all, from a District Court (see s. 12 of the Historic Act). Yet the judge granted the requested mandamus order, in part, by directing the building commissioner to revoke the stop work order; he declined to order the building commissioner to allow construction to proceed pursuant to the building permit [Note 5]. The effective judgment therefore read: "ORDERED . . . that the February 10, 1998, stop work order issued by the Town of Barnstable, Building Commissioner is revoked."

The Barnstable committee duly filed a notice of appeal from the judgment.

Thereupon the plaintiffs moved to strike the notice of appeal on the alleged ground that the Barnstable committee was not a party "aggrieved." The court allowed the motion to strike.

The Barnstable committee duly noticed its appeal from the order striking the notice of appeal [Note 6].

1. Lower court's error in striking the notice of appeal. The court erred in striking the Barnstable committee's notice of appeal from the court's own judgment. As the Barnstable committee correctly argues, while the lower court may annul a notice of appeal for certain procedural reasons [Note 7], there is no basis for annulling a notice of appeal filed by a party to the action for the reason that, in the lower court's view, the appeal would be

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without merit, whether for the appellant's lack of aggrievement, or for any other ground of substance. Questions going to the merits of the claimed appeal are for the appellate court to decide. Compare Chongris v. Board of Appeals of Andover, 17 Mass. App. Ct. 999 (1984).

If, perchance, it could be held that the lower court might strike a notice of appeal on the supposed ground that the appellant was not "aggrieved" by the judgment intended to be appealed from, then we are clear in the present case that the Barnstable committee was a party aggrieved. For - as shown more particularly in our point 2 below - the judgment appealed from was in defiance and derogation of the authority of the Barnstable committee as part of the administrative structure with ultimate judicial review set up by the constitutive Historic Act.

2. Lower court's error in declining to dismiss the action. We examine the Historic Act, as implemented by regulations of the Old King's Highway Regional Historic District Commission (district commission) published in the commission's "Bulletin [Note 8]." Local committees, such as the Barnstable committee, are subordinate to the district commission. Local committees, on application, issue certificates of demolition and appropriateness for unexempted properties located within their respective areas of the historic regional district. (Forms of these certificates are set out in the Bulletin.) Local building commissioners may not permit construction (or demolition) of a building without presentation of the relevant certificate [Note 9]. If an applicant is dissatisfied with the denial of a certificate or with the

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terms of a granted certificate, the applicant's recourse is to appeal to the district commission [Note 10]. (A form of "Petition for Appeal" is published in the Bulletin.) Where an applicant is dissatisfied with a district commission's decision, he may secure judicial review by a District Court [Note 11], from which appeal lies to the Appellate Division of the District Court [Note 12]. "The remedies provided by this section [s. 11 on 'Appeals'] shall be exclusive [Note 13]"

In the present case, the plaintiffs' certificate of appropriateness issued by the Barnstable committee would not authorize the construction actually undertaken and the building commissioner could not permit such construction [Note 14]. Therefore it was correct for the Barnstable committee to request the building commissioner to issue a stop work order and for the building commissioner to issue it [Note 15]. The proper procedure for the plaintiffs at this point would have been to apply to the Barnstable committee for a modification of their certificate to correspond to the actual construction line or for the issuance of a new certificate to that effect. Where the change required is considered minor, the Bulletin allows the local committee to modify the certificate without the formality prescribed for the issuance of a new certificate [Note 16]. If the Barnstable committee refused relief, the plaintiffs' road would lead to the district commission and thence, if need be, to the District Court.

When the judge below refused the plaintiffs' application for an injunction against the Barnstable committee for want of the Superior Court's "jurisdiction," he seemed to be mindful of preserving the integrity of the administrative-judicial scheme established by statute; but then, curiously, the judge scorned that salutary motive by issuing an order against the building

commissioner who for present purposes is but an enforcement arm of the Barnstable committee.

This is not the first case of a court's precipitous interference with a calculated administrative procedure culminating in judicial review. In early years such intrusion often reflected hostility toward newfangled administrative agencies and administrators. In the present case the intrusion likely reflects impatience with what the judge may see as bureaucratic fussiness over a trivial matter. Whether or not the matter is trivial (it is not so to the property owners), the judge erred in flouting the legislated design. The judge should have allowed the defendants' motion to dismiss.

It has been represented to us (but does not appear in the record before us) that the status quo has not been maintained and the house has been completed to the plaintiffs' desire. It is also represented that the neighbor Dugas has brought a suit against the instant plaintiffs that may be relevant to the property. We leave these matters to the parties for settlement or litigation as they may choose.

The judgment allowing the plaintiffs' motion to strike the defendant's appeal is reversed. The judgment of mandamus is vacated and the action is dismissed.

So ordered.

FOOTNOTES

[Note 1] Joan Rudders.

[Note 2] Old King's Highway Committee of Barnstable.

[Note 3] A neighbor, Joseph F. Dugas, was complaining of an interference with his view.

[Note 4] The committee made an informal request to the building commissioner on December 23, 1997, which was followed on January 21, 1998, by a brief note from the building commissioner to the chairman of the Barnstable committee that "the height and location are substantially in conformance with Zoning and the intent of the O.K.H. act. I believe the stop work order should be lifted. I intend on doing that forthwith."

[Note 5] The judge denied the motion of the neighbor Dugas to intervene in the action.

[Note 6] That an appeal to our court lies from an order of the lower court striking a notice of appeal to our court, see Zieminski v. Berkshire Div. of the Probate & Family Ct., 408 Mass. 1008 , 1009 (1990).

[Note 7] As for filing the notice untimely, Catalano v. First Essex Savs. Bank, 37 Mass. App. Ct. 377 , 383 (1994); failure to docket appeal, Mass.R.A.P. 10(c), as amended, 378 Mass. 938 (1979); failure to give required bond, Kargman v. Dustin, 5 Mass. App. Ct. 101 , 106-108 (1977).

[Note 8] The district commission is empowered to issue regulations by the Historic Act, s. 4; these have been promulgated in a "Bulletin" (reproduced in the case appendix) to which we refer.

[Note 9] Under the Historic Act, s. 6, fourth par., as amended by St. 1975, c. 845, s. 8, "Except in cases excluded by section seven [exclusions], no permit shall be issued by the building inspector for any building or structure to be erected within the district, unless the application for said permit shall be accompanied either by a certificate of appropriateness or a certificate of exemption which has been filed with the town clerk." More generally, by s. 12, second par., as amended by St. 1975, c. 845, s. 15, "The building inspector in the affected town shall have the power and duty to enforce the provisions of this act"; see also Old King's Highway Regional Historic District Commission Bulletin, Guideline A (Dec. 1983), text to the same effect.

[Note 10] See Historic Act, s. 11, first par., as amended by St. 1975, c. 845, s. 13.

[Note 11] Historic Act, s. 11, second par., as amended by St. 1977, c. 503, s. 4.

[Note 12] Historic Act, s. 11, fifth par., as amended by St. 1982, c. 338, s. 8.

[Note 13] Historic Act, s. 11, fifth par.

[Note 14] The Bulletin in Guidelines A and B calls for submission of plans and location with applications for appropriateness.

[Note 15] It was folly for the plaintiffs to rely on a talk with an unidentified person in the building department in order to bypass the decision of the Barnstable committee and the enforcement order of the building commissioner.

[Note 16] See Bulletin, Guideline E, which concludes in par. 1: "All alterations by amendment or otherwise will require the local Committee's approval."

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OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION
P.O. Box 140, Barnstable, Massachusetts 02630-0140

STANDING

"Person Aggrieved"

SANDWICH BARNSTABLE YARMOUTH DENNIS BREWSTER ORLEANS

Old King's Highway Regional Historic District Commission
P.O. Box 2187, Hyannis, Mass. 02601 Telephone 508-775-5793

MR. & MRS. JAMES DILLON

v. Decision #99-24

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMITTEE FOR THE TOWN OF SANDWICH

On Tuesday, January 11, 2000 the Commission held a hearing on Appeal #99-24 filed by Mr. & Mrs. James Dillon, seeking review of a decision by the Sandwich Historic District Committee denying a Certificate of Appropriateness for alterations to a building located at 18 School Street, Sandwich, Massachusetts.

Present were Dorothy Stahley, Barnstable; Paul White, Sandwich; Paul SanClemente, Dennis; Deborah Gray, Yarmouth; Roy Robinson, Brewster; Robert G. Brown, Commission Counsel; Grattan Gill, Architect for the Appellants; and James Dillon, Appellant.

The Committee's decision was filed with the Town Clerk on December 15, 1999. The appeal was entered with the Commission on December 23, 1999, within the 10 day appeal period.

In the absence of both the Chair and Vice-Chair, the Commissioners elected Roy Robinson as Chair Pro Tem.

THE APPELLANTS' PRESENTATION:

James Dillon, Appellant, addressed the Commission in favor of the appeal. He showed the original model that had been denied at a previous meeting. He showed how the new design has changes in both the exterior features and window treatments. He said he felt the undercurrent of the opinion of the Sandwich Committee was that there should be no two story additions in the area of the Hoxie House.

Grattan Gill, Architect for the Appellants, addressed the Commission in favor of the appeal. He explained the process of redesigning the addition and said the addition had been simplified so that there was no question it was appropriate for the District.

THE COMMITTEE'S PRESENTATION:

Paul White, representing the Sandwich Committee, explained the Sandwich Committee's reasons for denial. He said the Sandwich Committee took this matter very seriously as this property is situated in a very sensitive area of the District. The Sandwich Committee felt the addition was too modern and not compatible with the remainder of the District. Where this house is situated, the side of the house will be much more visible that the front of the house and an addition such as this is not appropriate.

DISCUSSION:

In discussion among Commission members, there was a consensus among the Commission members that while some deference should be paid to the Committee's decision, the Committee's decision was not beyond review and that the Sandwich Committee did not appear to have a reasonable basis for its decision in this matter.

FINDINGS:

The Commission voted as follows:

1. That the Sandwich Committee used poor judgment in denying the Appellants' application for a Certificate of Appropriateness. 4-0-1.

2. That the appeal be allowed. 4-0-1

DETERMINATION:

As to Appeal #99-24, the appeal is allowed.

Any person aggrieved by this decision has a right to appeal to the District Court Department, Barnstable Division, within 20 days of the filing of this decision with the Sandwich Town Clerk.

Roy Robinson
Chair Pro Tem

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

DISTRICT COURT DEPARTMENT
BARNSTABLE DIVISION
DOCKET NO. 0025 CV 0206

BETTY ALLEN, et al.)
)
)
V.)
)
)
OLD KING'S HIGHWAY)
REGIONAL HISTORIC DISTRICT)
COMMISSION, et al.)
)
AND)
)
JAMES P. DILLON, JR.)

DECISION ON JAMES DILLON'S MOTION TO INTERVENE AND AND DISMISS

PROCEDURAL HISTORY

This matter came before the Court for hearing on May 26, 2000 on the defendant James Dillon's motion to dismiss[1] a motion to file a late appeal by the plaintiffs. The plaintiffs wish to appeal a decision by the Old King's Highway Regional Historic District Commission (the "Commission") reversing a decision of the Sandwich District Committee (the "Committee".)

On December 15, 1999 the Committee denied the defendant's application for a certificate of appropriateness for a proposed addition to his residence. The defendant appealed. The Commission reversed, and its decision was filed with the town clerk on February 19, 2000. On March 2, 2000 the plaintiffs filed a notice of appeal. The plaintiffs, all residents of Sandwich, are or were all members of the Committee which denied the defendants application.

[1]his motion to intervene was allowed without objection

DECISION

As a board, the Committee is subordinate to the Commission and is therefore bound by its decision. Attorney General & Another v. Barnstable Committee of the Old King's Highway Regional Historic District, 416 Mass. 1009 (1993).

As members of the Committee, the plaintiffs should not be permitted to subvert the legal authority of the Commission over their governmental decision making by appealing its decisions as individuals. In addition, the plaintiffs cannot claim to be "aggrieved parties." An "aggrieved party" has been interpreted, in a zoning case, to include a person suffering "some infringement of his legal rights . . ." Marashlean v. Zoning Board of Appeals, 421 Mass. 719 (1996). None of the plaintiffs are abutters. Any claimed injury would be speculative, at best.

In light of the foregoing, the Court declines to rule on whether there is excusable neglect for filing the notice of appeal late.

Accordingly the defendant's motion to dismiss is allowed.

Entered: May 30, 2000

Joan E. Lynch
Associate Justice
Barnstable District Court

Betty Allen, and others[1] *vs.* Old King's Highway Regional Historic District[2]

Southern District—December 19, 2000.
Present: Wheatley, P.J., Welsh & Sabra, JJ.

Practice, Civil, Challenge to approval of certificate of appropriateness; Standing. *Words,* "Person(s) aggrieved."

Opinion affirming judgment for the defendants. Action heard in the Barnstable Division by Joan E. Lynch, J.

Peter A. Kuperstein for the plaintiff.
Robert G. Brown for the defendant.
James P. Dillon, Jr., for the intervener.

Welsh, J. This appeal[3] seeks judicial review and annulment of a decision of the Old King's Highway Regional Historic District approving a Certificate of Appropriateness sought by James Dillon and his spouse for the construction of an addition to their residence at 18 School Street in Sandwich.[4]

This case arises by virtue of St. 1973, c. 470 as amended, The Old King's Highway Regional Historic District Act. That statute requires a person seeking to construct or alter a structure within the district obtain a Certificate of Appropriateness from the appropriate town committee. Any "person aggrieved" by the town committee's decision on the application has the right to appeal to the regional commission which hears the matter de novo and decides on the basis of facts it finds whether the town committee exceeded its authority or exercised poor judgment or was arbitrary, capricious or erroneous in its action. The commission may either annul the town committee's decision and remand the matter for further action or revise the committee's determination and issue or deny the Certificate of Appropriateness. The statute provides for judicial review in the district court having jurisdiction over the town in which the building or property is situated upon the appeal of "any person aggrieved." The nature and scope of review is akin to that of a court conducting a judicial review of a decision by a Board of Appeals in the zoning context. G.L.c. 40A, §17.

The Dillons' request for a Certificate of Appropriateness was heard by the town committee which denied the request. Upon appeal to the regional committee, a decision was entered annulling the local committee's decision and granting the sought

[1] Paul White, Jacob Atwood, Linda Marsh, Barry Hall and Marian Reilly.

[2] James R. Dillon, Jr., intervener.

[3] The plaintiffs are residents and property owners in Sandwich. None is an abutter of the Dillons' property.

[4] The Dillons sought and were granted leave to intervene agreeably to Mass. R. Civ. P., Rule 24(b).

after Certificate. From this decision, the plaintiffs, who are residents and property owners of the Town of Sandwich and some of whom are members of the town committee who participated in the committee's decision, filed seeking judicial review agreeable to Section 11 of the Act (as amended through St. 1975, c. 845).

1. The question of whether the plaintiffs are "person(s) aggrieved" within the meaning of the Act so as to have standing to prosecute this appeal is decisive of this appeal. None of the plaintiffs is an abutter. The nearest plaintiff resides four houses distant and the remotest plaintiff resides approximately five miles from the location. None of the plaintiffs has shown any special harm that would occur to him if the Certificate of Appropriateness awarded by the regional commission is allowed to stand. The plaintiffs seem to rely upon the membership of some of them on the town committee that heard and denied the application. Nowhere in the Act is there any language from which might be inferred a right by the members of the town committee, acting as such, to appeal a decision of the Regional Historic District Commission.[5]

The burden of demonstrating that the plaintiffs are "aggrieved" is no mere procedural nicety: It goes to the very heart of the court's authority to hear and determine the cause. See *Marotta* v. *Board of Appeals of Revere*, 336 Mass. 199, 204 (1957); *Barvenik* v. *Board of Aldermen of Newton*, 33 Mass. App. Ct. 129 (1992); *Save the Bay, Inc.* v. *Department of Public Utilities*, 366 Mass. 667, 672 (1975). It was not the intention of the legislation creating the Commission to create a private right on the part of citizens of a community to enforce the provisions of the Act. See *Waltham Motor Inn, Inc.* v. *LaCava*, 3 Mass. App. Ct. 210, 214 (1975). Proximity to the property alone will not always suffice to confer "standing." *Marotta* v. *Board of Appeals of Revere, supra*, at 203. Once evidence is offered challenging the presumption of aggrievment, the presumption vanishes and the issue of jurisdiction must be revisited without the benefit of any presumption. *Waltham Motor Inn, Inc.* v. *LaCava, supra*, at 217. General civic interest in the enforcement of historic zoning is not sufficient to confer standing. *Amherst Growth Study Comm., Inc.* v. *Board of Appeals of Amherst*, 1 Mass. App. Ct. 826 (1973). "Subjective and unspecified fears about the possible impairment of aesthetics or neighborhood appearance, incompatible architectural styles, the diminishment of close neighborhood feeling, or the loss of open or natural space are all considered insufficient bases for aggrievement under Massachusetts law." *Barvenik, supra*, at 132-133.

The fact that the plaintiffs participated in the administrative process does not, *in se*, confer standing to challenge the actions of the regional commission. See *Ginther* v. *Commissioner of Insurance*, 427 Mass. 319, 324 (1998). One zealous in the enforcement of the laws but without a judicially recognized private interest is not a "person aggrieved." *Godfrey* v. *Building Comm'r of Boston*, 263 Mass. 589, 590 (1928). As observed, there is no statutory warrant either in the Old King's Highway Regional Historic District Act or in any other statute that would enable town committee members acting as such to qualify as plaintiffs in this proceeding.

The case of *Harvard Square Defense Fund, Inc.* v. *Planning Board of Cambridge*, 27 Mass. App. Ct. 491 (1989) contains an apt and germane discussion of the sort of standing necessary to obtain a judicial review in cases of this sort; "... the plaintiffs' concern about diminished open space, incompatible architectural styles, the belittling of historical buildings, and the diminished enjoyment of the 'village feeling' ... express matters of general public concern which were appropriately addressed by the administrative proceedings held in this case. Those matters, essentially involving the expression of aesthetic views and speculative opinions, do not establish a plausible claim of a definite

[5] Although not argued at length in the briefs, it may be observed that absent clear language permitting otherwise, it would be inappropriate to permit committee members acting as such, to appeal rulings of the regional committee. As town officers, they lack authority to bring suit or employ counsel without specific authorization from the town. See *O'Reilly* v. *Scituate*, 328 Mass. 154, 155 (1951).

violation of a private right, property interest or legal interest sufficient to bring any of the plaintiffs within the zone of standing." *Id.* at 493.

2. Appellants urge that a more indulgent and more inclusive construction be given to the term "person[s] aggrieved." They cite G.L.c. 40C, the Historic Districts Act (added to General Laws by St. 1960, c. 372), as cogent authority for the more liberal interpretation of the requirements for standing. The short answer to this contention is that G.L.c. 40C has no application to proceedings for judicial review under the Old King's Highway Regional Historic District Act. G.L.c. 40C mandates acceptance of its provisions by a city or town before it becomes effective for the particular municipality. There is no evidence in the record to show that the Town of Sandwich accepted its provisions. Nor do counsel intimate any such acceptance in their briefs or arguments on this appeal. The initial version of G.L.c. 40C did not contain a specific definition of "person aggrieved." Such a definition was added by St. 1983, c. 429, §1. "Aggrieved person" was defined to mean the applicant, an owner of adjoining property, an owner of property within the same historic district or property within one hundred feet of said property lines and any charitable corporation in which one of its purposes is the preservation of historic structures or districts. In our view, this liberal definition of "aggrieved persons" is inapposite to cases arising under the Old King's Highway Regional Historic District Act. G.L.c. 40C, §16 provides that a city or town in which there exists a historic district under a special law may by 2/3 vote and upon the recommendation of the historic district commission having jurisdiction over such district accept the provision of G.L.c. 40C. There is no evidence in the record, nor does counsel intimate, that any such acceptance was effected in Sandwich or in the district generally.

We perceive no reason to depart from the requirements of standing in this case. This historic district is a large one. To suggest that any inhabitant or property owner in so large a district may invoke the judicial review provisions of the Act without making a plausible claim of a definite violation of a private right would be inconsistent with the purposes of the Act by enlarging the class of potential plaintiffs who might attack the decision of the commission solely on aesthetic or other subjective grounds. To put the commission and the applicants to the expense of litigation when assailed from so large a quarter would not be consistent with the fair balance between the reasonable expectation of property owners to the use of their land and the preservation of antiquity espoused by the Act.

The motion judge correctly ordered the dismissal of the complaint. We affirm the judgment.

So ordered.

SANDWICH BARNSTABLE YARMOUTH DENNIS BREWSTER ORLEANS

Old King's Highway Regional Historic District Commission

P.O. Box 2187, Hyannis, Mass. 02601 Telephone 508-775-5793

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JAMES MASON & OTHERS

v.

Decision #99-22

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMITTEE FOR THE TOWN OF DENNIS

On Tuesday, December 7, 1999 the Commission held a hearing on Appeal #99-22 filed by James Mason and others, seeking review of a decision by the Dennis Historic District Committee allowing a Certificate of Appropriateness to John & Carol Cichy for the construction of a new building to be located at 102 Scargo Hill Road, Dennis, Massachusetts.

Present were Edward Molans, Barnstable; Paul White, Sandwich; Elizabeth Wilcox, Dennis; Polly McGrory, Yarmouth; Roy Robinson, Brewster; Robert G. Brown, Commission Counsel; and John Cichy, Applicant.

The Committee's decision was filed with the Town Clerk on November 8, 1999. The appeal was entered with the Commission on November 18, 1999, within the 10 day appeal period.

In the absence of the Chair and as the appeal arose from the town of the Vice-Chair, the Commission members elected Roy Robinson as Chair Pro Tem.

THE APPELLANT'S PRESENTATION:

There was no on present to represent the Appellants. In examining the file, it was determined that none of th named Appellants were direct abutters of the subject property. Commission Counsel opined that, based on the decision in the matter of Ungermann v. Old King's Highway Regional Historic District Commission, Barnstable District Court, Docket #90-1802, the Appellants lacked standing to pursue the matter before the Commission as they were not direct abutters of the subject property.

DISCUSSION:

In discussion among Commission members a majority of the Commissioners agreed to defer to the opinion of the Commission Counsel.

FINDINGS:

The Commission voted as follows:

1. That the Dennis Committee did not act in an arbitrary, capricious or erroneous manner in allowing the Applicant's (John & Carol Cichy) application for a Certificate of Appropriateness. 3-0-2.

2. The Appellants lack standing to pursue this matter before the Commission as they are not direct abutters to the property in question.

3. That the appeal be denied.

DETERMINATION:

As to Appeal #99-22, the appeal is denied.

Any person aggrieved by this decision has a right to appeal to the District Court Department, Orleans Division, within 20 days of the filing of this decision with the Dennis Town Clerk.

Roy Robinson
Chair Pro Tem



James Mason, and others[1] *vs.* Old King's Highway Regional Historic District Commission *vs.* John Cichy, and another[2]

Southern District—June 12, 2001.
Present: Wheatley, P.J., Crimmins[3] & Sabra, JJ.

Administrative, Grant of certificate of appropriateness by historic district committee. *Practice, Civil,* Motion to dismiss; Notice of appeal, Late filing of.

Opinion dismissing plaintiffs' appeal. Dismissal motion heard in the Orleans Division by Robert A. Welsh, Jr., J.

Peter D. Stanton for the plaintiffs.
Robert G. Brown for the defendant.
E. James Veara for the intervenors.

Sabra, J. This is an expedited appeal by the plaintiffs from a decision by the trial court allowing a motion to dismiss their complaint. The plaintiffs, James Mason, Sandra Mason, Michael Skol and Claudia S. Serwer (hereinafter "plaintiffs"), claimed to be parties aggrieved by a decision of the Old King's Highway Regional Historic District Commission (hereinafter "Commission") which allowed the intervenors, John and Carol Cichy (hereinafter "Cichy's"), to obtain a Certificate of Appropriateness for the construction of a new building at 102 Scargo Hill Road, Dennis, Massachusetts. The court allowed the motion to dismiss based on the failure of the plaintiffs to file notice of their appeal with the town clerk within the 20-day time limit established by the statute. We affirm.

[1] Sandra Mason, Michael Skol and Claudia S. Serwer.

[2] Carol Cichy.

[3] Although Judge Crimmins participated in the hearing and the decision in this case, he did not sign the opinion because his term expired before the certification date.

The story begins with a decision by the Town of Dennis Old King's Highway Historic District Committee (hereinafter "Committee") allowing a Certificate of Appropriateness to John and Carol Cichy for the construction of a new building located at 102 Scargo Hill Road, Dennis, Massachusetts. This occurred on November 4, 1999. The plaintiffs are members of a group called the Scargo Homeowners Association but who individually filed an appeal of the Committee's decision to the Old King's Highway Regional Historic District Commission on or about November 18, 1999. The gravamen of their appeal was that certain protective language for the development of the Scargo Lake area was not included in the Certificate of Appropriateness issued by the Committee.

After a hearing in December, the Commission rendered a decision that the plaintiffs were not direct abutters to the property in question and both dismissed the plaintiffs' appeal and affirmed the Committee's decision.[4] The Commission further filed its decision regarding 102 Scargo Road with the Town Clerk on January 6, 2000 in accordance with the law. The plaintiffs filed the instant complaint with the district court on January 26, 2000 but did not file a copy of the complaint with the Town Clerk until March 3, 2000.

At the core of this appeal is whether the failure to file the plaintiffs' complaint with the Town Clerk within twenty days of the Commission filing its decision is fatal to the maintenance of this action. Specifically, the plaintiffs were required to file a copy of their complaint with the Town Clerk no later than January 26, 2000. The plaintiffs do not dispute the fact that Section 11 of Chapter 470 of the Acts of 1973 requires that notice of the complaint be filed with the Town Clerk of the Town of Dennis. Their argument on appeal, however, is that this court should construe the statutory procedural requirements in a manner that would have allowed the trial judge to exercise discretion in allowing the plaintiffs' appeal of the Committee's decision to go forward despite the procedural lapse. To that end, the plaintiffs urge us to interpret the 20-day filing requirement with the Town Clerk similar to the broader purposes encompassed by the statutory schemes concerning conservation commissions and historical commissions as opposed to basing it on the stricter jurisdictional construction of the zoning statutes. For the reasons which follow, we decline to do so.

The Old King's Highway Regional Historic District Act provides in pertinent part that "[a]ny person aggrieved by the action of the commission may, within twenty (20) days after notice of said decision has been filed with the town clerk of the affected town, appeal to the District Court having jurisdiction over the affected town and notice of such appeal shall be given to the town clerk so as to be received within such twenty (20) days." Section 11 of Chapter 470 of the Acts of 1973, amended by St. 1975, c. 298 and c. 845; St. 1976, c. 273; St. 1977, c. 38 and c. 503; St. 1978, c. 436; St. 1979, c. 631; St. 1982, c. 338; and St. 1994, c. 90. The clear import of this section is that the plaintiffs were required to give notice of their complaint to the Town Clerk of the Town of Dennis by January 26, 2000.

The language of Section 11 is identical to the language in the zoning statutes regarding the time periods and procedural steps for judicial review. Although there appear to have been no appellate decisions on this precise issue under the Old King's Highway Historic District Act, "[s]ound principles of statutory con-

[4] The plaintiffs' complaint alleges that the hearing was held on December 7, 1999, and that the Notice for the hearing was deficient in that it was postmarked on December 3, 1999 and not received until the day of the hearing, which violated the Commission's procedural rules requiring seven days notice. We need not address this precise point since it is not pertinent to this appeal which centers on the 20-day filing requirement of the plaintiffs' complaint with the Town Clerk in accordance with Section 11 of St. 1973, c. 470, as amended.

struction dictate that interpretation of provisions having identical language be uniform." *Webster* v. *Board of Appeals of Reading*, 349 Mass. 17, 19 (1965). Moreover, "[w]here statutes are parts of a general system relating to the same class of subjects, and rest upon the same reasons, they should be so construed, if possible, as to be uniform in their application, and in the results which they accomplish." *Sheldon* v. *Boston & A.R. Co.*, 172 Mass. 180 (1898).

Here, where the issues of land use and preservation are common themes of both the zoning laws and the historic district act, it is logical to presume, as the trial judge did, that the Legislature had in mind the existing judicial interpretation of zoning appeal requirements when it chose virtually identical language for appeals taken under the Old King's Highway Historic District Act. Precedence for this approach exists where the courts have read the statutory scheme of a specific historic district in light of the "more general statutes providing for zoning, G.L.c. 40A, and for historic districts, G.L.c. 40C." *Gumley* v. *Board of Selectmen of Nantucket*, 371 Mass. 718, 719 (1977) (where language of section of Historic Nantucket District Act was substantially identical to zoning enabling act relative to standard of review).

In zoning appeals, the requirement of giving notice to the town clerk within twenty (20) days is a jurisdictional requirement such that failure to do so generally mandates dismissal. *Pierce* v. *Board of Appeals of Carver*, 369 Mass. 804, 809 (1976); *Garfield* v. *Board of Appeals of Rockport*, 356 Mass. 37 (1969); *Lincoln* v. *Board of Appeals of Framingham*, 346 Mass. 418 (19); *McLaughlin* v. *Rockland Zoning Bd. of Appeals*, 351 Mass. 678 (19); *Bjornlund* v. *Zoning Bd. of Appeals of Marshfield*, 353 Mass. 757 (19). The purpose of this requirement is to give interested persons "at least constructive notice of the appeal." *Carey* v. *Planning Bd. of Revere*, 335 Mass. 740, 745 (1957) citing *McLaughlin* v. *Rockland Zoning Bd. of Appeals*, *supra* at 680. As a jurisdictional matter, the notice requirement has been "policed in the strongest way," *Pierce* v. *Board of Appeals of Carver*, 369 Mass. 804, 808 (1976), and been given "strict enforcement," *O'Blenes* v. *Zoning Bd. of Appeals of Lynn*, 397 Mass. 555, 558 (1986). See also *Konover Management Corp.* v. *Planning Board of Auburn*, 32 Mass. App. Ct. 319 (1992).

The plaintiffs point to several cases which, they argue, indicate that some lapses with respect to the procedures for appeal "should be treated on a less rigid basis." *Pierce* v. *Board of Appeals of Carver*, 369 Mass. at 811, citing *Schulte* v. *Director of the Div. of Employment Security*, 369 Mass. 74, 81 (1975). Citing the *Schulte* case in particular, the plaintiffs contend that the filing of notice to the town clerk 54 days[5] after the Commission decision was filed, rather than the twenty days required under the statute, should not be viewed as a "serious misstep" but as an "innocuous one," which would allow the judge "to consider how far they have interfered with the accomplishment of the purposes implicit in the statutory scheme and to what extent the other side can justifiably claim prejudice." *Schulte* at 79-80. The problem with the plaintiffs' argument, and the reason it must fail, is because it ignores the fact that actual notice to the town clerk is a condition precedent to maintaining the appeal. As stated in *Konover Management Corp.* v. *Planning Board of Auburn*, 32 Mass. App. Ct. 319, 324-325 (1992), "[t]he key element of these decisions relaxing the rigors of strict compliance with the zoning appeal statute is that within the mandatory twenty-day period the clerk is actually notified that an appeal — i.e., a complaint — has in fact been timely filed." No such showing has been

[5] Assuming that a timely filed notice would have been made on or before January 26, 2000, the March 3, 2000 filing of the notice by the plaintiffs would be 36 days late, or 56 days after the filing of the Commission decision with the town clerk on January 6, 2000. It is unclear how both the plaintiffs and the defendant arrived at "54 days."

made on the record in this appeal.[6] Therefore, the assertion that the court can only dismiss upon a showing of prejudice is without merit.

We need not address the issue of whether the plaintiffs are "aggrieved parties" within the meaning of the statute since we hold that they have not met the jurisdictional requirement of notice to the town clerk within the twenty-day period in order to proceed with their appeal. Accordingly, the appeal is dismissed.

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[6] The fact of actual notice to the town clerk is absent from the record, although, in their brief, the plaintiffs make reference to their "belief" that the town clerk had notice because the plaintiffs had informed members of the Town of Dennis Historic Commission on or about November 4, 1999, that they intended to appeal the decision all the way to the court. This court notes that their "belief" that their intentions to appeal were well known at the town hall is insufficient to prove notice under the statute, and, in any event were communicated prior to the Commission decision being filed with the town clerk on January 6, 2000. We decline to take cognizance of an intent to appeal prior to the decision being rendered. In addition, this is analogous to *County of Norfolk* v. *Zoning Bd. of Appeals of Walpole*, 16 Mass. App. Ct. 930 (1983), where telephoning the clerk within the twenty-day period to express an intent to appeal the board's decision was found to be insufficient.

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION
P.O. Box 140, Barnstable, Massachusetts 02630-0140

COMPREHENSIVE PERMIT

"M.G.L. CHAPTER 40B Project"

DENNIS HOUSING CORP. vs. ZONING BOARD OF APPEALS OF DENNIS & another. [Note 1]

439 Mass. 71

December 5, 2002 - March 31, 2003

Bristol County

Present: MARSHALL, C.J., GREANEY, SPINA, SOSMAN, & CORDY, JJ.

Zoning, Comprehensive permit, Housing appeals committee, Low and moderate income housing. Housing. Historic District Commission. Words, "Local board."

Discussion of the background, governing structure, and organization of a legislatively created regional historic district. [73-76]

Statement of the purpose of G. L. c. 40B, s. 21-23, the comprehensive permit act for the development of affordable housing. [76-78]

This court concluded that the town of Dennis historic district committee was a "local board" within the meaning of G. L. c. 40B, s.s. 20-23, the comprehensive permit act, and that, consequently, a developer seeking to construct elderly low-to-moderate income housing within the geographic boundaries of the town's historic district did not need to file a separate application for a certificate of appropriateness with the town's historic district committee, and that any comprehensive permit issued by the town's zoning board of appeals would be inclusive of any certificate that would ordinarily have to be obtained from the town's historic district committee. [78-83]

CIVIL ACTION commenced in the Superior Court Department on August 4, 2000.

The case was heard by Robert J. Kane, J., on motions for summary judgment.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

George X. Pucci for the defendants.

James P. Killoran for the plaintiff.

David S. Weiss & Jennifer M. DeTeso, for Citizens' Housing and Planning Association, amicus curiae, submitted a brief.

SOSMAN, J. The defendants, members of the zoning board of

appeals of the town of Dennis (ZBA) and members of the town of Dennis Old King's Highway historic district committee (Dennis historic committee), appeal from the entry of summary judgment declaring that the Dennis historic committee is a "local board" within the purview of

the comprehensive permit act, G. L. c. 40B, §§ 20- 23. We transferred the case on our own motion, and now affirm the declaratory judgment.

1. Background. The plaintiff, Dennis Housing Corp. (developer), seeks to construct elderly low-to-moderate income housing in the town of Dennis. On May 9, 2000, the developer filed an application with the ZBA seeking a comprehensive permit pursuant to G. L. c. 40B, § 21, which allows the ZBA to rule on "a single application to build such housing in lieu of separate applications to the applicable local boards." The site for the proposed project is within the geographic boundaries of the Old King's Highway regional historic district (historic district), created by St. 1973, c. 470, as amended (Historic Act). Historic Act, § 2, as appearing in St. 1978, c. 436, § 1. No construction, alteration, demolition, or removal of structures located within the historic district may occur without a "certificate of appropriateness" as to the exterior architectural features issued by the requisite town historic district committee. [Note 2] The developer took the position that its "single application" to the ZBA pursuant to G. L. c. 40B, § 21, and the ZBA's authority to grant a comprehensive permit based on that single application, obviated the need to obtain a certificate of appropriateness from the Dennis historic committee. The ZBA and the Dennis historic committee took the position that the committee was not a "[l]ocal [b]oard" as defined by G. L. c. 40B, § 20, and that a comprehensive permit issued under § 21 would therefore not allow the project to go forward without a separate application to and certificate of appropriateness from the Dennis historic committee.

The developer filed a complaint for declaratory judgment, seeking a declaration that the Dennis historic committee was a "local board" within the purview of G. L. c. 40B, that no separate application for a certificate of appropriateness needed to be filed with the Dennis historic committee, and that any

comprehensive permit issued by the ZBA would be inclusive of any certificate that would ordinarily have to be obtained from the Dennis historic committee. On cross motions for summary judgment, the Superior Court judge ruled in favor of the developer, and entered judgment declaring that the Dennis historic committee was a "local board" subject to the provisions of G. L. c. 40B, §§ 20-23. The ZBA and the Dennis historic committee appealed.

2. Organization of the historic district. Because it is necessary to our analysis of whether the Dennis historic committee is a "local board" subject to G. L. c. 40B, §§ 20-23, we set forth the background, governing structure, and organization of the historic district in some detail. The Legislature's purpose in creating the historic district was "to promote the general welfare of the inhabitants of the applicable regional member towns so included through the promotion of the educational, cultural, economic, aesthetic and literary significance[,] through the preservation and protection of buildings, settings and places within the boundaries of the [historic district] and through the development and maintenance of appropriate settings and the exterior appearance of such buildings and places, so as to preserve and maintain such

[historic district] as a contemporary landmark compatible with the historic, cultural, literary and aesthetic tradition of Barnstable county, as it existed in the early days of Cape Cod, and through the promotion of its heritage." [Note 3] The historic district originally included portions of nine Cape Cod towns (Bourne, Sandwich, Barnstable, Yarmouth, Dennis, Harwich, Brewster, Orleans, and Eastham). Historic Act, § 2. [Note 4]

The Legislature established a "town historic district committee" (town historic committee) for each of the member towns, with each town historic committee to be comprised of five members, including at least one architect. Historic Act, § 5. For most of the member towns (including Dennis), four out of the five town historic committee members must be residents of the

town. [Note 5] All of the initial town historic committee members were appointed by each town's selectmen. Id. Following the expiration of their initial terms, the succeeding architect members are appointed by the selectmen, with the remaining town historic committee members elected at an annual meeting of the registered voters within the historic district, such elections to be conducted in accordance with "such rules and regulations as the selectmen may prescribe." Id. For two towns (including the town of Dennis), town historic committee members are now elected at the town's annual election. [Note 6] A town historic committee may nominate, and the town's selectmen may then appoint, an alternate member, who must be a town resident, to serve as needed to establish a quorum. [Note 7] Vacancies occurring prior to the expiration of a town historic committee member's term are also filled by selectmen's appointment, and the selectmen have the power to remove a town historic committee member for cause. Historic Act, § 5.

Within the historic district, no building or structure can be erected without a certificate of appropriateness issued by the town historic committee, and the building inspector may not issue a building permit unless the applicant submits the requisite certificate of appropriateness. [Note 8] The building inspector has the power and duty to enforce the provisions of the Historic Act. [Note 9] On submission of an application for a certificate of appropriateness, the town historic committee is to schedule a public hearing on the application, publish notice thereof in a "local newspaper," and notify all abutters to the project. [Note 10] In ruling on an application, the town historic committee must determine whether the "size" and "features" of the proposed structure "will be appropriate for the purposes of this [Historic Act]." Historic Act, § 10. In making that determination, the town historic committee is to consider "the historical value and significance of the building or structure, the general design, arrangement,

texture, material and color of the features . . . and the relation of such factors to similar factors of buildings and structures in the immediate surroundings," along with the "settings" and "relative size of buildings and structures." Id.

The Legislature also established the Old King's Highway regional historic district commission (historic commission), which is comprised of the chairmen of each of the town historic committees. [Note 11] Persons aggrieved by a town historic committee's grant or denial of a certificate of appropriateness may appeal to the historic commission. [Note 12] The historic commission may reverse the town historic committee's decision if the committee "exceeded its authority or exercised poor judgment, [or] was arbitrary, capricious or erroneous in its action." [Note 13] Persons aggrieved by the historic commission's decision may seek judicial review in the District Court having jurisdiction over that town. [Note 14]

The historic commission promulgates rules and regulations for the administration of the historic district. [Note 15] The historic commission has the power to designate portions of the historic district as "exempt areas," within which the requirement of a certificate of appropriateness is eliminated, if the historic commission determines that those areas "lack historical significance." [Note 16] The historic commission may also designate whole "categories of exterior architectural features" as similarly exempt from review for appropriateness. [Note 17] The expenses of managing the historic district are apportioned by the historic commission among the member towns, with each town's board of assessors including the amount in the following year's tax levy. Historic Act, § 14.

The effective date of the legislation creating the historic district was made contingent on a vote by the residents of the towns within the historic district. Historic Act, § 16. If a majority of those town voters voting in the 1974 State election voted

that the legislation should "be accepted," the legislation was to become effective and the historic district would be created. Id. Absent such majority vote, the legislation would not become effective, but the question would be placed on the ballot again in up to two subsequent elections. If still not accepted by a majority vote at any of those elections, the legislation would remain without effect, and the question of its acceptance could only be put back on the ballot by way of a petition signed by fifteen per cent of the registered voters in each of the nine towns. Id. The requisite majority vote was obtained, and the legislation was thereby accepted and effective, at the November 4, 1974, State election. In each of the subsequent enactments authorizing particular towns to withdraw from the historic district, the option to withdraw was to be placed on the ballot at the withdrawing town's annual election, with that withdrawal becoming effective only on receipt of a majority vote. [Note 18]

3. The comprehensive permit act. Against this backdrop pertaining to the creation and functioning of town historic committees in the historic district, we must consider the

comprehensive permit act, G. L. c. 40B, §§ 21-23. The comprehensive permit act was intended to remove various obstacles to the development of affordable housing, including regulatory requirements that had been utilized by local opponents as a means of thwarting such development in their towns. See Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership, 436 Mass. 811 , 814-815, 820-824 (2002); Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339 , 347-355 (1973); Rodgers, Snob Zoning in Massachusetts, 1970 Ann. Survey of Mass. L. 487, 487-489. Among those regulatory obstacles was the need to obtain permits and approvals from multiple local agencies through separate application and review proceedings. "[T]he process of obtaining local approval is so protracted as to discourage all but the most determined and well-financed builders." Board of Appeals of Hanover v. Housing Appeals Comm., supra at 351, quoting Report of the Committee on Urban Affairs, 1969 House Doc. No. 5429.

To eliminate that particular impediment, G. L. c. 40B, § 21, provides that a qualified developer proposing to build low or

moderate income housing may submit to the zoning board of appeals "a single application to build such housing in lieu of separate applications to the applicable local boards." The zoning board is then to notify those "local boards" for their "recommendations" on the proposal; the zoning board may "request the appearance" of representatives of those "local boards" at the public hearing as may be "necessary or helpful" to the decision on the proposal; and the zoning board may "take into consideration the recommendations of the local boards" when making its decision. G. L. c. 40B, § 21. The zoning board then has "the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application," id., and, in some circumstances, has the power to override requirements or restrictions that would normally be imposed by those local boards. See Mahoney v. Board of Appeals of Winchester, 366 Mass. 228 , 232-233 (1974), appeal dismissed, 420 U.S. 903 (1975); Board of Appeals of Hanover v. Housing Appeals Comm., supra at 354-355, 364-365; G. L. c. 40B, §§ 20, 23. If the zoning board denies the application for comprehensive permit, or approves it only on conditions that make the project "uneconomic," the applicant may appeal to the housing appeals committee (created by G. L. c. 23B, § 5A), which also has the power to override local regulations and direct the issuance of a comprehensive permit. G. L. c. 40B, §§ 22-23. See Zoning Bd. of Appeals of Wellesley v. Ardemore Apartments Ltd. Partnership, supra at 815-816; Mahoney v. Board of Appeals of Winchester, supra; Board of Appeals of Hanover v. Housing Appeals Comm., supra at 345-346, 354-355, 364-367.

The zoning board's proceedings on a comprehensive permit application are subject to stringent deadlines, with a public hearing to be held within thirty days of the receipt of the application, and the decision to be rendered within forty days of the close of the public hearing. G. L. c. 40B, § 21. Absent the applicant's agreement to extend those deadlines, the application will be deemed allowed if the zoning board fails to meet them. Id. See Bell v.

Zoning Bd. of Appeals of Gloucester, 429 Mass. 551 , 552 (1999); Pheasant Ridge Assocs. Ltd. Partnership v. Burlington, 399 Mass. 771 , 782-783 (1987); Milton Common

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Assocs. v. Board of Appeals of Milton, 14 Mass. App. Ct. 111 , 116, 117 (1982). The apparent purpose behind these provisions is to consolidate what would otherwise be multiple, protracted proceedings before separate local agencies into a single, streamlined proceeding before the zoning board. "These are designed to expedite action on such applications where previously a builder might have suffered delays of months and even years in negotiating approvals from various boards." Rodgers, supra at 489. See Board of Appeals of Hanover v. Housing Appeals Comm., supra at 347; Milton Common Assocs. v. Board of Appeals of Milton, supra at 117.

4. Is the Dennis historic committee a "local board" under the comprehensive permit act? The issue now before us is whether the Dennis historic committee qualifies as a "local board" such that its customary power to determine whether a project's exterior features are "appropriate" for the historic district may instead be exercised by the ZBA as part of a comprehensive permit proceeding. For the following reasons, we conclude that it is such a "local board."

The "local boards" whose ordinary jurisdiction may be exercised by the zoning board under G. L. c. 40B, § 21, are defined as "any town or city board of survey, board of health, board of subdivision control appeals, planning board, building inspector or the officer or board having supervision of the construction of buildings or the power of enforcing municipal building laws, or city council or board of selectmen." G. L. c. 40B, § 20. The list of local agencies and officials that comprise the definition of "local board" is not intended to be a list of the precise names of such local agencies, but rather encompasses local agencies and officials performing comparable functions to the listed forms of "local board." Zoning boards have so treated that list in processing applications for comprehensive permits. See, e.g., Quinn v. Zoning Bd. of Appeals of Dalton, 18 Mass. App. Ct. 191 , 193, 196-197 & n.12 (1984) (including police department, fire department, conservation commission, and water department among "local boards" entitled to receive notice of comprehensive permit application). The housing appeals committee similarly interprets the term "local board" to include all boards that "perform functions usually

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performed by locally created boards." 760 Code Mass. Regs. § 30.02 (2001). [Note 19] Indeed, the defendants' brief concedes that a local commission not listed by name in § 20 could still qualify as a "local board" for purposes of comprehensive permit proceedings.

That we are to undertake a functional analysis -- not a name matching exercise -- with respect to the definition of "local board" is made explicit in the definition's treatment of the building inspector. The definition of "[l]ocal [b]oard" includes the "building inspector *or the officer or*

board having supervision of the construction of buildings or the power of enforcing municipal building laws" (emphasis added). G. L. c. 40B, § 20. Within the operational structure of the historic district, the functions of the town historic committee are directly linked to those of the building inspector: the building inspector may not issue a building permit for construction in the historic district unless the applicant submits a certificate of appropriateness issued by the town historic committee, and it is the building inspector who enforces the prohibition against uncertified construction within the historic district. [Note 20] See Rudders v. Building Comm'r of Barnstable, 51 Mass. App. Ct. 108 , 112-113 (2001) (building commissioner functioned as "enforcement arm" of town historic committee in issuing stop work order against construction that deviated from that authorized by certificate of appropriateness). It would be anomalous to hold that the zoning board's powers in the comprehensive permit scheme include the powers held by the building inspector in enforcing local requirements, but not the powers of the local agency for which the building inspector functions as enforcer. Where a town historic committee exercises a degree of "supervision of the construction of buildings," requiring that the exterior features of such buildings be "appropriate" to the historic district, and where the building

inspector (expressly named in the definition of "local board") is the local official that operates to uphold and enforce the town historic committee's power of supervision, we are satisfied that a town historic committee comes within the definition of "local board." G. L. c. 40B, § 20. [Note 21]

The defendants seek to evade this analysis by arguing that the town historic committee is not enforcing a mere local or "municipal" building law, id., but rather a State law as mandated by the Legislature. The defendants correctly note that the comprehensive permit scheme was designed to override local ordinances, bylaws, and regulations that impeded the development of affordable housing, not Statewide requirements set by the Legislature and State agencies. See Board of Appeals of Maynard v. Housing Appeals Comm., 370 Mass. 64 , 68 (1976) (comprehensive permit does not override wetlands protection scheme mandated by G. L. c. 131, § 40); Board of Appeals of N. Andover v. Housing Appeals Comm., 4 Mass. App. Ct. 676 , 679-680 (1976) (condition in comprehensive permit invalid where it purported to usurp procedures for resolving State building code disputes between builder and building inspector). However, the mere fact that the historic district was created by act of the Legislature does not operate to negate the overwhelmingly "local" nature of its implementation and operation. Town historic committee members (and thereby the town historic committee chairpersons that comprise the historic commission) are appointed by the town selectmen and elected by the towns' registered voters; they are removable for cause by the town selectmen; all members (except for the architect) must be residents of the town; and the expenses of the historic committee are paid entirely from local tax revenues. See Attorney

Gen. v. Barnstable Comm. of the Old King's Highway Regional Historic Dist., 416 Mass. 1009 , 1010 (1993) (town manager had authority to order town historic committee to withdraw appeal because its members were "town officer[s]" within meaning of town ordinance). While it is true that the Legislature set the general standards to be employed in assessing an application for a certificate of appropriateness, it is left to the locally elected and locally appointed historic commission and town historic committees to administer the historic district, exempt geographic areas and categories of features from its requirements, and decide applications for certificates of appropriateness. There is no State agency that has oversight of the workings of the historic commission or the town historic committees, either as to the determination of individual applications or as to the administration of the historic district. Rather, the historic commission and the town historic committees function independent of any State supervision, answerable only to the town voters and the town selectmen.

Contrary to the defendants' suggestion that the historic district was created by legislative command to preserve Cape Cod for the benefit of the State at large (thus giving the historic commission and the town historic committees the mandate to implement and enforce a "State" program), the Legislature's stated purpose was "to promote the general welfare *of the inhabitants of the applicable regional member towns*" (emphasis added). [Note 22] The Legislature also left it to the voters within the proposed historic district member towns to decide whether even to create (or remain in) the historic district. [Note 23] Thus, when the town historic committees act on applications for certificates of appropriateness

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for projects within their respective towns, they are enforcing locally adopted building standards, not a "State" program.

Finally, we note that exempting the town historic committees from the comprehensive permit scheme would leave in place the very form of local impediment to the development of affordable housing that the comprehensive permit act sought to eliminate. At a minimum, any requirement that a developer of affordable housing submit applications to an additional local agency increases the cost and adds to the delay in developing such housing. And, in the event that a town historic committee were dissatisfied with the proposed affordable housing project on any of the very general aesthetic grounds for which a certificate of appropriateness may be denied, [Note 24] that historic committee's denial of a certificate would create an insurmountable barrier to the project -- the town historic committee's decision could not be overridden by the housing appeal committee pursuant to G. L. c. 40B, § 23, no matter how deficient the region's supply of affordable housing. Leaving a town historic committee with effective veto power over proposed affordable housing would be wholly incompatible with the purposes of the

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comprehensive permit act. "The object of all statutory construction is to ascertain the true intent of the Legislature from the words used. If a liberal, even if not literally exact, interpretation of certain words is necessary to accomplish the purpose indicated by the words as a whole, such interpretation is to be adopted rather than one which will defeat that purpose." Champigny v. Commonwealth, 422 Mass. 249 , 251 (1996), quoting Lehan v. North Main St. Garage, 312 Mass. 547 , 550 (1942). This principle of statutory construction confirms our interpretation that a town historic committee is a "local board" within the meaning of G. L. c. 40B, § 20.

Judgment affirmed.

FOOTNOTES

[Note 1] Town of Dennis Old King's Highway historic district committee.

[Note 2] Historic Act, § 6, as amended by St. 1975, c. 845, § 5.

[Note 3] Historic Act, § 1, as appearing in by St. 1982, c. 338, § 1.

[Note 4] The Legislature subsequently authorized three towns to withdraw from the historic district if they so chose. See St. 1976, c. 273 (Eastham); St. 1977, c. 38 (Harwich); St. 1978, c. 436 (Bourne).

[Note 5] Historic Act, § 5, as amended through St. 1982, c. 338, § 4.

[Note 6] Historic Act, § 5, as amended through St. 2000, c. 276, § 1, and St. 1994, c. 90, § 1.

[Note 7] Historic Act, § 5, as amended by St. 1979, c. 631, § 3.

[Note 8] Historic Act, § 6, as amended by St. 1975, c. 845, §§ 5, 8.

[Note 9] Historic Act, § 12, as amended by St. 1975, c. 845, § 15.

[Note 10] Historic Act, § 9, as appearing in St. 1975, c. 845, § 11.

[Note 11] Historic Act, § 4, as amended by St. 1978, c. 436, § 3.

[Note 12] Historic Act, § 11, as appearing in St. 1975, c. 845, § 13.

[Note 13] Id.

[Note 14] Id.

[Note 15] Historic Act, § 4, as amended by St. 1975, c. 845, § 4.

[Note 16] Historic Act, § 7, as amended through St. 1977, c. 503, § 2.

[Note 17] Historic Act, § 7, as amended by St. 1975, c. 845, § 9.

[Note 18] Statute 1978, c. 436, § 5; St. 1977, c. 38, § 5; St. 1976, c. 273, § 5.

[Note 19] The defendants argue that the housing appeals committee has exceeded its authority by crafting its own definition of "local board" beyond the terms of the statutory definition. While we agree that the housing appeals committee has no authority to expand the reach of the comprehensive permit act to agencies not intended by the Legislature, its use of a functional approach to interpreting the statute's definition of "local board" is consistent with the approach we take today.

[Note 20] Historic Act, §§ 6, 12, as amended by St. 1975, c. 845, §§ 8, 15.

[Note 21] Indeed, where the building inspector is explicitly identified as a "local board," the zoning board would have the power to override the building inspector's requirement that an applicant submit a certificate of appropriateness as a prerequisite to a building permit, thereby effectively overriding the requirement that an applicant obtain such a certificate from the town historic committee. Rather than allowing a zoning board to override this requirement through the building inspector's status as a "local board," surely a town historic committee would prefer to have the status of "local board" in its own right so that it may have notice and an opportunity to be heard on the merits of the comprehensive permit application before the zoning board. See G. L. c. 40B, § 21.

[Note 22] Historic Act, § 1, as appearing in St. 1982, c. 338, § 1.

[Note 23] Historic Act, § 16; St. 1978, c. 436, § 5; St. 1977, c. 38, § 5; St. 1976, c. 273, § 5. In that sense, the historic district is comparable to historic districts created by individual municipalities pursuant to G. L. c. 40C, which authorizes municipalities to create historic districts within their own borders if they so choose. See G. L. c. 40C, § 3. The defendants concede that historic district commissions established by individual cities and towns pursuant to G. L. c. 40C, § 3, are "local boards" within the meaning of G. L. c. 40B, § 20. The principal difference between those historic districts and the historic district at issue here is that the historic district encompasses more than one municipality. Rather than have Cape Cod divided up into separate historic districts created by each of the nine towns, the Legislature authorized the creation of a multiple-town historic district, but still left it up to those towns to decide whether they wanted such a historic district.

[Note 24] While many of the aesthetic considerations at issue in a determination of historical appropriateness would not impose undue burdens on an affordable housing project (e.g., restrictions on paint color or style of windows), we note that limitations on "size," and consideration of the "relative size of buildings and structures," Historic Act, § 10, could be very problematic for proposed multi-family projects. From the point of view of a town historic committee, even a very modest sized apartment building would likely appear out of proportion to a classic Cape Cod saltbox. See Harris v. Old King's Highway Regional Historic Dist.

Comm'n, 421 Mass. 612 , 613, 616-617 (1996) (upholding historic commission's decision to deny certificate of appropriateness to project involving attached three-car garage and freestanding shed based on "sizing, massing and scale" of project); Sleeper v. Old King's Highway Regional Historic Dist. Comm'n, 11 Mass. App. Ct. 571 , 573-574 (1981) (upholding historic commission's decision to deny certificate of appropriateness for proposed radio antenna that extended twenty feet above roof line). See also Gumley v. Selectmen of Nantucket, 371 Mass. 718 , 723 (1977) (similarly worded statute creating historic district on Nantucket "confers on the commission a substantial measure of discretionary power with respect to 'the appropriateness of exterior architectural features' and congruity to historic aspects of the surroundings and the district").

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OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION
P.O. Box 140, Barnstable, Massachusetts 02630-0140

TOWN HISTORICAL COMMISSION LACKS STANDING TO APPEAL REGIONAL COMMISSION DECISION

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION

P.O. Box 140, Barnstable, Massachusetts 02630-0140
Tel: 508-775-1766 FAX 508-775-9248

04 DEC 17 PM 12:35

Dennis Historic Commission, Appellant

V. **Decision #2004-7**

Old King's Highway Regional Historic District Committee for the Town of Dennis

On Tuesday, December 7, 2004 at 7:45 P.M., the Commission met to hold a hearing at the Fire Station Community Room, 340 Route 6A, Yarmouth Port, Massachusetts, on Appeal #2004-7 filed by the Dennis Historic Commission seeking reversal of a decision by the Dennis Historic District Committee granting a Certificate of Appropriateness for the construction of a single family dwelling to be located at 49 J.H. Sears Road, East Dennis, Massachusetts.

Present were Roy W. Robinson, Jr., Brewster; Robert DeRoeck, Sandwich; Deborah Gray, Yarmouth; Peter Lomenzo, Dennis; James R. Wilson and Leslie Ann Morse Commission Counsel; Nancy Reid Chairman of the Dennis Historic Commission, Appellant; Andrew L. Singer, attorney for the Applicant.

The Committee's decision was filed with the Town Clerk on October 15, 2004. The appeal was entered with the Commission on October 25, 2004, within the 10-day appeal period.

The Applicant's Presentation:

Andrew L. Singer, attorney for the applicant, addressed the Commission on behalf of client's Application and stated that the Appellant had failed to comply with Section 1.04 (e.) 3 of the Commissions Rules & Regulations (972 CMR 1.00 et seq.) that require an appellant to mail or deliver a copy of the appeal petition to the applicant within the ten day appeal period. He submitted written affidavits to support his claim that no notice was sent to his clients.

In addition, he stated that the Dennis Historic Commission is not a required "person aggrieved" and therefore lacked standing to go forward with the appeal.

Roy Robinson, Chairman of the Commission, asked the Appellant if they had sent or delivered the required notice to the Applicant. The appellant acknowledged that they had not sent the notice, but had relied upon a town employee, who had said that she would take care of notifying the applicant.

Mr. Robinson asked the Commission Counsel to provide legal advice on the two issues raised by the Applicant's attorney.

Findings:

The Commission found as follows:

The Appellant failed to give the proper notice as required under CMR 972 Section 1:04(e.) 3.

Determination:

As to Appeal #2004-7, the decision of the Dennis Committee is affirmed. (3-0-1).

Any person aggrieved by this decision has a right to appeal to the District Court Department, Orleans Division, within 20 days of the filing of this decision with the Dennis Town Clerk.

Roy W. Robinson, Jr.
Chairperson

COMMONWEALTH OF MASSACHUSETTS

Barnstable, ss.

District Court Department
Orleans Division
Docket No. 0526 CV 0007

DENNIS HISTORICAL COMMISSION,
Plaintiff

vs

OLD KING'S HIGHWAY REGIONAL
HISTORIC DISTRICT COMMISSION
& KENNETH & CAROL WATCHMAKER,
Defendants

MEMORANDUM & DECISION ON
DEFENDANT WATCHMAKERS' MOTION
FOR SUMMARY JUDGMENT

1. The Dennis Historical Commission was established by the Town of Dennis under the provisions of G. L. c. 40, §8D, for the preservation, protection and development of the historical or archeological assets of the Town of Dennis. The enabling statute delineates with some particularity the sorts of activities such commission may engage in, such as researches of places of historic or archeological value, cooperating with the state archeologist in conducting such researches or other surveys coordinating the activities of unofficial bodies organized for similar purposes, the promulgation of books, maps and charts necessary or incidental to such work. Nowhere in the enumeration of powers is listed the capacity to sue or be sued. Since among the powers enumerated is the power to enter into contracts and to perform acts which are necessary or desirable to effect the statutory purpose or goals, by implication, the commission may be a party to litigation at least as to contracts it enters into.

2. The Commission is not an enforcement agency. None of its enumerated powers either directly or by implication appear to give it standing to litigate the issue of historic appropriateness of proposed land uses in the Town of Dennis. The agency vested with that responsibility is the Dennis Town Committee of the Old King's Highway Regional Historic District commission. That agency granted a certificate of appropriateness to the Watchmakers. On appeal, the

decision to grant the certificate of appropriateness was affirmed by the Regional Commission. St. 1973 c. 470, as amended.

3. The central issue presented is whether or not the Dennis Historical Commission, established under G. L. c. 40, §8D, has standing as a party aggrieved for purpose of challenging in the court the action taken by the Old King's Highway Regional Historic District Commission. This court determines that it does not.

The Regional Commission did not make a determination whether the Dennis Historic Commission had "standing." Since the issue is largely a question of law, the doctrine of primary jurisdiction, the principles of law of deference to the administrative agency's expertise, it is not required to remand the cause for an initial determination of that issue by the Regional Commission.

Although the case of ***Mason v. Old King's Highway Regional Historic District Commission,*** 2001 Mass. App. Div. 125 is not directly in point, some of the analysis is pertinent. The opinion alludes to the similarity by analogy to zoning appeals on judicial review. **Id** at 126-127. Based upon this analogy, the court determined that failure to give notice to the town clerk within 20 days was fatal to the appeal. Here, the appeal was claimed in a timely manner, but appellant failed to give notice of the appeal to the Watchmakers, as required by 972 CMR, §1.03 (6)(e). I rule that such failure is not so egregious as to warrant forfeiture of the right of judicial review. In other words, such failure to follow the regulations promulgated by the Commission do not mandate dismissal of the appeal. Since the applicants participated fully in the proceedings before the Regional Commission, no prejudice was shown.

The issue of "standing" is more directly explored in ***Allen v. Old King's Highway Regional Historic District,*** 2000 Mass. App. Div. 330. In that case members of the local town committee of the Historic District Commission sought to obtain a judgment annulling the award of a certificate of appropriateness by the Regional Commission. The Appellate Division determined that the members of the local town committee did not have standing. A pivotal case in the court's analysis was the case of ***Harvard Square Defense Fund, Inc. v. Planning Board of Cambridge,*** 27 Mass. App. Ct. 491 (1989). I rule that in the absence of a clear indication in the statute conferring standing upon the local Historic Commission, the Commission, as such, is not a "person aggrieved" for purposes of appealing a ruling by the Old Kings Highway Regional Historic District Commission.

I rule that the special act creating the Old King's Highway Regional Historic District Commission and its procedural array was intended by the legislature to create a comprehensive and exclusive

procedure to determine the issue of historic appropriateness in its jurisdiction area. **Id** at 332. Since none of the parties have argued that individual members might qualify as parties aggrieved, it is assumed that that point is waived.

It is ordered that a judgment enter dismissing the complaint for judicial review by reason of lack of standing.

SO ORDERED

March 1, 2005

Hon. Robert A. Welsh, Jr.
First Justice

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION
P.O. Box 140, Barnstable, Massachusetts 02630-0140

ENFORCEMENT

BY

"CONTEMPT of COURT"

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

BARNSTABLE, ss.

DISTRICT COURT DEPARTMENT
BARNSTABLE DIVISION
Civil Action No. 0125CV0320

MICHAEL CONENA,
Plaintiff,

v.

DOROTHY STAHLEY, DEBORAH GRAY, ROY ROBINSON, ELIZABETH WILCOX, and JONATHAN SHAW, as they constitute THE OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION,
Defendants.

FINDINGS OF FACT, FINDINGS OF THE COURT, AND ORDER

After trial on 28 March 2003 of this appeal taken pursuant to St. 1973, c. 470 §11, as amended ("Act"), of a decision by the Old King's Highway Regional Historic District Commission ("Commission"), the Court affirms that decision

FINDINGS OF FACT

The house at 36 Torrey Road, East Sandwich, that the plaintiff, Michael Conena ("Conena"), bought in 1996 lies within the boundaries of the Old King's Highway Regional Historic District, as established by the Act, and is subject to the provisions of that Act. The house is not visible from Route 6A—"the Old King's Highway"—itself. The gambrel-style, Maine post-and-beam house is one of about 80 in a neighborhood of "upscale homes" of mixed architectural styles, the oldest of which is about 25 years old.

On or about 25 May 1999, Conena applied to the Sandwich Old King's Highway Regional Historic District Committee ("Sandwich Committee") for a Certificate of Appropriateness to construct a roof deck on his house (Application Number 99-116).[1]

[1.1] The Committee itself acts through each member town's local committee, comprised of five members, at least one of whom must be an architect. Act, §5; *see Dennis Housing Corp. v. Zoning Bd. of Appeals of*

Specifically, the description of proposed work read: "Add a roof deck onto back side of house. Size 14' x 14'. Deck will consist of wood including mahogany cedar and pressure treated [*sic*]. Only top part of railing will be seen from road." After a hearing on 23 June 1999, the Sandwich Committee approved construction of the roof deck based on the plans Conena filed.[2] These plans depicted the deck as being off-center, as opposed to being symmetrically situated around a center chimney. There was no objection to the plans, and after about a 15-minute presentation and a three to one vote (the one representing an abstention, since that committee member worked for the real estate office that sold Conena his house), the application was approved and Conena was issued the Certificate of Appropriateness.

Construction of the roof deck began in July 2000. Nearly halfway through the project, the roof was opened in order to tie the posts of the deck to the beams of the house. At that point, the builder, Chris Smith ("Smith"), opined to Conena that the added stress would render the deck unsafe, especially in high winds. He expressed his belief that the only solution would be to move the posts of the deck higher onto the roof, closer to the main beam of the house, along the ridgeline.[3] Because Conena wanted a second opinion, from ZIA, of Middleboro, construction ceased, even though the back of the roof was open. The opening was covered with plastic to ward off rain, which in fact came, staining interior ceilings.

Smith pressed Conena to decide whether to continue because of the open roof and because Smith would have to proceed on to other jobs. Conena told him to go ahead and finish the job and make the deck safe. Conena asked Smith if he had to advise the Sandwich Committee of the now-altered project, and Smith told him that the change was a small structural change of a kind commonly made, and it did not warrant returning to the Sandwich Committee.

Soon after work recommenced, a member of the Torrey Beach Community Association[4] called Conena to point out that the deck was higher than the approved plans had

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Dennis, 439 Mass. 71, 73 (2003). (The *Dennis Housing* decision came down three days after the trial of this matter, and except for its elucidation of the "background, governing structure, and organization of the [Act]," *id.*, it holds little relevance to the issues presented here).

[2] The plans submitted at this hearing contain no measurements, and do not depict the rather elaborate structure on the rear of the roof shown in Exhibit 6-C and observed on the view the Court took the day of trial.

[3] The Court's finding that these things were said to Conena is not the same as this Court's accepting the substance of those statements as true. As discussed below, this evidence, offered as the sole rationale for the change in the deck's placement on Conena's roof, came not from a builder or expert but, secondhand, from Conena himself. Whether Smith's opinions were sound or not, however, is of little relevance since such "necessity," as elaborated on below, did not excuse Conena's forgoing further consultation with the Sandwich Committee regarding the altered plan.

[4] Conena was required to join this neighborhood association, which has a sub-committee overseeing architectural additions to the houses in the neighborhood. Conena's roof-deck plan was presented to this eight-member committee, and they approved the original plan. There was no evidence that this

indicated, and that that Association had wanted it exactly as originally represented. Conena explained his problems, to which the member—himself a retired experienced building construction engineer--expressed incredulity. On or about 5 September 2000 Conena received a stop-work order from the Sandwich Building Department based on the building inspector's judgment that the property violated the Sandwich Commission's permit conditions.[5] The work was then about 90% complete.

On 4 December 2000 Conena applied for a new Certificate of Appropriateness. He, with Smith, attended a hearing on 10 January 2001. The application was denied on the grounds that the deck was not centered on the roof and was not aesthetically pleasing. Pursuant to §11 of the Act, Conena appealed that decision to the Commission,[6] and on 16 February 2001 that appeal was denied. This action for judicial review pursuant to § 11 of the Act followed.

RULINGS OF LAW

The Sandwich Committee was mandated by §10 of the Act to determine the appropriateness of any proposed change in exterior architectural features—here, Conena's roof deck--in the light of such factors as the historical value and significance of the house (not applicable here),[7] the general design, size, features, or construction of the deck, and the relation of the deck to similar features, exposed to public view, in nearby buildings, in order, ultimately, to determine whether such a proposed change would further the purpose of the historic district. *See, e.g., Harris v. Old King's Highway Regional Historic Dist. Comm'n*, 421 Mass. 612, 614 (1996); *Anderson v. Old King's Highway Regional Historic Dist. Comm'n*, 397 Mass. 609, 610 (1986). That purpose is the promotion of the welfare of the historic district through "the preservation and protection of buildings, settings and places. . . and through the development and maintenance of appropriate settings and the exterior appearance of such buildings and places, so as to preserve and maintain such regional district as a contemporary landmark compatible with the historic, cultural, literary and aesthetic tradition of Barnstable county, as it existed in the early days of Cape Cod, and through the promotion of its heritage." Act, §1; *see Harris*, 421 Mass. at 614-15. "The committee shall not make any recommendations or requirements except for the purpose of preventing changes in exterior architectural features obviously incongruous to th[ose] purposes. . . ." Act, §10.

Association's concerns or involvement had any relation to the statutory mandate of the Sandwich Committee or Commission under review in this action.

[5] The building inspector of each member town is empowered to enforce the provisions of the Act. Act, §12, as amended by St. 1975, c. 845, §15; *see Dennis Housing Corp.*, 439 Mass. at 74.

[6] The Commission is composed of the chairpersons of each of the town committees. Act, § 4, as amended by St. 1978, c. 436, §3; *see Dennis Housing Corp.*, 439 Mass. at 75.

[7] The Act does not exempt from its scope subareas within the historic district that, considered in isolation, have scant or no historical significance. *See Sleeper v. Old King's Highway Regional Historic Dist. Comm'n*, 11 Mass.App.Ct. 571, 574 (1981).

That this mandate is broad and arguably vulnerable to a charge of subjective application is of no moment.

A party aggrieved by the decision of such a local committee as the Sandwich Committee must appeal, as Conena did, to the Commission. That Commission may annul or revise a local committee's decision only upon finding that the local committee "exceeded its authority or exercised poor judgment, was arbitrary, capricious, or erroneous in its action." Act, §11; *see, e.g., Dennis Housing Corp. v. Zoning Bd. of Appeals of Dennis*, 439 Mass. 71, 75 (2003); *Harris*, 421 Mass. at 615; *Anderson*, 397 Mass. at 611; *Paanenen v. Old King's Highway Regional Historic Dist. Comm'n*, 1991 Mass.App.Div. 135, 135 (1991). The Commission may not substitute its judgment on the facts for the local committee's, but may only determine whether the local committee stumbled on one of these criteria. *Harris*, 421 Mass. at 615. The appeal from the Commission is to this Court, whose standard of review is essentially the same as to the Commission as the Commission's was to the local committee's: this Court is required to affirm the Commission's decision, unless, on the facts found,[8] it decides that the Commission should have concluded that the local committee exceeded its authority, exercised poor judgment, or was arbitrary, capricious, or erroneous in its decision. Act, §11; *see Harris*, 421 Mass. at 615-16. Stated another way, if the Sandwich Committee's decision had a "rational basis," this Court should not set that decision aside. *Id.*, at 618. The Court affirms the Commission's decision.

The evidence here was that the Sandwich Committee initially approved Conena's deck plan knowing it would be built off-center but believing that only the top part of the railing would be visible from Torrey Road. The plan was altered during construction such that the entire deck, including the side of the deck surface itself, is so visible. When Conena reapplied for a Certificate of Appropriateness, the Sandwich Committee denied it, reportedly because the deck was not centered on the roof and because it was not aesthetically pleasing. This last concern was not recorded in the Commission's Decision 2001-01, which recounted only that the reapplication was denied because "the way the roof deck had been built caused the house to look inappropriately asymmetrical." The Commission decided that this denial was not the result of the Sandwich Committee's acting in an arbitrary, capricious or erroneous manner, and further noted that any hardship befalling Conena "was not the fault of the Committee."

This Court specifically finds, in addition to the findings recounted above, that the altered deck plan raised the deck at least 14 inches, and that, while the Sandwich Committee approved the deck on the representation that only the top part of the railing would be visible from the street, in fact the entire deck, including the side board to the deck surface itself, is so visible. It is true that the Committee originally approved the deck knowing it would be asymmetrically situated on the roof. If the Committee's reversal rested solely on its finding that the deck was not symmetrical, that reversal of position—even with a change in Committee membership—might well be deemed arbitrary and capricious. But

[8] This Court is directed by the Act to hear the pertinent evidence and to find facts, which are considered "final and conclusive." Act §11; *see Harris*, 421 Mass. at 615.

the "inappropriate asymmetr[y]" to which the Committee objected, which condition apparently led to the Committee's more general conclusion that the deck was not "aesthetically pleasing," resulted not from the asymmetry itself but from the fact that that asymmetry was made glaringly manifest when the deck, originally envisioned as all but hidden from Torrey Road on the rear part of the roof, now appears to perch on the ridgeline, on the extreme right side of the roof as one faces the house from Torrey Road.

As indicated above, then, the Court—not empowered to substitute its judgment for the Committee's or the Commission's— must affirm the Commission's decision, unless, on the facts it finds, it determines that the Commission should have concluded that the Sandwich Committee exceeded its authority, exercised poor judgment, or was arbitrary, capricious, or erroneous in its decision.[9] There is no suggestion that the Committee exceeded its authority. There was no pointed argument that it "exercised poor judgment," and even if there had been, that criterion for reversal cannot be materially different from the "arbitrary and capricious" criterion.[10] The issue, then, is whether the Commission should have concluded that the Sandwich Committee's decision was arbitrary and capricious, or, stated another way, whether that decision lacked "a rational basis." *Harris*, 421 Mass.at 618. The Court cannot say that the Sandwich Committee's, and the Commission's, conclusions regarding the incongruity of Conena's roof deck, as it was altered during construction, were irrational or whimsical in the context of the factors to be considered in the determination of "appropriateness" and of the purposes of the Act. The deck was made considerably more conspicuous to view from Torrey Road than had been originally represented. The Commission's decision is affirmed.

Worth noting is the quality of the evidence regarding the claimed necessity—the emergency--of moving the deck from its original position. The Court does not question Conena's veracity. It does observe, though, that evidence of Smith's opinion that construction of the deck as originally planned was impossible came in the form of Conena's hearsay testimony, and not in some detailed shape from Smith himself—either at the Commission or before this Court. The opinion of ZIA, to the extent there was evidence of one about the structural reasons for the change, was even murkier. Apparently, neither of these purportedly key witnesses even prepared a report or affidavit. There was, in short, but thin evidence bearing on the claimed necessity defense. Having noted that, though, the Court further observes that no authority suggests that even had such necessity existed, such a circumstance would excuse Conena's failure to have approached the Sandwich Committee with his dilemma. The proper procedure would have been for Conena to apply to the Sandwich Committee for a modification of his Certificate to correspond with the revised, "necessary," plan or for the issuance of a new

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[9] "Erroneous in its decision" must signify a decision based on "a legally untenable ground." *See Sleeper v. Old King's Highway Regional Historic Dist. Comm'n*, 11 Mass.App.Ct. 571, 574 (1981).

[10] A determination that some body "exercised poor judgment" must mean more than it seems to say. If the Commission, for example, found that the Sandwich Committee had "exercised poor judgment" and proceeded to overturn the Committee's decision, it would simply be substituting its own, "better," judgment for the Sandwich Committee's "poor"—or "inferior"—judgment. Such a substituted-judgment exercise is clearly not the standard of review applying to either the Commission or this Court.

Certificate to that effect. *See Rudders v. Building Comm'r of Barnstable*, 51 Mass.App.Ct. 108, 112 (2001). Conena's reliance on Smith's advice that the change was "minor" and did not require consulting the Sandwich Committee was unfortunate. "Where the change required is considered minor, the [Act] allows the local committee to modify the certificate without the formality prescribed for the issuance of a new certificate." *Id.* (footnote omitted).[11]

Conena also argued that the Commission should have concluded that the Sandwich Committee should have determined that failure to approve Conena's second application would pose a "substantial hardship" to Conena. Act, §10(c). Specifically, Conena submits that the cost of removing the offending deck could reach some $15-20,000.00 and thus cause him significant financial hardship. The language of this Act regarding the substantial-hardship exception "is substantially similar to the language authorizing zoning variances" in M.G.L. c.40A, §10. *Sleeper v. Old King's Highway Regional Historic Dist. Comm'n*, 11 Mass.App.Ct. 571, 574 n.3 (1981). Variance cases interpreting that section uniformly hold that financial hardship—the only kind Conena suggests—is insufficient to constitute "substantial hardship." *E.g., Joy Street Condominium Ass'n v. Board of Appeal of Boston*, 426 Mass. 485, 490 (1998), *citing, inter alia, McNeely v. Board of Appeal of Boston*, 358 Mass. 94, 101 (1970); *see also, e.g., Perez v. Board of Appeals of Norwood*, 54 Mass.App.Ct. 139, 144 (2002). Any financial hardship befalling Conena could not properly have formed a basis for the Committee to approve the revised deck plan, and so obviously could not have supported the Commission concluding that the Committee should have approved the deck.

The Court affirms the conclusion of the Commission.

RULINGS ON PLAINTIFF'S "REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW"

RULINGS ON "FINDINGS OF FACT"

1.-17. These numbered requests are requests for findings of fact, action upon which is not required. M.R.Civ.P. 52(C). The Court declines to address these numbered requests, and refers to its detailed findings of fact set out above.

RULINGS ON "CONCLUSION [sic] OF LAW"

1. Denied.
2. Denied.

[11] Here, as it turned out, the end result was not "minor" in the eyes of the Sandwich Committee. Whether some accommodation could have been reached had the Committee been apprised of the perceived structural problems of course remains unknown.

3. Denied.

ORDER

The Court finds that the decision of the Commission should be, and is, **affirmed**, and directs the entry of judgment in favor of the defendants Dorothy Stahley, Deborah Gray, Roy Robinson, Elizabeth Wilcox, and Jonathan Shaw, as they constitute The Old King's Highway Regional Historic District Commission, accordingly.

Dated: 24 APRIL 2003

H. Gregory Williams
Justice

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

BARNSTABLE, ss. **DISTRICT COURT DEPARTMENT**
BARNSTABLE DIVISION
Civil Action No. 0125CV0320

MICHAEL P. CONENA,
Plaintiff,

v.

DOROTHY STAHLEY, DEBORAH GRAY, ROY ROBINSON, ELIZABETH WILCOX, and JONATHAN SHAW, as they constitute THE OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION,
Defendants.

ORDER
ON DEFENDANT'S "VERIFIED COMPLAINT FOR CIVIL CONTEMPT"

This Court's decision of 23 May 2003 ordered the plaintiff, Michael P. Conena ("Conena"), to remove the subject roof deck and to restore his house to its former condition on or before 22 July 2003. The Amended Judgment entered on 13 June 2003. On 18 June 2003 Conena filed a Notice of Appeal, but the appeal was abandoned when the parties filed a stipulation with dismissal in December 2003.

Believing that Conena had taken no action to remove the deck, that was ordered to have been removed some ten months earlier, the defendant/plaintiff-in-contempt Old King's Highway Regional Historic District Commission ("Commission") filed on 27 May 2004 its Verified Complaint for Civil Contempt. *See generally* M.R.Civ.P. 65.3. The summons on contempt, *see id.* 65.3(f), served on Conena on 9 June indicated that the hearing scheduled for 11 June was for the purpose of holding a hearing on the merits of the contempt complaint. That hearing was held on 11 June 2004.[1]

[1] Conena raised the issue of the court's jurisdiction over the contempt proceeding since the parties had filed a stipulation of dismissal, with prejudice, on 18 December 2003. But although the civil-contempt action is docketed with the number of the underlying action, it is distinct from that underlying action, and culminates in a separate judgment. *See Jones v. Manns*, 33 Mass.App.Ct. 485, 489 (1992). The Court is not divested of jurisdiction to find contempt of its Order in the underlying case because the parties agreed to a dismissal of that action.

That Conena has still not removed the deck as ordered is undisputed. Noncompliance with that order may be excused when it becomes impossible, but the burden—which is a difficult one—of proving impossibility is Conena's. *See In re Care and Protection Summons*, 437 Mass. 224, 237 (2002); *Commonwealth v. One 1987 Ford Econoline Van*, 413 Mass. 407, 412 (1992). That burden is met, minimally, when the contemnor—here, Conena--presents evidence he has been "reasonably diligent and energetic in attempting to accomplish what was ordered." *One 1987 Ford Econoline, supra*, at 412. Characterizing Conena's efforts as "diligent" and "energetic" expands somewhat the connotations of those words. Conena and his counsel, however, did submit at the hearing that, following the Order in this case, they had negotiated with the Sandwich Old King's Highway Regional Historic District Committee ("Sandwich Committee") for approval to retain the deck, but to reduce its size and change its location, so as to bring it within the ambit of the Sandwich Committee's approval. Conena and his counsel represented that efforts to accomplish that are well underway. Conena estimated that the work would begin within the next week or two, and would be completed in 40 to 60 days.

The Court orders that the alterations to the deck—agreeable to the Sandwich Committee—be fully accomplished on or before 1 August 2004. Failure to do so will subject Conena to a civil penalty of $150.00 a day starting on 2 August 2004 and continuing until compliance. *See One 1987 Ford Econoline, supra*, at 414-15; St. 1973, c. 470, §12.

In addition, counsel for the Commission has submitted a motion for attorney's fees, requesting $1,200.00 for six hours of work at $200.00. An award of such fees in a civil-contempt proceeding is appropriate. *See, e.g., Eldim, Inc. v. Mullen*, 47 Mass.App.Ct. 125, 130-31 (1999). It is appropriate even in a case, such as this, in which no finding of contempt is made, since the Commission here incurred the fees in the attempt to ensure Conena's compliance with this Court's Order. *See Police Comm'r of Boston v. Gows*, 429 Mass. 14, 18-19 (1999). The Commission has been "forced to incur further legal expenses simply to obtain what [this] court has previously awarded or to enforce a right that [this] court has previously declared." *Id.*, at 19 (further citation omitted). The Court finds that $200.00 an hour for work on Cape Cod of the kind Commission counsel performed here is reasonable, and further finds that six hours is a reasonable time for counsel to have resurrected this matter and to launch this contempt action. The Court awards the Commission $1,200.00 in attorney's fees, and orders Conena to pay that amount to the Commission's counsel on or before 16 July 2004.[2]

So ordered.

Dated: 11 JUNE 2004

H. Gregory Williams
Justice

[2] The Commission's motion for attorney's fees mentions $46.40 in costs, but no support for an award in that amount is provided.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

BARNSTABLE, ss.

DISTRICT COURT DEPARTMENT
ORLEANS DIVISION
Civil Action No. 0526CV0421

RICHARD W. GURNEY,
Plaintiff,

v.

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION; JAMES MASON, and SANDRA MASON
Defendants.

FINDINGS OF FACT, FINDINGS OF THE COURT, AND ORDER

After trial on 18 June 2007 and 22, 23 May, 1 and 12 August 2008[1] of this appeal by the plaintiff, Richard W. Gurney ("Gurney"), taken pursuant to St. 1973, c. 470 §11, as amended ("Act"), of a decision by the Old King's Highway Regional Historic District Commission ("Commission"), the Court affirms that decision

The Dennis Committee was mandated by §10 of the Act to determine the appropriateness of any proposed change in exterior architectural features—here, Gurney's plan--in the light of such factors as the historical value and significance of the house (not applicable here),[2] the general design, size, features, or construction of the house, and the relation of aspects of the house to similar features, exposed to public view, in nearby buildings, in order, ultimately, to determine whether that such proposed change would further the purpose of the historic district. *See, e.g., Harris v. Old King's Highway Regional Historic Dist. Comm'n*, 421 Mass. 612, 614 (1996); *Anderson v. Old King's Highway Regional*

[1] Much of the delay in completing this case was occasioned by the untimely death of counsel for the defendants/intervenors James and Sandra Mason ("Masons") after the first day of trial. Additionally, although the trial itself ended in August 2008, the parties were afforded until 24 October 2008 to file closing arguments and requests for rulings.

[2] The Act does not exempt from its scope subareas within the historic district that, considered in isolation, have scant or no historical significance. *See Sleeper v. Old King's Highway Regional Historic Dist. Comm'n*, 11 Mass.App.Ct. 571, 574 (1981).

Historic Dist. Comm'n, 397 Mass. 609, 610 (1986).[3] That purpose is the promotion of the welfare of the historic district through "the preservation and protection of buildings, settings and places. . . and through the development and maintenance of appropriate settings and the exterior appearance of such buildings and places, so as to preserve and maintain such regional district as a contemporary landmark compatible with the historic, cultural, literary and aesthetic tradition of Barnstable county, as it existed in the early days of Cape Cod, and through the promotion of its heritage." Act, §1; *see Harris*, *supra*. at 614-15. "The committee shall not make any recommendations or requirements except for the purpose of preventing changes in exterior architectural features obviously incongruous to th[ose] purposes. . . ." Act, §10. That this mandate is broad and arguably vulnerable to a charge of subjective application is of small moment. *See*, *e.g.*, *Gumley v. Selectmen of Nantucket*, 371 Mass. 718, 723 (1977), quoted in *Dennis Housing*, *supra*, at 82 n.24 (statute creating Nantucket historic district, similarly worded to Act here, "confers on the commission a substantial measure of discretionary power with respect to 'the appropriateness of exterior architectural features' . . . .")

A party aggrieved by the decision of such a local committee as the Dennis Committee must appeal, as Gurney did, to the Commission. That Commission may annul or revise a local committee's decision only upon finding that the local committee "exceeded its authority or exercised poor judgment, was arbitrary, capricious, or erroneous in its action." Act, §11; *see, e.g., Dennis Housing Corp. v. Zoning Bd. of Appeals of Dennis*, 439 Mass. 71, 75 (2003); *Harris*, *supra* at 615; *Anderson*, *supra* at 611; *Paananen v. Old King's Highway Regional Historic Dist. Comm'n*, 1991 Mass.App.Div. 135, 135. Indeed, "[i]f *any* reason given by that local committee in support of its decision presents a valid basis for its decision, *all* other reasons for its decision become immaterial." *Paananen*, *supra*, at 136. The Commission may not substitute its judgment on the facts for the local committee's, but may only determine whether the local committee stumbled on one of these criteria. *Harris*, *supra* at 615. Indeed, "[t]he provision for appeal to the [Commission] is not to be taken as transferring. . . discretionary power to the [Commission]. It seems intended either to confine the power of the [committee] within authorized limits, or to prevent its abuse, for example, by decisions *based on peculiar individual tastes*." *Gumley*, *supra*, at 723 (Emphasis supplied). The appeal from the

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[3] The Supreme Judicial Court summarized, in the *Dennis Housing* decision cited above, the function of the committee and the operation of the Act as follows:

> Within the historic district, no building. . . can be erected without a certificate of appropriateness issued by the [Dennis] committee, and the building inspector may not issue a building permit unless the applicant submits the requisite certificate [Act, §6]. The building inspector has the power and duty to enforce the provisions of the. . . Act. [Act, §12]. . . . In ruling on an application, the [Dennis] committee must determine whether the 'size' and 'features' of the proposed structure 'will be appropriate for the purposes of this [Act] [Act, §10].' In making that determination, the [Dennis] committee is to consider 'the historical value and significance of the building. . . the general design, arrangement, texture, material and color of the features. . . and the relation of such factors to similar factors of buildings and structures in the immediate surroundings,' along with the 'settings' and 'relative size of buildings and structures.' *Id.*

Dennis Housing, *supra*, at 74-75.

Commission is to this Court, whose standard of review is essentially the same as to the Commission as the Commission's was to the local committee's: this Court is required to affirm the Commission's decision, unless, on the facts found,[4] it decides that the Commission should have concluded that the local committee exceeded its authority, exercised poor judgment, or was arbitrary, capricious, or erroneous in its decision. Act, §11; *see Harris*, *supra* at 615-16.[5] Stated another way, if the Dennis Committee's decision had a "rational basis," this Court should not set that decision aside. *Id.* at 618. Although numerous witnesses testified over several days spread over more than a year's time about varying subjects concerning this Dennis neighborhood, the subject of this action—as this Court sought to remind the parties at trial—boils down to this single issue: this Court's determination as to whether the Commission acted rationally or otherwise. This Court need neither analyze the history of this neighborhood since the 1940s, nor delve into the multifaceted and acrimonious neighborhood disputes that have sporadically flared there.[6]

Gurney went to the Dennis Committee in July 2004 with plans to build a single-family house at 17 Scargo Heights, Dennis. Gurney is a general contractor and real-estate broker, who had built several other houses, for others, in the immediate neighborhood. Significantly, he had been a member of the Dennis Committee for a three-year term, about 1993-95. He was familiar with the rules and regulations of the Dennis Committee. There is little dispute that the Gurney property fell within the Old King's Highway Regional Historic District, and thus within at least the geographical reach of the Dennis Committee's jurisdiction.

The Dennis Committee approved Gurney's plan, with some modifications, on 14 July 2004. On that day, Gurney signed a "Statement of Understanding" to the effect that he must return to the Committee for approval of changes. Specifically, by signing that Statement, Gurney confirmed his understanding that "[o]nly minor changes may be approved by the Committee without a new application and a hearing. Minor changes, include [*sic*] things like moving a single window or door or a minor change of color. All changes by amendment require the Committee's approval."

By the Fall of 2004, Gurney had begun pressing ahead with construction of the house. In April 2005, however, the Dennis Committee found that Gurney had violated the Certificate of Appropriateness it had issued, and therefore voted that the building as constructed did not conform to the plans that the Committee had approved. The Dennis Building Commission issued a cease-and-desist order to Gurney as to the property on 9

[4] The Act directs the Court to hear the pertinent evidence and to find facts, which findings are considered "final and conclusive." Act §11; *see Harris*, *supra* at 615; *see also Tisbury Fuel Serv., Inc. v. Martha's Vineyard Comm'n*, 68 Mass.App.Ct. 773, 775 n.5 (2007).

[5] Although *Harris* sets out these standards, which are familiar in administrative review law, the Act sets them out only as to the Commission's review of the Committee's decision. Act, §11. It limits the standard as to this Court's review of the Commission's decision to a determination of whether the Commission exceeded its authority. *Id.* This Court, however, has been unable to find a reported decision suggesting that a court's review of the Commission's decision is limited to this single criterion.

[6] *See, e.g., Mason v. Old King's Hwy. Regional Historic. District Comm'n*, 2001 Mass.App.Div. 125.

May 2005. (*See* Act, §12; *Dennis Housing, supra*, at 79, citing *Rudders v. Building Comm'r of Barnstable*, 51 Mass.App.Ct. 108, 112-113 (2001) (building commissioner functioned as "enforcement arm" of town historic committee in issuing stop work order against construction that deviated from that authorized by certificate of appropriateness)).

That month, Gurney filed a new application with the Committee seeking, in essence, to ratify the existing house. Following a hearing on 22 June 2005, the Committee denied the application, citing, among other things, the excessive mass and setting of the house and the excessive number of windows,[7] and Gurney, in July, timely appealed that finding to the Commission. (On 27 June 2005 the Building Inspector had issued a second cease-and-desist order). The Commission held a public hearing in August 2005, following which the Commission voted 4-0-1 to uphold the decision of the Committee. In September 2005, Gurney timely appealed that determination to this Court.

Generally, the Dennis Committee disapproved of the Gurney house given its "overall mass and setting." The Committee regarded applications, and applications for changes, "holistically", and not "item by item." The Committee, specifically, looks at proposed buildings or changes as they would be seen from a public way or place, and how they fit into a place and setting. Here, the Committee determined that Gurney had wrought over a dozen unapproved changes to an approved application—which changes they deemed significant and inappropriate for the house itself and its setting. Most significantly, the Committee felt that the left elevation, the "back," or northwest aspect of the house had been radically changed, and that the approved two-story look from that aspect now appeared as three stories. (The final grade ended up being some six to seven inches different). There was now a "mass of wall [the view of which] had previously been broken up." There was "an excessive amount of mass and glass;" windows and a slider had been relocated, and windows had been added. The house "sticks up and does not nestle in"—it presents to a viewer "a larger sense of height and mass" than the design as approved. There was an excessive and unacceptable amount—a "dramatically increased amount"-- of exposed concrete foundation. The regrade was unapproved. Less significantly, Gurney changed the shutters color from cottage red to black. The electric meter for the house was post-mounted rather than mounted on the house itself—the Committee prefers them house-mounted or screened. Gurney substituted white cedar shingles on the front of the house in place of the clapboard originally approved. The house featured flying rakes. The trim and gutters were originally approved as white, and Gurney wanted grey.

The core of this case is the fact that the Committee had approved a given plan, and Gurney significantly made changes in that plan—despite his having signed on 14 July 2004 a Statement of Understanding demonstrating that he knew that he must return to the

[7] Specifically, the Committee, through its Chairman, noted "that [Gurney's] application reflects over a dozen significant unapproved changes to the approved application of July 2004. These changes are significant violations and are inappropriate for the structure, the place and the setting with unapproved re-grading of the lot and the addition of windows and a porch. The application is inappropriate for the setting with excessive use of an exposed concrete foundation; and further, the committee requires that enforcement of Committee decisions is vital to the integrity of the Act."

Committee for approval of changes--without giving the Committee the opportunity to consider them. Gurney had, in short, presented the Committee a fait accompli—being forced to accept the house in an "as built" condition, and the Committee did not like it. The positions of the main parties are therefore clear. Briefly stated, the Commission maintains that after it had approved Gurney's house plan, he radically changed it, even though he had agreed in writing that any changes had to be approved by the Committee. Gurney argues, on the other hand, that the changes were not that significant, that any he made were necessitated by problems with the grade of his lot, that any such changes were appropriate, that his house fits in well with the other houses in the neighborhood in any event, and that the Committee was simply irritated that he did not return to them.

Even were the Court to agree with most of Gurney's points, such agreement would not translate to a finding that the Commission failed to have a rational basis for its decision. *Harris*, *supra*, at 618. The Court must thus affirm the Commission's decision.

Besides the points raised above, Gurney suggests a defense that merits further comment: his argument that any exterior changes to his house cannot be seen from a public way—necessary for a structure to be subject to the Act at all. Specifically, Gurney suggests that the main allegedly objectionable feature of his house, the "mass" of the northwest corner, is not subject to the ambit of the Act because, even if he did effect changes to the approved plan, those changes are not subject to public view. Therefore, in seeking to exercise oversight over such a feature, he argues, the Commission had exceeded its authority.

The Act states that "[i]n passing upon appropriateness, the Committee. . . shall not consider detailed designs, interior arrangement and other building features not subject to public view." Act, §10(c). The regulations, 972 CMR 1.00 *et seq.*, established further to the Act, §4, create three exemptions to the operation of the Act. The relevant one here is the second: "when the feature is not within view from a way or public place and only a site plan is required along with the application for a Certificate of Exemption." *Id.* 2:04. And the Act itself defines "way": "a way owned, or normally maintained, or normally repaired by any federal, state, county or municipal entity; a way shown on a plan approved or signed by a Board of Survey, Planning Board or Board having similar duties and responsibilities; or an improved way shown on a plan recorded at the Registry of Deeds in the County of Barnstable." Act, §3.

Reading all these provisions together, it is clear that excluded from the operation of the Act are building features that cannot be seen from an obviously public place, or from a way—not necessarily a *public* way--as defined in the Act. If we concentrate on the exemption set out in the regulations, we note that it is written in the conjunctive: "when the feature is not within view from a way. . . *and* only a site plan is required *along with* the application for a Certificate of Exemption." (Emphasis supplied). There is no evidence here regarding Gurney having applied for a "Certificate of Exemption" as to the northwest corner, or any other feature, at any time. In noting the definition of a way, however, and thus taking a more expansive view of the provisions together a way

includes "a way shown on a plan approved or signed by [one of various] Board[s]. . .or an improved way shown on a plan recorded at the Registry of Deeds. . . ."

There are two alleged ways in question near Gurney's property: Featherbed Lane, and the so-called "15-foot way." Gurney, in his "Plaintiff's Memorandum Regarding Pleadings, Findings of Fact and Request for Orders etc." (see below), notes that the *"15 foot private way, shown on a plan of land and recorded at the Barnstable registry of deeds in book 101 Page 591, (exhibits 12 & 55)* is not accessible by the general public." (Emphasis supplied; emphasis as indicated in original omitted). He also suggests that Featherbed Lane is a private way, and is so posted. There is, however, some evidence suggesting that Featherbed Lane, however characterized as a private way, is shown on a plan of 19 February 1946 and recorded with the Land Court (registered-land side) of the Barnstable County Registry of Deeds (Certificate of Title No. 2439). There is further evidence that persons on these ways have views of the offending aspects of the exterior of Gurney's house. Both these ways, in sum, bring the northwest corner of Gurney's house within the definition of way in the Act, and thus within the scope of the Act, thereby affording the Committee and Commission jurisdiction. At the least, the burden of proof was on Gurney to demonstrate that no allegedly objectionable feature of his house, notably the northwest corner, could be seen by the public or from a way as defined, and he has not sustained that burden—on this point, of demonstrating that in this regard the Commission had exceeded its authority--by a preponderance of the evidence. *See, e.g., Paananen, supra,* at 135, citing *Gumley, supra,* at 723-724 and *Marr v. Back Bay Architectural Comm'n,* 23 Mass.App.Ct. 679, 681-682 (1987).

Finally, the issue of the presence of the Masons in this action warrants discussion. The Masons moved in September 2006 to intervene in this appeal, which motion was allowed in November 2006, on the ground that they were direct abutters to the Gurney property and thus were "persons aggrieved." (*See* "Order on James and Sandra Mason's Motion to Intervene," 29 November 2006 (Welsh, J.)). The Masons proceeded to set out, most recently in an amended counterclaim, their claims against Gurney and their prayers for relief--a finding that the Gurney house violates the Act, the issuance of a permanent injunction requiring the removal of the house and the restoration of the property to its former condition, and the awarding of costs and attorney's fees—which appear to echo verbatim the position of the Commission. The Masons participated vigorously in the litigation. *See* note 1, above.

Although abutters are presumptively accorded "persons-aggrieved" status, or standing, in zoning cases, *see, e.g., Dwyer v. Gallo*,---Mass.App.Ct.---, 2008 WL 5094042 (5 Dec. 2008), the term "person aggrieved" in the Act that governs this case--that is, a person who may appeal to this Court--is one "aggrieved *by the action of the commission.*" Act, §11. (Emphasis supplied). *See Allen v. Old King's Highway Regional Historic Dist.*, 2000 Mass.App.Div. 330, 332("this 'liberal definition of 'aggrieved persons' [in G.L. c. 40C, the Historic Districts Act] is inapposite to cases arising under the Old King's Highway Regional Historic District Act"). The Masons are not claiming that they are aggrieved by the Commission's decision. Indeed, the relief they sought in this Court is identical to the relief sought by the Commission. They are, rather, claiming to have been damaged by the

actions of Gurney, not the Commission. *Cf. Mason v. Old King's Highway Regional Historic Dist.*, 2001 Mass.App.Div. 125 (Masons claimed to have been aggrieved by decision of Commission). They are not proper parties in this action, and the Court therefore dismisses them from it. The Court does not address their requests for proposed rulings of fact or law.

Even given all the unauthorized changes wrought by Gurney to the approved plan, it is this Court's opinion, bolstered by its view of the house[8] and the neighborhood, that the Gurney house is not dramatically out of character with other houses in the Scargo Heights neighborhood. But that opinion, as noted above, does not matter. This Court may not substitute its judgment for the Commission's. At the same time, this Court cannot say that Gurney has met his admittedly steep burden of demonstrating that the Commission's decision denying his application did not have a rational basis. *Harris*, *supra*, at 618. Because it cannot so say, it cannot under the Act "modify. . . by way of amendment, substitution, or revocation the decision of the Commission. . . ." Act, §11. Further, the Court, when constrained to find that the Commission has not exceeded its authority or otherwise acted so as to justify the Court's annulment of the Commission's action, does not appear to enjoy the broad equitable powers afforded it under the Act. *Id.* Even were the Court empowered to entertain the relief sought in the Commission's counterclaim—a "Permanent Injunction requiring the removal of the [house] and restoration of the property to its former condition" (presumably bare ground)—such relief would likely offend common sense and common-law doctrines disfavoring waste.

The Court affirms the decision of the Commission.

RULINGS ON "PLAINTIFF'S MEMORANDUM REGARDING PLEADINGS, FINDINGS OF FACT AND REQUEST FOR ORDERS ETC."

As indicated above, the Court afforded the parties the opportunity to file, post-trial, whatever they wished to file by way of closing argument and requests for rulings, even though it is not clear that the request-for-rulings procedure is required in an action of this kind.

Gurney has filed a 23-page document encompassing 77 numbered items, grouped under the headings: "The Parties," "Pleadings and Proceedings Below," "Findings of Fact / Evidence / Testimony etc.," and "Conclusion / Court Orders." These items are an admixture of factual assertions—some of which was not in evidence—argument, conclusion of law, and prayers for relief. The form of this submission renders it impossible for this Court to respond to meaningfully, even had the Court been inclined to respond to requests for pure findings of fact. *See, e.g., Bottone v. DeFreitas*, 2006 Mass.App.Div. 57, 58, citing, *inter alia*, *F & G Pasqualucci, LLC v. Global Naps Realty, Inc.*, 2004 Mass.App.Div. 69 (court correctly declined to respond to requests for factual

[8] "Information acquired at a view is not evidence in a strict and narrow sense, but is of assistance to understand better the testimony that has been or may be presented." *Paananen*, *supra*, at 137, citing *Keeney v. Cibrowski*, 304 Mass. 371 (1939).

findings). The Court therefore must decline to do so. Even had the numbered items all been properly formulated requests for rulings of law, the Court might have been justified in refusing to rule on them, or in requesting Gurney to reduce and reformulate them, given their excessive number. *See, e.g., Pagliarulo v. Arbella Mut. Ins. Co.*, 2008 Mass.App.Div. 77, 81 n. 9. Their mixed character, however, makes such a refusal unnecessary and such a request unwieldy.

RULINGS ON "THE DEFENDANT OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION FINDINGS OF FACT AND RULINGS OF LAW"

1.-17. These numbered requests are requests for findings of fact, which the Court generally allows, and indeed incorporates in its factual findings as set out above.
18. Allowed.
19. Allowed.
20. Allowed.
21.Allowed.
22. Allowed.
23. Denied.
24. Allowed.
25. Denied.

ORDER

The Court finds that the decision of the Commission must be, and is, **AFFIRMED**, and directs the entry of judgment in favor of the defendant Old King's Highway Regional Historic District Commission, accordingly.

The Court dismisses the defendants/intervenors James and Sandra Mason from the action for lack of standing.

Pursuant to the Act, §11, costs may be awarded only against parties who have proceeded in bad faith or with malice. The Court does not find that Gurney or the Commission has done so, and so declines to award costs to either party.

So ordered.

Dated: 12 December 2008

H. Gregory Williams
Justice

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION
P.O. Box 140, Barnstable, Massachusetts 02630-0140

STANDARDS FOR APPROPRIATENESS

"Wind turbine"

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION

P.O. Box 140, Barnstable, Massachusetts 02630-0140
Tel: 508-775-1766

J. K. Scanlon Co., Inc., Commonwealth of Massachusetts Department of Capital Asset Management, and Cape Cod Community College, Appellant

Vs. **Decision for Appeal No. 2010-1**

Old King's Highway Regional Historic District Committee For the Town of Barnstable

On Tuesday, March 2, 2010 at 1:30 P.M., the Commission held a hearing at the West Barnstable Fire Station Meeting Room, 2160 Meeting House Way (Route 149),West Barnstable, Massachusetts, on Appeal # 2010-1 filed by J. K. Scanlon Co., Inc., Commonwealth of Massachusetts Department of Capital Management, and the Cape Cod community College seeking reversal of a decision by the Barnstable Historic District Committee denying a Certificate of Appropriateness for the installation of a 600 KW Wind Turbine to be located at the Cape Cod Community College, 2240 Iyannough Road, West Barnstable, Massachusetts.

Present were Chairman Peter T. Lomenzo, Jr., Dennis; William Collins, Sandwich; Richard Geganwarth, Yarmouth; Lawrence Houghton, Brewster; George Jessop, Barnstable; Paul Leach, Orleans; James R. Wilson, Commission Administrative Counsel; Bruce P. Gilmore, Attorney for the Appellants/Applicants.

The Committee's decision was filed with the Town Clerk on February 3, 2010. The appeal was entered with the Commission on February 5, 2010, within the 10-day appeal period.

Copies of the Appeal Petition, Town's Decision, Plans, Minutes and Photographs from the Town Committee's hearings were distributed to the Commissioners for review.

The Appellant/Applicant's Presentation:

Attorney Bruce P. Gilmore addressed the Commission on behalf of the Applicant's appeal. He stated that the Town Committee made a series of errors in reviewing and acting on his client's application. He read the following sentence from Section 10 of the Historic District Act (Ch. 470 of the Acts of 1973, as amended): "The Committee shall consider the energy advantage of any proposed solar or wind device." He argued that the Town Committee failed to properly consider the energy advantage of the proposed wind turbine. He suggested that the absence of a statement of detailed facts about this issue by the Town Committee either in it's minutes or in the written decision reflected a failure to fully consider or properly address this aspect of the proposed wind turbine. He went on to claim that the Town Committee appeared to act in an arbitrary and capricious manner by

not adopting substantial findings on the electrical energy that would be generated by the proposed large wind turbine.

In addition, he argued that the Town Committee acted erroneously in not recognizing the Applicant's claim that the site of the college campus was isolated and lacked any significant historical buildings or structures near the proposed site of the wind turbine.

He further claimed that the existence of radio and cell phone towers and large power transmission lines in various locations within the historic district supported his claim that the denial reflected arbitrary and capricious action by the Town Committee.

He asserted that the appearance of the proposed large wind turbine would be screened by trees and minimally visible. He presented photo simulation pictures from nearby locations to support this claim.

He pointed out that the height of the proposed structure had been reduced from four hundred (400) feet to two hundred forty-three (243) feet and that it had been relocated from the southeastern corner of the campus to the northwestern corner to accommodate the requirements of the Federal Aviation Administration. He again claimed that the visual impact of the proposed wind turbine on the neighborhood would be minimal.

He stated that the Town Committee made an error when it stated in its decision that there would be lights on the blades of the turbine. He clarified the issue by stating that the Federal Aviation Administration only required that one red light to be located on the top of the proposed wind turbine.

He mentioned the historical use of wind power in the region and suggested that the early use of windmills by the salt works and other industries had an important place within the history of Cape Cod.

Returning to the energy advantage issue, Attorney Gilmore again expressed the opinion that the Town Committee had failed to properly address that aspect of the project. He criticized the last sentence of paragraph thirteen (13) of the written Decision in which the Town Committee stated that: *"The Committee considered the energy advantage of the proposal but found that the adverse impact of the project upon the historic values and character of the district were too great."* He claimed that the statement amounted to a simple restatement of the statutory language of the Act. He argued that the Decision did not represent a proper statement of the benefits of the proposed wind turbine.

He went on to state that the economic advantages of the project were multiple. He indicated that the College would receive a $170,000.00 reduction in its annual electric bill of approximately $725,000.00. In addition, a $50,000.00 benefit in surplus energy could be sold back to the grid and the cash profit re-distributed to low-income utility users. He claimed that the proposed project would assist in providing students with a wind energy educational program and that the clean energy produced would reduce green house gases and pollution.

He submitted a letter dated March 1, 2010 from Mark Zielinski, Treasurer of the Cape & Vineyard Cooperative, Inc. in support of the project and a copy of a letter dated January 1, 2008 from Paul O'Keefe, Director of Facilities at the Massachusetts Maritime Academy in Buzzards Bay, indicating an absence of noise complaints about the operation of their similar wind turbine. He also submitted fax copies of a letter from a Mark Wirtanen, a neighbor, and one from Edward Wirtanen, another neighbor, in support of the project. Additionally, he submitted copies of four (4) local newspaper articles that appeared to show local media support for the project.

He next submitted a copy of the June 9, 2005 Massachusetts Environmental Policy Act (MEPA) determination that the proposed project did not require an Environmental Impact Report. He indicated that all other approvals for the project had been obtained and that a misunderstanding of the requirements of the Historic District Act had caused the improper commencement of construction at the site. He indicated that the approval of the project by the Town Committee and/or the Regional Commission was all that remained in the way of erecting the large wind turbine.

He requested that he be allowed to have four speakers associated with the college and/or the project, offer addition information in support of the appeal.

The Chairman Peter Lomenzo granted the request.

Dixie Norris, Vice President for Administration and Finance, described the estimated economic and energy advantages that would flow from the proposed wind turbine. She reported that the eleven million dollar Commonwealth's share of the twenty-three million dollar annual operating budget for the college had been level funded for nearly nine (9) years and that the proposed wind turbine would reduce the Seven Hundred Twenty-five Thousand annual electric bill by nearly twenty-four (24%) percent. She stated that the college uses approximately 4.6 million kilowatts of electricity per year and that the wind turbine was projected to generate one million eighty-two thousand kilowatts of energy per year.

Demetrius Atsalis, D-Barnstable Representative, spoke in support of the use of wind turbines and the proposed project for the college. He expressed the opinion that a wind turbine has a "majestic" appearance and can provide great economic benefit as well as an educational value to the college.

John Lebecca, Assistant Vice President for Facilities and Sustain Abilities, stated that the reduction in the height of the tower and its relocation to the northwest corner of the campus was for the benefit of the people using the Airport. He indicated that the college had investigated the placement of a second wind turbine on the campus and been told that they only had sufficient space for the proposed turbine.

Richard Tabaczynski, Engineer for Atlantic Design Engineers, Inc., showed a plan of the area and a series of nine (9) photographs to demonstrate how the proposed wind turbine

might be seen from various nearby locations. He explained that the photographs were generated by a computer software program called "photo simulation" that allows the addition of the appearance of the proposed wind turbine, as it might be seen following construction. He also described the tethered balloon test that was requested by the Town Committee and indicated that it confirmed the accuracy of the photo simulations.

Kathleen Schatzberg, President of the College, stated that the college was a leader in promoting land based wind energy for the region. She disputed four (4) items in the Town Committee's decision. She asserted that the proposed wind turbine would help to preserve the history of the District by preserving the 19th Century commercial and business use of wind energy. She again pointed out the absence of lights on the tips of blades and stated that steel and not fiberglass would be used in the construction of the wind turbine. She challenged the "industrial" characterization of the turbine claiming that it was only half the size of the smallest commercial turbines. Finally, she interpreted a statement in the decision that identified some of the opinions expressed in favor of the wind turbine as coming from outside the District as implying a negative or diminished weight to their input in the process.

Based on the above observations, she stated that the Town Committee failed to appreciate the scope and benefits of the proposed wind turbine. She highlighted these benefits as providing the Community quality education at a low cost, education for renewable energy jobs, support for the development of new jobs and businesses in renewable energy and a financial support for energy costs reductions for low-income families.

She urged the Commission to approve the construction of the proposed wind turbine.

Attorney Gilmore indicated that this concluded his presentation.

Chairman Lomenzo asked the Commissioner's if they had any questions.

Mr. Geganwarth of Yarmouth asked if the proposed wind turbine was similar to the Massachusetts Maritime Academy wind turbine and was answered in the affirmative. He inquired about the average yearly usage of energy by the college and the cost of the wind turbine.

Dixie Norris stated that the college's total yearly usage was 4,621,508 Kilowatts and the proposed wind turbine cost 2.1 Million Dollars. She indicated that the wind turbine would generate about twenty-four (24%) percent of the College's annual electrical usage.

Mr. Lomenzo asked if all the information presented to the Commission was presented to the Town Committee at their public hearings on the application. Attorney Gilmore answered in the affirmative.

The Town Committee's Presentation:

George Jessop addressed the Commission on behalf of the Barnstable Town Committee. He stated that the Town Committee decided that the proposed structure was excessively large for the requested location within the Historic District.

He stated that the Town Committee did not decide that wind energy was inappropriate for the District. He claimed that the Town Committee regularly approves solar energy devices, but that the Town Committee determined that the large size of the proposed wind turbine would have a very detrimental visual impact upon the Historic District.

He criticized the photographs that had been submitted by the Applicant, pointing out that they were taken from a rather close proximity to the structure. He stated that the trees along the side of the streets are in excess of thirty (30) feet high and suggested that it does not take much separation to block anything from that perspective. He went on to state that given distance, the greater the height and size of the structure the more visible it becomes. He indicated that the proposed structure had the approximate height of a 23-story building and therefore would be very visible throughout the district.

He went on to claim that the proposed structure compares with the Sagamore Bridge for height. He stated that the Sagamore Bridge has a height of one hundred thirty five (135) feet to the road - bed and an over-all height of two hundred and sixty (260) feet. The proposed wind turbine has a proposed height of two hundred forty-three (243) feet. He claimed that when viewed with this comparison, the impact of the size of the proposed structure on the historic district becomes a much more significant issue

He pointed out that the radio towers and transmission lines that presently exist within the historic district are static. This he distinguished from the proposed wind turbine that will be in motion and have a very dynamic display and/or appearance. The blades are moving and will tend to draw the eyes attention.

He went on to say that the appearance of the 19th Century windmills has little resemblance to the proposed modern wind turbine. He acknowledge that the salt industry used windmills, but distinguished their size and appearance from the proposed wind turbine. He state that the windmills of the past were the equivalent in size to that of a two-story building.

He reported that the Town Committee determined that the large size of the wind turbine would not be compatible with its proposed residential setting. The issue was not the facility, but the size and appearance of the proposed facility.

Public Comment:

William E. Griswold of Centerville expressed concern about the existence of the 400 - foot Aircomm cell tower located at 749 Oak Street, West Barnstable.

Robert Senott of West Barnstable expressed support for the proposed wind turbine as a means to save the College money.

Wendy Northcross of West Barnstable expressed support for the proposed wind turbine both individually and as the C.E.O. of the Cape Cod Chamber of Commerce. She stated that the project would be an economic benefit to the College and the local community.

James Liedell of Yarmouth Port submitted a petition with thirty-five (35) signatures in support of the proposed wind turbine and stated that the project would expand wind energy related jobs and be an important step forward in the use of renewable energy devices.

Richard Bartlett of Cotuit expressed support for the proposed wind turbine as being a great asset to the College and its students. He expressed the opinion that the shape and design of the turbine was aesthetically pleasing.

Melody Masi of West Barnstable expressed concern about the photographs and the angel and/or location from which they were taken.

Erica Brown of Cummaquid expressed support for sustainable energy, but opposed the proposed wind turbine unless there was some sort of remediation ought to be required for the project.

George Zografos of Sandwich identified himself as a College Trustee and in support of the project as bringing a financial benefit to the College and its students.

William Mullin of West Barnstable expressed his opposition to the project. He stated that it did not look like the early windmills of Cape Cod and that he did not believe that it would be aesthetically appropriate for its proposed location.

Richard Kraos of West Barnstable registered his support for the wind turbine.

Sarah Cote of Sandwich identified herself as a former student at the College and as the Executive Assistant at Clean Power Now. She expressed support for the wind turbine as benefiting the local economy by helping to create green jobs and helping to educate students on the value of renewable energy devices.

Carl Freeman of Orleans expressed support for the wind turbine as being a step toward reducing air pollution and its related diseases.

Mary Jane Curran of Orleans identified herself as a former employee of the College and urged the Commissioners to allow the project to go forward for the benefit of the students. She expressed the opinion that wind turbine would be an invaluable teaching tool for the College.

Thomas Kelley of Yarmouth expressed the opinion that the historic district covers too large an area and should be reduced in size to the corridor of Route 6A and should not cover the area from Cape Cod Bay to Route 6.

Brenda Tri of West Barnstable identified herself as the owner of Diamond Edge Farm, an abutting seven and one-half (7 ½) acre farm. She expressed her opposition to the proposed wind turbine and suggested that energy conservation and other means would better serve the College and the local community. She criticized the all night emission of light from the College parking lots. She stated that she favored use of wind and solar renewable energy devices in the proper location.

She disputed the claim that the 2.1 Million Dollar cost of the wind turbine was free since the money came from a part of each person's utility bill.

Ann Canedy of Cummaquid expressed her support for the action of the Town Committee in denying the proposed wind turbine. She stated that two (2) of the members of the Town Committee have spoken publicly in favor of renewable energy. She indicated that the issue of size and height were the dominant reasons for denying the project.

Mark Bonainto of West Barnstable expressed his support for the Town Committee's decision to deny a permit for the proposed wind turbine. He indicated that he lived within the Historic District and that his home is located a quarter mile west of the proposed site for the wind turbine. He claimed that he bought his residence with the protections afforded by the Historic District Act that are intended to preserve the many visual and historic residential qualities that characterize the north side of Cape Cod.

He claimed that the wind turbine would be "catastrophic" for the Historic District by degrading the visual historical and architectural integrity of the area and reducing property values. He asserted that the Town Committee and local residents work to preserve the historic character of their neighborhood. He stated that residents design their homes and submit to the regulations of the Historic District Act in an effort to preserve the look and esthetic qualities that existed in the early days of Cape Cod.

He described the proposed wind turbine as consisting of a two hundred forty-two foot tall, ninety tons of steel, with a hundred fifty foot blade span, rotating, shadow flickering, light flashing, noise emitting structure that is dissimilar to all other structures ever constructed within the historic district. He referred to the Old King's Highway Regional Historic District Guidelines – Section 5 (a.) that states for wind generators, the device should have "Minimum visual impact on the surrounding neighborhood." He declared that the Act requires structures to be compatible in size, design and the use of materials so as to blend into an area. He referred to the structure as a "mammoth monolithic structure" that will tower over the Historic District and be visible from many historic views, sites and locations. He pointed out that the Historic District is listed on the Massachusetts and National Registers of Historic Places.

He identified the 600 Kilowatt size of the proposed wind turbine as being classified as an "industrial grade turbine" and therefore not compatible in size and appearance with the surrounding historic residential neighborhood. In support of this characterization, he stated that the Cape & Island Renewable Energy Resource Collaborative classifies wind turbines by size and that a 600 Kilowatt turbine fits into the "industrial category."

Additionally, he claimed negative health consequences that had been reported from exposure to the flickering light and sound of wind turbines.

He showed the Commissioners a scaled drawing of the proposed height of the proposed wind turbine and compared it with the Bourne Bridge (265 ft.); the Bunker Hill Monument (220 ft.); and Pilgrim Monument (252 ft.).

Mary Anne Boniato of West Barnstable and the wife of the former speaker showed the Commissioners a picture of the historic Eastham Windmill and contrast it appearance with that of the proposed wind turbine. She expressed her support for the Town Committee's denial of the permit stating that the proposed structure will be the tallest and largest non-static structure located on Cape Cod. She criticized the proposed location as being the least appropriate setting for the structure.

John Demilio of Marstons Mills expressed concern that the dispute would end in Court and encouraged all interested parties work for the best interests of the community.

Gabrielle Black of West Barnstable expressed support for the Town Committee in denying a permit for the proposed wind turbine. She expressed doubt that wind turbines provide cleaner and/or cheaper energy. She pointed out the residential and historical character of the area and suggested that the height and large size of the structure will have a major negative impact on surrounding neighborhood.

Appellant/Applicant's Rebuttal:

Attorney Gilmore stated that the as a part of the MPA process the Massachusetts Historical Commission had approved of the Project and that the College is in complete compliance with all other regulatory authorities.

In addition he indicated that the Project meets the requirements of the Town of Barnstable's proposed wind generator by law.

He reassured the Commissioners that the granting of approval for the proposed Project would not have a precedent setting impact on the District because each application is to be judged on its own merits.

He disputed the visibility claims stating that the topography and vegetated buffer around the campus would screen and hide the appearance of the wind turbine.

He indicated that there was no evidence that the construction of wind turbines had a negative impact on property values.

He challenged the claim that the location was in the middle of the Historic District. He described the location as being in the periphery of the District and away from the location of any historical buildings.

He again asserted that the Town Committee failed to consider the energy advantage of the proposed wind turbine and that based on all the information presented to the Committee at its hearings and to the Commission in this proceeding, the decision of the Town Committee should be reversed and a Certificate of Appropriateness ought to be issued for the Project.

Town Committee's Rebutall:

Mr. Gessop read from a portion of Section 10 of the Act, which, in addition to other factors, requires the Town Committee to consider "the relative size of any building or structure." The size and scale of the proposed wind turbine became the dominant factor for its determination that a Certificate of Appropriateness should not be issued for the proposed wind turbine.

He indicated that the Town Committee considered the Applicant's claim that the structure would be shielded by vegetation and determined that the great height above the tree line would cause the structure to be very visible through out the Historic District.

He disputed the Applicant's claim that the topography would conceal the tower. He stated that it is sited on one of the highest points in the Historic District. The site has been identified as having an elevation of 250 above sea level. The structure will be visible from up to five miles away.

He stated that the 400 foot Aircomm cell phone tower located at 749 Oak Street had never been approved by the Town Committee and therefore should not be considered as serving as a precedent for the approval of the proposed wind turbine.

He defended the Town Committee's determination that proposed location was in the middle of the Historic District by describing the Boundaries of the District that extends from the Cape Cod Canal to the Eastham town Line.

He indicated that he had been informed that the proposed 600 Kilowatt Unit is as small as could be submitted and still meet the requirements of the College for its 2.1 Million Dollar Funding. He stated that smaller units were not proposed and the Town Committee had to act on the proposal as presented.

Final Questions:

Mr. Lomenzo stated that he wanted to explore the Appellant's claim that the Town Committee did not properly address the energy advantages of the proposed wind turbine. He asked Attorney Gilmore to again clarify the issue.

Mr. Gilmore indicated that proper procedure ought to have been for the Applicant to present all of the information about the energy advantages of the proposed wind turbine to the Town Committee, which he indicated had been done and that the Town Committee should have discussed the information and based on the information presented, made a determination that incorporated the energy advantages of the proposed wind turbine.

Mr. Lomenzo reviewed the specific advantages presented and invited the Applicant to again clarify the amount of the economic savings of $170,000 to the College and $50,000 the local community from the proposed wind turbine. He additionally asked President Schatzberg to highlight the other advantages. Dr. Schatzberg restated the educational advantages of the proposed wind turbine.

Mr. Lomenzo requested that the Applicant clarify the significance of the claim that the site for the wind turbine was not a historically significant part of the Historic District. Attorney Gilmore explained that the issue was relevant to the character of the neighborhood and was not a suggestion that the College was not subject to the requirements of the Act.

Mr. Lomenzo requested that the Applicant clarify the visibility issue. Mr. Gilmore indicated that the impact on the immediate area would be minimal and that while it may be seen from a great distance that it would not amount to visual pollution.

Mr. Lomenzo asked Mr. Jessop if he wished to add or comment on the clarifications.

Mr. Jessop stated that the Town Committee had listened to the presentation on the energy advantages of the proposed wind turbine. He expressed the opinion that the Town Committee members could not have overlooked the extensive presentations by the Applicant.

Commission Discussion:

The members of the Commission reviewed the pictures, plans, photographs and other items submitted for review during the public hearing.

Mr. Lomenzo began the discussion by stating that determining whether the Barnstable Committee made a mistake of one of the five types set forth in Section 11 of the Historic District Act. He highlighted the points by asking the following questions. Did the Committee exceed its authority? Did the Committee exercise poor judgment? Was the

Committee arbitrary in its actions? Was the Committee Capricious in its actions? Was the Committee erroneous in its actions? He asked each Commissioner to comment.

Paul leach of Orleans stated that he believed that the Town Committee did consider the energy advantage of the wind turbine and the omission of the financial data or other presented information did not mean that the factor was not considered. He indicated that he believed that the Town Committee Members acted properly in denying the wind turbine and that weight of the evidence was not in support of granting the Certificate of Appropriateness for the project.

William Conley of Sandwich stated that he has reviewed all of the submitted material and visited the site of the proposed wind turbine and the site of the existing wind turbine located at the Massachusetts Maritime Academy in Buzzards Bay.

He pointed out that the Appeal petition states that it based on three (3) things. The first claim is that the decision is arbitrary and capricious. He stated that he found, after reading all the submitted material, visiting the sites and hearing the presentations, that the Town Committee did not make a capricious or arbitrary decision. In his opinion the Town Committee Members did their homework and put a lot of thought into the review of the application and their ultimate determination.

The second claim is that the Town Committee made an error in the application of Section 10. He agreed with the Applicant's claim that Section 10 requires the Town Committee to consider the energy advantage of a proposed wind device. However, he concluded that the Committee did consider the energy advantage of the proposed device as stated in their written Decision. He stated that not all things get into the Minutes because they tend to be a summary. He said that after reading the Minutes and hearing the testimony that the Town Committee members appeared to clearly understand wind energy devices and the issues related thereto. The decision states that the town Committee was "sympathetic to alternative energy proposals."

He went on to express the opinion that the sentence cited by the Appellant that the Committee "...shall consider the energy advantage..." does not represent a "trump card," but adds it as an additional factor to consider in determining the appropriateness of a proposed wind device.

The third claim is that the Town Committee's decision went against the substantial weight of the evidence. He stated that having reviewed all the material presented and heard the conflicting testimony presented at this public hearing, it all appeared to come down to a simple thing, that reasonable people may differ on their interpretation of the evidence. All the evidence, all this emotion, all the concerns, have to be weighed against the many interests set forth in Section 10 of the Act. He indicated that he believed that different people may disagree and will come to their own conclusion about the facts and the interests to be enhanced and/or protected. He indicated that he found that the Committee's decision did not go against the weight of the evidence and that there was a reasonable basis for the determination to deny the application.

Lawrence Houghton of Brewster stated that having reviewed the submitted materials and heard all the testimony, he could not find that the Town Committee Members acted in an arbitrary or capricious manner. Additionally, he indicated that he agreed that the Town Committee did consider the energy advantage of the proposed wind turbine and properly applied the many factors set forth in Section 10 to the review of the Application.

Richard Gagenwarth of Yarmouth observed that the Town Committee had seen the material and heard all of testimony that was presented to the Commission. He agreed with the observation of Mr. Conley that the record showed that the Town Committee Members thoroughly reviewed the application and considered the factor of the energy advantage of the proposed wind turbine. He expressed the view that the Town Committee did not act in an arbitrary or capricious manner, but acted reasonably in denying a permit for the proposed wind turbine.

Mr. Lomenzo of Dennis stated that it appeared that the Town Committee did not exceed its authority in acting on the application for the wind turbine. He pointed out that the project was located within the Historic District and legally subject to the jurisdiction of the Town Committee. He agreed with the other Commissioners that the Town Committee did not exercise poor judgment. He stated that it appeared that the Town Committee had several meetings and took their time to understand the application for the proposed wind turbine. He indicated that the requested red balloon test demonstrated an effort by the Town Committee to be thorough in its review of the proposed project and not to act in an arbitrary or capricious manner. He stated that he found that the Town Committee appeared to listen to the many benefits of the proposed wind turbine but that the concern for the size, location and visibility of the wind turbine was not unreasonable or erroneous.

The Commission findings:

The Commission found as follows:

The Town Committee did not exceed its authority or exercise poor judgment.

The Town Committee was not arbitrary, capricious, or erroneous in denying the application.

The Town Committee considered the issue of the energy advantage of the wind device.

The Town Committee did not commit an error in its application of the review standards of Section 10 of the Historic District Act.

The Town Committee acted reasonably in determining, from the presented evidence, that the large industrial size of the proposed wind turbine would have a significant detrimental impact upon the interests of the Historic District.

The Town Committee acted reasonably in denying a Certificate of Appropriateness for the proposed large wind turbine.

Determination:

As to Appeal #2010-1, the decision of the Barnstable Committee is affirmed (5-0-1).

Any person aggrieved by this decision has a right to appeal to the District Court Department, Barnstable Division, within 20 days of the filing of this decision with the Barnstable Town Clerk.

Dated March 18, 2010

Peter T. Lomenzo, Jr., Chairperson

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS.

DISTRICT COURT DEPARTMENT
BARNSTABLE DIVISION
NO. 10 CV 0537

J.K. SCANLON CO. INC., COMMONWEALTH OF MASSACHUSETTS, DEPARTMENT OF CAPITAL ASSET MANAGEMENT and CAPE COD COMMUNITY COLLEGE
Plaintiffs

VS.

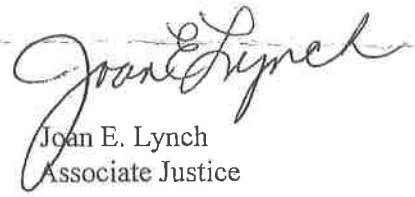
OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION
Defendant

DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The above captioned matter is an appeal from a decision of the Old King's Highway Regional Historic District Commission upholding the Barnstable Town Committee's decision to deny the plaintiffs a certificate of appropriateness for a proposed wind turbine to be constructed at Cape Cod Community College. The defendant filed a motion for summary judgment. A hearing on the motion was conducted on October 12, 2010.

The Court is empowered to overturn the decision of the regional commission's decision only if finds that the commission "should have concluded that the local committee exceeded its authority, exercised poor judgment, or was arbitrary, capricious or erroneous in its actions." *Harris v Old King's Highway Regional Historic District Commission*, 421 Mass. 612, 615 (1996). It is clear from the record that the decision of the local committee, rendered after a public hearing at which the plaintiffs were afforded a full opportunity to make a presentation in favor of the project, based its decision on rational grounds. The plaintiffs' arguments that the committee did not consider the "energy advantage" of the wind turbine and that certain members of the committee demonstrated a general bias against the device are without merit. Accordingly, the defendant's motion for summary judgment is ALLOWED.

By the Court,



10/14/2010

Joan E. Lynch
Associate Justice

OLD KING'S HIGHWAY REGIONAL HISTORIC
DISTRICT COMMISSION
P.O. Box 140, Barnstable, Massachusetts 02630-0140

STANDARD OF REVIEW

&

STANDING

"Person Aggrieved"

All fact findings and legal rulings in following ARC cases vacated by Mass. Appeals Court 11/9/15.

(See Decision at Page 330)

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION

P.O. Box 140, Barnstable, Massachusetts 02630-0140
Tel: 508-775-1766

LCM

RECEIVED

Rosemarie Austin, Appellant

Vs. **Decision for Appeal No. 2010-7**

Old King's Highway Regional Historic District Committee For the Town of Dennis

On Tuesday, September 28, 2010 at 2:00 P.M., the Regional Commission held a hearing at the West Barnstable Fire Station Meeting Room, 2160 Meeting House Way (Route 149), West Barnstable, Massachusetts, on Appeal # 2010-7 filed by Rosemarie Austin seeking reversal of a decision by the Dennis Town Committee granting a Certificate of Appropriateness to Aquacultural Research Corporation for the installation of a 600 kilowatt wind turbine to be located at 99 Chapin Beach Road, Dennis, Massachusetts.

Present were Chairman Peter T. Lomenzo, Jr., Dennis; Patricia McArdle, Sandwich; Richard Gegenwarth, Yarmouth; Lawrence Houghton, Brewster; Patricia Anderson, Barnstable; James R. Wilson, Commission Administrative Counsel; Rosemarie Austin, Appellant; John W. Kenney, Attorney for the Applicant.

The Dennis Town Committee's decision was filed with the Town Clerk on August 27, 2010. The appeal was entered with the Regional Commission on September 2, 2010, within the 10-day appeal period.

Copies of the Appeal Petition, Town's Decision, Plans, Minutes Application and Memorandum, and Photographs from the Dennis Town Committee's hearings were distributed to the Regional Commissioners for review.

Prior to beginning the Applicant's presentation, Chairman Peter Lomenzo stated that because he would be representing the Dennis Town Committee during the hearing that he would ask that the Regional Commissioners to elect another Member to conduct the hearing.

On motion of Patricia Anderson, seconded by Patricia McArdle, Lawrence Houghton of Brewster was elected Acting Chairman to conduct the hearing. (5-0)

The Applicant's Presentation:

Attorney John W. Kenney of Centerville addressed the Regional Commission on behalf of the Applicant's application. He stated that his client, Aquacultural Research Corporation, commonly called "ARC," received a Certificate of Appropriateness from the Dennis Town Committee on August 25, 2010. That approval, allows the Applicant to construct a 600-kilowatt wind turbine on its property located at 99 Chapin Beach Road,

Dennis, Massachusetts. The wind turbine would have a hub height of one hundred sixty-four (164) feet and a blade tip height of two hundred forty-two (242) feet. The wind turbine would be constructed upon a circular slab foundation 50 feet in diameter. The base of the wind turbine's tower would be 10.3 feet in diameter, constructed of tubular steel and painted a non-glossy off white color. The anticipated life of the wind turbine is twenty (20) years.

The Applicant filed its application on July 16, 2010. On August 11, 2010, a public hearing before the Dennis Town Committee took place with four (4) hours of public comment and discussion. The Committee continued the hearing, so that a site visit and tethered balloon test could be conducted. On August 20, 2010 the Town Committee members visited the site and observed the tethered balloon test. On August 25, 2010, the Town Committee reconvened its public hearing and after additional public comment and discussion voted (3-2) to grant the Certificate of Appropriateness.

Atty. Kenney stated that the Applicant is a shellfish cultivator and wholesaler. The company produces clams and oysters from broodstock using state of the art processes including heating, lighting and circulation. As part of the process, the Applicant also grows its own algae to feed the shellfish. The Applicant produces over ninety (90%) percent of the shellfish used in Massachusetts and the majority used in northeastern United States.

He indicated that the Applicant's property contains thirty-nine and seven tenth (39.7) acres of land and has continuously operated at its present site since 1960. The site is an irregular shaped parcel comprised of 17.8 acres of upland, 15.2 acres of marsh, and 6.7 acres of manmade tidal lagoons. The property is located at the westerly end of the paved portion of Chapin Beach Road. It is bounded on the south and west by Chase Garden Creek, on the north by Chapin Memorial Beach, and on the east by marshland owned by the Dennis Conservation Trust. There are three (3) structures on the site with the main building housing the hatchery, a warehouse, and a greenhouse. These structures are all part of the aquaculture operation. There are no buildings, other than those belonging to the Applicant's operation, within approximately 2,600 feet of the proposed wind turbine location.

He stated that the Applicant would be the primary beneficiary of the proposed wind turbine. The projected savings to the company's energy costs resulting from the wind turbine total $120,000.00 to $140,000.00 per year. Other beneficiaries of the proposed wind turbine include the many shellfish farmers who depend exclusively on the Applicant as a source of shellfish seed, and the local municipalities who depend on the Applicant to produce shellfish seed for the propagation and remediation efforts.

He introduced Gail Hart, Vice President of Aquacultural Research Corporation, to provide more information about the company and its operations.

She stated that the company is a shellfish farm. The research part of the name reflects that the Applicant has developed much of its own technology for raising the shellfish. She

described the company as a privately owned for profit business using a vertically integrated shellfish farming system. She explained that the shellfish spawn from the company's parent stock and are raised in closely monitored heated tanks during the winter months. The seed are then planted in protected tidal flats. The shellfish grow in the tidal flats to maturity in about two (2) to three (3) years. The mature shellfish are hand harvested at low tide and sold through a national wholesale distribution system.

She stated that the winter hatchery process is the most energy intensive part of the business. She indicated that the annual growing cycle begins in the heated seawater tanks, were the juvenile seed grow to an adequate size for the outdoor planting. This process of growing the juvenile shellfish requires keeping the saltwater hatchery tank at a constant warm temperature. The microscopic algae that feed the shellfish require warm water temperature, light and circulating water.

She indicated that the Applicant presently obtains its energy from three sources: electricity, a boiler with a large oil tank and three large propane tanks. The proposed wind turbine would replace the oil and propane tanks and the business will convert all of its energy needs to exclusively electricity that will come from the wind turbine and the grid.

She stated that the unique site of the hatchery was ideal for its operations and indicated that the use of seawater and other factors made any effort to relocate the business economically impractical and cost prohibitive.

She reviewed the deterioration of the company's economic business model, which she attributed to rising electric, oil and propane costs. She suggested that the operational savings of the conversion to exclusively electricity with an industrial size wind turbine would restore a viable cash flow for the business and allow improvements and an opportunity for expansion of the company's production.

She described the 600-kilowatt wind turbine as the best size for their company's needs and suggested that the company's property was ideally suited for locating the proposed wind turbine. She compared the turbine with the Massachusetts Maritime Academy 600 kilowatt wind turbine and stated that they were similar in size and height.

She stated that the company's studies show no significant or potential adverse impact to the area from the proposed wind turbine.

Attorney Kenney introduced Richard Kraus, President of Aquacultural Research Corporation, to continue the Applicant's presentation.

He reviewed company's history as the main supplier of shellfish seed in the area. He indicated that their hatchery is the only commercial producer of hard shell clam and oyster seed located in Massachusetts. He asserted that the company is the largest producer and supplier of its seed in the northeast. He estimated the economic impact to the region of their shellfish industry to be around $42,000,000.00.

He indicated that do to market place constraints and competition; the price of the mature products has remained relatively static over the past ten to twelve years. This has forced the company to become more efficient in its seed production and to produce more quantity of product. He claimed that the proposed conversion to exclusively electric power through the addition of the 600-kilowatt wind turbine would greatly reduce the company's energy production costs and strengthen the company's overall business plan.

He highlighted the historical nature of the shellfish industry on Cape Cod. He pointed out that during the 1800s shellfish seed from Virginia were transported on sailing ships to the area for planting. He claimed that their company had single handedly brought back a dying shellfish industry.

Attorney Kenney asked Tom Michelman of Borel Renewable Energy Development, to describe the proposed Elecon 600 kilowatt wind turbine to the Regional Commission.

Mr. Michelman stated that the wind turbine was comparable to as the one located at the Massachusetts Maritime Academy in Buzzards Bay, Massachusetts, and had the same height and size.

He indicated that the wind turbine would operate when the wind is between 3.5 meters per second (8 MPH) and 25 meters per second (60 MPH). The anticipated average wind speed at the site is 6.76 meters per second (15 MPH), which should enable the wind turbine to meet the energy requirements of the company.

He confirmed that the anticipated life of the wind turbine is twenty (20) years. He stated that the tower for the wind turbine would be erected where the greenhouse is located. The wind turbine will be computer operated with a manual override. It will have three-phase power with breaking in case of icing. He indicated that there should be no sound or flicker effect problem from the wind turbine.

The proposed height of the steel tower is the lowest available for a 600-kilowatt wind turbine. He claimed that any lower or a smaller wind turbine would be less effective and impractical to operate at the site. He expressed the opinion that the proposed wind turbine would meet the projected energy needs of the company and would be better than solar panels, geothermal heat pumps or any other energy source for the site.

Attorney Kenney presented his legal argument in support of sustaining the Dennis Town Committee's granting of the Certificate of Appropriateness for the 600-kilowatt wind turbine. He read from Sections 1, 3, 6, 10 and 11 of the Historic District Act and Section 5 of the Commission Guidelines. He presented the argument that was previously presented to the Dennis Town Committee in support of granting the Certificate of Appropriateness. The argument had been submitted in a written Memorandum dated August 11, 2010. (A copy of the Memorandum had been provided to the Commissioners as a part of the Town Committee record prior to the hearing.)

He disputed the claims made by the Appellant in the Appeal and concluded by asserting that the Dennis Town Committee correctly granted the approval of the Applicant's application and requesting that the decision be affirmed.

The Appellant's Presentation:

Rosemarie Austin of Dennis, addressed the Regional Commission on behalf of her appeal. She indicated that residents from Dennis, Yarmouth and other neighborhoods, who shared her opposition to the Dennis Town Committee's decision, would join her in the presentation.

She claimed that the Dennis Town Committee "exercised poor judgment" in acting on the application. In support of her claim, she charged that the Dennis Town Committee did not exercise due diligence and did not adequately review the information that was available about the proposed project before rendering its decision.

She suggested that the Dennis Town Committee did not adequately address the ownership and/or the "industrial and commercial" nature of the large wind turbine.

She pointed out that the proposed project is to be located in a part of the town that is only zoned for residential use. She stated that the maximum permitted height for a wind turbine in a Dennis Residential Zoning District is only forty-five (45) feet and not the two hundred forty-two (242) feet of the Applicant's proposed 600-kilowatt wind turbine.

She showed the Commissioners a copy of the Town of Dennis Zoning Map, which highlighted the five (5) areas where the Town of Dennis had specifically authorized the placement of small, medium and large wind turbines. None of the areas are located within the Old King's Highway Regional Historic District.

She expressed concern about the fourteen (14) feet height of the ground water table in the area where the proposed thirty (30) feet deep concrete foundation base for the steel tower is to be located.

She asserted that the Dennis Town Committee failed to properly consider the degree of adverse impact that the large wind turbine would have on an environmentally sensitive residential part of the Regional Historic District.

Anne Ierardi of Route 6A, Yarmouth Port, criticized the action of the Dennis Town Committee for its failure to give adequate notice to the Yarmouth residents or to give due consideration to the adverse impact of the proposed structure on the nearby Bass Hole area with its popular board walk and public bathing beach. She suggested that the Dennis Town Committee acted on the application from a narrow Town of Dennis only prospective and ignored the regional impact of the proposed project or to adequately seek alternative solutions to the Applicant's needs.

Richard Watts of 15 Whig Street, Dennis, suggested that the Dennis Town Committee acted erroneously in not properly analyzing the financial and electrical energy assumptions set forth in the November 2008 Feasibility Study. He stated that the Applicant represented that the 600 Kilowatt industrial size wind turbine was needed to bring down the electricity costs of their facility. He expressed the opinion that high cost of construction (est. $2.2 mil. less $.9 mil. in grants) plus the annual operating cost of $24,036.00 would result in an overall higher energy cost to the Applicant.

He claimed that, as referenced in the study, the available tax advantages would bring in a third party investor.

He stated that the study included an assumption of significant expansion and increased production to meet projected electrical usage and raised the possibility that the Applicant might not be the primary user, but would be selling more than fifty (50%) per cent of its electricity to other parties.

He claimed that the project would destroy many important view sheds from the Towns of Dennis and Yarmouth. He expressed the opinion that, while it might be appropriate to locate a large commercial industrial wind turbine in an industrial zone, it was inappropriate for the proposed residential coastal setting.

Ann Porotti of 22 Dr. Bottero Road, Dennis, stated that the Dennis Town Committee failed to properly address the issue of public safety. She cited a series of wind turbine incidents where blades broke or towers collapsed. She suggested that the Dennis Town Committee acted in an arbitrary and capricious manner by not investigating these incidents or properly addressing the issue in its decision.

She reported that Vestas, a leading producer of wind turbines, recommends a 1300 feet safety zone around its industrial wind turbines. She stated that the frequent public recreational use of Chapin Beach, Gray's Beach and Chase Garden Creek would bring people with in the 1300 feet safety zone. She urged the Regional Commission to overturn the Dennis Town Committee's and deny the application.

Judy Recknagel of 408 Route 6A, Yarmouth Port, stated that the Old King's Highway with its many historic places is listed in the AAA Magazine as one of the top ten (10) scenic places in the America. She suggested that this was in large part the result of the Regional Historic District Act and the preservation efforts of those who administer it.

She voiced concern that Yarmouth residents did not get notice of the hearings. She claimed that none of her neighbors were aware of the proposed wind turbine project and that Yarmouth interests appear to have been ignored by the Dennis Town Committee.

She claimed that, while the Town of Dennis has many public bathing beaches on the Bay side, Yarmouth has only one and it abuts the area where the proposed wind turbine is to be located. She described the Gray's Beach as a jewel with its bathing beach for swimming, shaded picnic tables, cooking grills and a long boardwalk across the marsh.

She stated that the area is enjoyed by hundreds of Cape Codders and tourist who visit the site. She suggested that the large wind turbine belonged in a less sensitive industrial or commercial area.

She charged that the Dennis Town Committee showed poor judgment and acted capriciously in allowing the proposed industrial wind turbine to be placed where it would have a maximum visual impact for Yarmouth residents and visitors. She claimed that the large industrial wind turbine would significantly detract from the historic, natural and aesthetic quality of an important part of the Regional Historic District.

She requested that the Regional Commission annul the decision and deny the Certificate of Appropriateness and preserve the historic, natural and aesthetic character of Gray's and Chapin Beach.

Mario Gonzalez of Yarmouth Port, expressed the opinion that the Dennis Town Committee based their decision on poor judgment. He referenced the Old King's Highway Regional Historic District Commission Guideline requirements under Section 5, which states that a solar or wind generator should have "a minimum visual impact on the surrounding neighborhood" and "...be designed and constructed in such manner as to blend with existing features in the immediate area." He characterized the judgment to approve the proposed wind turbine as a failure to follow the Guidelines and apply them to the application.

He claimed that the beauty of the natural landscape of the area would be decimated by the installation of the proposed industrial wind turbine.

He dismissed the economic claim of the Applicant that it might fail if it did not obtain the wind turbine. He stated that there is nothing in the Regional Historic District Act that says that it is the responsibility of the Dennis Town Committee to save a financially faltering private business.

Ronald Perera of 114 Wharf Lane, Yarmouth Port, stated that the proposed wind turbine would be visible from his home, along the shore to the end of Yarmouth village, the Yarmouth town wharf, the Yarmouth boardwalk at Gray's Beach and along the edge of Chase Garden Creek as far as to the Dennis town line. He expressed the opinion that the exterior architectural features of such a large industrial wind turbine are out of scale with the residential character of the surrounding neighborhood.

He suggested that the impact of the Applicant's application for the large industrial wind turbine should not be treated as a local Town of Dennis matter only, but should be addressed as a regional issue.

He requested that the Regional Commission refer the matter to the Cape Cod Planning Commission for review and in the absence of doing so, reverse the action of the Dennis Town Committee to protect and preserve the natural beauty and historic shorelines of Yarmouth and Barnstable.

Josie Dornback of 42 Rodoalph Way, Dennis, expressed concern about the area wetlands, migratory birds and endangered species. She indicated that the construction of the wind turbine would have a destructive impact on these aspects of the salt marsh and creek area.

She suggested that allowing the project to go forward would have an adverse impact on the public interests identified in Article 97 of the Massachusetts Constitution.

The Town Committee's Presentation:

Peter Lomenzo addressed the Regional Commission on behalf of the Dennis Town Committee.

He stated that because of prior admonishment for not fully exploring the economic advantages of any proposed solar or wind device, the Dennis Town Committee agreed at the outset to receive and review all the available information on the issue.

The Dennis Town Committee agreed with the Applicant to defer any presentation or determination on the hardship issue until such time as the Town Committee issued a complete denial of the application.

He indicated that he felt that the Dennis Town Committee did not exceed its authority because the proposed project was geographically located within the Regional Historic District and the Applicant's proposed activity was under the jurisdiction of the Act.

He indicated that he felt that the Dennis Town Committee did not make an error. He stated that the Dennis Town Committee followed its regular procedures and held six (6) hours of hearing time on the application and a site visit with a tethered balloon test.

He noted two procedural issues that occurred during the processing of the application. The first was a failure by the Applicant to file for a Certificate for Demolition for the Quonset hut buildings that were to be removed to make room for the proposed tower base. The second was the submission of more detailed specification about the proposed wind turbine. He reported that the Dennis Town Committee and the Applicant resolved both issues.

He indicated that he felt that the Dennis Town Committee was not arbitrary or capricious in acting on the application. He described the review process as being lengthy and complete. He reported that all determinations were based on a full discussion and thorough review of the issues.

He acknowledge that the judgment to approve the application was a three (3) to two (2) split vote. He stated that three (3) members felt that the proposed wind turbine was appropriate for the site and two (2) members felt that it was too big and too high for the site.

He stated that after the first hearing it appeared that a majority of the Committee was going to approve the application. He indicated that the focus of the Dennis Town Committee shifted to establishing the conditions that would best protect the Dennis community interests. As a result the Certificate of Appropriateness was finally issued with the following seven (7) conditions:

1.) A Certificate for Demolition shall be obtained by September 20, 2010 or Certificate of Appropriateness shall expire.
2.) The wind turbine shall be maintained in proper working order.
3.) A Bond shall be in place to remove the wind turbine.
4.) A Specification Sheet for all items in feet and inches shall be submitted.
5.) Clarification of FAA light on hub.
6.) The Applicant shall consider a less intrusive turbine design if it becomes available.
7.) Color to be 9001.

He stated that he believed that the Town Committee did its job. He indicated that he felt that the only issue that remained for the Regional Commission was whether or not the Dennis Town Committee exercised poor judgment in approving the large size of the proposed wind turbine at its proposed location.

Public Comment:

Richard Elrick, the Barnstable and Bourne Energy Coordinator, stated that there is a strong public commitment to the use of wind and solar energy. He urged the Regional Commission to vote in favor of the proposed wind turbine as being in the public interest. He indicated that if wind turbines are appropriate in Europe and the old-world, they ought to be appropriate on Cape Cod.

James Liedell of 148 Kates Path, Yarmouth Port, stated that, as an engineer, he has examined the proposed wind turbine and its location. He supports its approval because of its isolated location from residences and a belief that it will have a minimal impact on the Regional Historic District.

Gerry Palano, of the Massachusetts Department of Agricultural Resources, expressed support for the Applicant and its effort to obtain approval of the wind turbine. He indicated that the Department supports the use of clean energy resources and the importance of local shellfish industry.

Stephen Wright, President of the Massachusetts Aquacultural Association, stated that the shellfish industry has benefited from the seed production of the Aquacultural Research Corporation. He expressed support for the proposed wind turbine project because he felt that it would assist the members of his organization in continuing the growing and harvesting of shellfish.

Carl Freeman of Orleans expressed support for the use of wind power. He claimed that the use of wind power is much safer and better than using fossil fuels.

Gary Sherman, President of the Massachusetts Shellfish Officers Association, expressed support for the Aquacultural Research Corporation. He reported that many local communities have shellfish propagation programs and that the Applicant's business plays an important support role for these programs.

Richard York of Falmouth stated that as a marine biologist, he supports the application for the wind turbine. He expressed the opinion that the company provided a public benefit to the shellfish industry and to the community. He described the company as the sole provider of clam and oyster seed in the area. He urged the Regional Commission to support the application because the company needs the financial help.

Janet Polito of 20 Loch Rannoch Way, Yarmouth Port, expressed her opposition to the wind turbine and requested that the Dennis Town Committee be reversed.

Thomas Kelley of Yarmouth expressed his support for the proposed wind turbine and characterized Gray's Beach and the Bass Hole in Yarmouth as a "mud hole."

Frank Ciambriello of Dennis and a member of the Dennis Town Committee, who voted against the application, asked to speak as a resident of Dennis.

Atty. Kenney objected to his being allowed to address the Regional Commission because the Chairman was the designated speaker for the Town Committee.

The Regional Commission noted the objection but allowed him to speak as a resident of Dennis.

Mr. Ciambriello objected to the focus on the Applicant's economic needs as opposed to the appropriateness of the industrial wind turbine in its proposed location.

Susan Arayas of Dennis expressed opposition to the approval of the proposed wind turbine and expressed the opinion that there were too many unanswered question about the project.

Applicant's Rebuttal:

Attorney John Kenney showed the Regional Commissioners letters of support from the Dennis Board of selectmen and Massachusetts Representative, Cleon H.Turner, encouraging the Regional Commission to sustain the Dennis Town Committee's decision to approve the proposed wind turbine.

He asked Gail Hart to clarify the ownership issue. She assured the Regional Commission that only Gail Hart, Richard Kraus and Susan Machie owned Aquacultural Research Corporation and that there was no plan to bring in any third party owners.

She reviewed the financing plan for the project and indicated that they expected to obtain two government grants for $400,000.00 (State) and $500,000.00 (Federal) for a total of $900,000.00 in grant money. She indicated that the owners would borrow $1.200,000.00 as the balance of the estimated construction costs. She asserted that there was no plan to lease any part of the property or business.

Attorney Kenney assured the Regional Commissioners that the wind turbine would be accessory to their shellfish business and that more than fifty (50%) per cent of the electricity would be used by Aquacultural Research Corporation.

He stated that they could not relocate the business or the wind turbine to one of the five permitted Dennis zoning districts because they did not own any land in the designated areas. He again pointed out the need of the hatchery to be located in its current location near the shore.

He asked Richard Kraus to address the risk to the aquifer by the project.

Mr. Kraus assured the Commissioners that there would be no risk of harm to the ground water. He indicated that the water under the proposed wind turbine was salt water and not fresh water.

Attorney Kenney asked Tom Michelman to address the safety issues.

Mr. Michelman stated that the wind turbine, tower and base would have to meet the standards in the state Building Code and other safety regulatory standards. He assured the Commissioners that the geology of the site was suitable for the device.

He stated that the V 90 Vestas Wind Turbine was about twice as large as the proposed 600 Kilowatt wind turbine. He expressed the opinion that the 1,300 feet safety zone was not being followed.

Atty. Kenney stated that location was picked to assure that if it collapsed it would fall on the applicant's property. He claimed that there are many wind turbines safely functioning in the world and to his knowledge no one has been injured by a collapse or structural failure.

He stated that there might be confusion about the numbers in the November 2008 Feasibility Study, which he indicated, is only based on the conversion of the existing electrical usage and omits the fuel oil and propane conversion factor. The calculation changes significantly when the overall projected energy costs are brought into play.

He asked Tom Michelman to clarify this issue.

Mr. Michelman stated that when you convert from fuel oil and propane there would be a much higher electrical usage. The proposal that is being presented is based on a total conversion to electricity resulting in a substantial increase in electrical usage at the site.

Atty. Kenney asked Gail Hart to address the claim that notice and publicity about the proposed project had not been adequately given.

Gail Hart stated that for two (2) to three (3) years they have been inviting public comment to obtain permission for the proposed wind turbine. She indicated that there have been many articles in the newspapers on the subject.

Atty. Kenney requested that the Dennis Town Committee's decision be affirmed.

Appellant's Rebuttal:

Roseanne Austin stated that the opposition is directed to the placement of the large wind turbine in its proposed location. She stated that it is too large for the site.

She again stated that the Town of Dennis on January 10, 2010, voted to create five (5) places that were suitable for wind turbines. She suggested that if this residential site were approved, there would be wind turbines being constructed all over Town.

She raised a question about the future use and ownership of the wind turbine. She asked, if the people sell the property, does the wind turbine go with the new owner?

She requested that the Regional Commission reverse the Dennis Town Committee and deny the application.

Town Committee's Rebuttal:

Mr. Lomenzo stated that the first time that they encountered an application that was as large and difficult as this one, it involved the placement of cellular antennas for telephone communication. With the help of technology, they were able to work through the issue to a solution in which the antennas are now buried inside church steeples, attics and on top of water tanks. It would appear that we have not reached that point with this technology. He suggested that the addition of the seven (7) conditions was an effort to move toward that solution.

He suggested that, as indicated in the proceedings, the core factors of size and setting remain to be considered. He stated that the Dennis Town Committee now defers to the Regional Commission to determine whether or not its action was an "exercise of poor judgment."

He indicated that a remand would not be of benefit. He noted that the presentations by the Applicant have shown that the proposed tower and wind turbine cannot be lowered or reduced in size and that other changes would not be practical.

Commission Discussion:

The members of the Regional Commission reviewed the pictures, plans, photographs and other items submitted for review during the public hearing.

Patricia Anderson began the discussion by expressing concern for the large number of historic buildings, places and sites in the area that could be affected by the appearance of the large wind turbine.

Richard Gegenwarth of Yarmouth identified himself as a physicist and retired engineer. He stated that electricity is not the best way to heat water. He pointed out that the existing use of oil and gas was far more efficient than a switch to electricity. He reviewed the projected numbers and stated that the comparable 600 Kilowatt wind turbine at the Massachusetts Maritime Academy generated about one-third less energy than the applicant's projections for the proposed 600 kilowatt wind turbine. He suggested that from an engineering point of view, the proposed wind turbine appeared to be the wrong size for the intended job.

He challenged the energy advantage of an all-electric conversion and suggested that mixed alternative solutions to be considered. He expressed the opinion that heat pumps and other energy devices might work better and would be more appropriate for the project. He recommended that more study and engineering work was needed before a project of the proposed magnitude went forward.

He voiced strong concern about the visual impact of the large size of wind turbine on the surrounding area. He described the Gray's Beach area as having the character of a miniature National Seashore Park. He described the site as being visited by many people who came to enjoy its natural scenic seashore beauty. He suggested that its natural beauty would be lost by the construction of the proposed wind turbine. He therefore concluded that the proposed location of the two hundred and forty-two feet (242) wind turbine would be inappropriate under the Act.

Patricia McArdle expressed concern about the many issues raised by the hearing and indicated that based on the presented information, she was not able to support the Dennis Town Committee's judgment to approve the project.

Acting Chairman Houghton stated that he believed that the Dennis Town Committee did not exceed its authority, was not arbitrary, erroneous or capricious. He indicated that he felt that the use of wind energy is very important and that the Regional Historic District should encourage its use. He expressed the opinion that the public needs to get used to seeing wind turbines and that he supported the proposed site for the large wind turbine.

He stated that he could not comment on the energy advantage issues raised by his fellow commissioner, but that he felt that the project should be approved and that the Dennis

Town Committee did not exercise poor judgment in issuing the Certificate of Appropriateness.

Patricia Anderson stated that she agreed that Dennis Town Committee was not arbitrary and capricious. She expressed the view that everybody was given a fair opportunity to have spoken and be heard. However, she found that the Dennis Town Committee exercised poor judgment in granting permission to construct the industrial size wind turbine abutting the scenic public creek, marshland and Cape Cod Bay.

She expressed the opinion that the Dennis Town Committee failed to properly consider the visual abutters many concerns. She found that the proposed wind turbine would have a significant detrimental affect on the many historic and aesthetic assets of the Regional Historic District located in Dennis, Yarmouth and Barnstable.

Richard Gegenwarth of Yarmouth stated that he agreed that the Dennis Town Committee made a poor judgment in granting the Certificate of Appropriateness.

Chairman Houghton asked for a motion.

On Motion by Richard Gegenwarth, seconded by Patricia Anderson, the Commission voted to annul the Dennis Town Committee's grant of a Certificate of Appropriateness and to deny the application. (Anderson, Gegenwarth and McArdle voting in favor: Houghton voting against; and Lomenzo abstaining) (3-1-1)

The Commission findings:

The Commission found as follows:

The Dennis Town Committee exercised poor judgment in approving the 600-kilowatt wind turbine at the proposed location.

The Dennis Town Committee grant of a Certificate of Appropriateness should be annulled and the application denied.

Determination:

As to Appeal #2010-7, the decision of the Dennis Town Committee is annulled and the application for a Certificate of Appropriateness denied (3-1-1).

Any person aggrieved by this decision has a right to appeal to the District Court Department, Orleans Division, within 20 days of the filing of this decision with the Dennis Town Clerk.

Dated October 25, 2010

Peter T. Lomenzo, Jr. Chairperson

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE , SS.

District Court Department
of the Trial Court
Orleans Division
No. 1026-CV-0662

AQUACULTURAL RESEARCH CORPORATION,
Plaintiff

and

TOWN OF DENNIS, Intervenor

VS.

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION and ROSEMARIE AUSTIN,
Defendants

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

This is an appeal pursuant to § 11 of Chapter 470 of the Acts of 1973, as amended, the Old King's Highway Regional Historic District Act (hereinafter "the Act"), from a decision of the of the Old King's Highway Regional Historic District Commission ("the Regional Commission"), annulling a decision of the Town of Dennis Old King's Highway Regional Historic District Committee ("the Town Committee). The plaintiff Aquacultural Research Corporation ("ARC") had sought a "certificate of appropriateness" from the Town Committee, as required by the Act for the construction of a wind turbine on its property. The Town Committee granted the certificate but the defendant Rosemarie Austin, a resident of Dennis, claiming to be a "person aggrieved by the determination of the Committee" appealed to the Regional Commission. The Regional Commission annulled the Town Committee determination on the ground that

the "Dennis Town Committee exercised poor judgment." ARC has appealed to the District Court.

As appears in more detail below the success of ARC's operations is of great import to the shellfish farming and fishing industries and thereby to the interests protected by the Act. Of course the preservation of places and settings from "incongrouous" construction is also an interest protected by the Act. Where interests protected by the Act are in conflict, it is the function of the Town Committee, not the Regional Commission or the Court to balance those interests and resolve the conflict. The Regional Commission may annul the Town Committee's decision only if it is unreasonable or in violation of the statute. For reasons it elaborates upon in the findings and conclusions below, the Court finds and rules that the Town Committee's decision was not unreasonable or otherwise in violation of the standard in the Act. The Regional Commission therefore exceed its authority by annulling that decision.

Findings of Fact

The Property. ARC's property contains 39.7 acres located on a sort of peninsula, created by Cape Cod Bay on the north and Chase Garden Creek to the west and south. The property shares the peninsula with Chapin Memorial Beach to the north. ARC's 39.7 acres is comprised of 17.8 acres of upland, 15.2 acres of marshland, and 6.7 acres of tidal lagoons, bounded by Chase Memorial Beach to the north, Chase Garden Creek to the east and south and conservation land of the Town of Dennis to the east. The only access by land is by Chapin Beach Rd. There are three buildings on the site, including a main building housing the hatchery, a warehouse, and a greenhouse. As shown in the plans,

maps and many photographs, much of the area appears as sand dunes, marshland, tidal lagoons and low natural vegetation. The buildings are mostly high one story industrial type. The buildings are approximately fifty years old and have had little visual or structural maintenance and appear battered and weather beaten. On the other side of Chase Memorial Creek and in all directions on land there is marsh or conservation land for a half mile or more as far as is visible. There are no other structures within about a half mile from the proposed turbine site.

The Proposed Wind Turbine. For reasons discussed elsewhere in these findings, ARC proposes to build a wind turbine on its property. From its base to the hub of the blades the turbine will have a height of 164 feet. To a fully upright blade tip the height will be 242 feet. The base, which will be 10 feet in diameter, will be set in a concrete slab foundation of 50 feet in diameter. The proposed wind turbine will be constructed of tubular steel and will be painted a non-glossy off-white. While it will be sleekly modern and not unattractive in appearance to some, it must be said to be incongruous to its proposed setting. It will be to the back of anyone on Chapin beach facing the water or a sunset. It will be visible in the distance from several sites on the outer edges of the marsh and conservation areas surrounding it and from the home of the alleged aggrieved party, Rosemarie Austin, about three-quarters of a mile away.

Historical Dennis Beachfront. Cape Cod for the first two and a half centuries of European settlement was not a place of Potemkin villages of salt box cottages and pristine beaches for recreation and contemplation. Historically the beaches of Cape Cod and Dennis, including what is now Chapin Beach, were, in the 17th, 18th and 19th century

primarily places, not of leisure but of work and commerce. The whaling industry represented significant commerce in Dennis, existed among the Native Americans and continued with white settlement in the 1650's and until at least the 1730's. Pilot whales, historically referred to as "black fish," would be driven by boats to shore at Chapin Beach where they would be cleaned of their blubber which was then boiled in kettles with the whale carcass being left to rot on the beach.

The fishing industry has been a historically important part of Cape Cod and it is part of the cultural history of Barnstable County. Fishing was conducted from the beaches, including Chapin Beach by the use of fishing weirs, located in the waters near the beaches. The weirs were constructed of posts and netting which act as a maze and trap the fish. They collected seaweed and were visible on the beach from a distance. They drew in workers both in boats and in horse drawn carriages to carry away the fish. Weirs have been used since Native American times on Cape Cod, they were used heavily, particularly in the 1800s and into the early 1900s in the tidal flat areas. Indeed, they existed in the shallow areas of Chapin Beach into the 1970's. Cold storage facilities also were constructed on the coastline to store the fish, including two in Dennis.

The beaches and the marshes of Cape Cod, including the ones here were the location of a very busy salt making industry. The practice of making salt and its related industry, first developed in the Revolutionary War when England blockaded the American coasts and denied colonists the opportunity to receive salt from England. The history of the Cape Cod saltworks began in what is now Dennis. The saltworks industry grew substantially during the early to mid 1800's and entrepreneurs from Cape Cod were

among some of the major traders of salt on the entire American east coast. The industry only declined in the 1860's once cheaper salt sources elsewhere were discovered.

The saltworks manufacturing was done by solar evaporation of the water from square or rectangular vats or traps that had tent-like roofs that could be rolled on and off to protect the salt from rain. When the saltworks originated, water was transported to the different vats by hand. Windmills were subsequently added to power the pumps that sent water through the hollowed out pine logs from the ocean to the vats. These windmills were located contiguous to the saltworks vats.

The windmill, with canvas sails, would be connected to the pump and generated the power needed for the pump. The pump would be placed in a small cistern and sunk to the level of the tide water from which it carried a subterranean pipe towards the low water mark. The pump sent water to the vats it served and there would be many pumps and related windmills necessary to service the numerous vats located in the saltworks areas. The vats varied in sizes but typically ran approximately 10-16 feet square, although some were as large as 40 feet wide. The vats typically were between 9-12 inches deep and sat on timber posts.

There were over one hundred windmills in Dennis providing power for the saltworks pumps. These windmills were not quaintly shingled but consisted only of the wooden open framing with the interior works exposed. With the many canvas sails, removable roofs, vats and windmill frames the area of the present ARC property resembled nothing so much as a dilapidated shanty town. The deteriorating saltworks structures remained late into the 1800's, after they ceased being used. One would have

seen the saltworks industries located at Gray's Beach and what is now ARC from the Taylor Bray Farm while that Farm was operational and from the other sites where the present ARC facilities are visible.

ARC's Operations. ARC is a shellfish cultivator and wholesaler since about 1960. The present ownership and top management were originally long time employees of the founder who operated more as a public service than a business and turned the business over to them. The company produces shellfish seed, particularly oyster and clam seed from broodstock. It is the only company in Massachusetts which performs this function. The technology ARC now employs was not developed when the company first started so the 'Research' part of the company name explains that ARC actually developed much of its current technology and has improved its brood stock to be healthier and stronger with a better chance of surviving to full growth.

ARC is a vertically integrated shellfish farming operation, that is, it takes its clams or quahogs and oysters from the very beginning --- from the parent brood stock and spawning, through all the phases of their lives to market size. It sells a lot of the seed stock it breeds to shellfish farms and to towns, to be planted in tidal flats for further growth for two or three years. It also plants seeds in its own tidal flats which it leases. The shellfish are covered with nets to protect them from predators while they grow for two or three years. It then harvests the shellfish by hand and operates as a wholesaler. As a wholesaler it sometimes buys shellfish from its seed customers for resale. This has the extra benefit of adding to stability in its markets.

ARC is the first company to have created brood stock on the East Coast. Shellfish farming was formerly done, taking seed from live stock in the wild and planting it. ARC grows the seed, grows the food-algae-that it feeds to the seed, sells quantities of seed to farmers, plants quantities of seed, and harvests the grown shellfish.

The process which ARC carries out on an annual basis of spawning and rearing juvenile shellfish to a size large enough to plant on the tidal flats is all done in the winter months opposite the natural cycle of such growth. This is necessary to improve the potential of survival. That is, the chances for survival immensely increase when the seeds are at least a quarter of an inch in size before being planted. When they are less than a quarter inch in size, they have a less than reasonable chance of survival in the flats.

ARC begins growing the seed that it gathers from the brood stock during the winter and spring so that it can be large enough to plant in late spring/early summer. Shellfish do not spawn in the ocean until late May/early June. These seeds are still small as the season heads into winter and they have much less opportunity for survival because they are more vulnerable and there is little food. By comparison, because ARC obtains a spawn in December/January and grows its seed in the warm indoors, they are much larger when they are planted in late May/early June. This increased size ensures a higher survivability rate.

When the clams or oysters are first spawned during the earliest stages of their lives, they require water temperature of 82 degrees. ARC heats seawater with a large

boiler and heat exchanger. ARC has an 8,000 gallon fuel tank it fills regularly to keep the boiler running. ARC also grows the food for the clams while they are in-house. That food source is microscopic algae, a plant that requires constant light and circulating water. The algae grow in a room devoted entirely to carboys (jars) and 200 gallon clear tubes, backed by banks of lights covering whole walls. The temperature in that room must be maintained at 68 degrees.

For the first few months in the life of a shellfish, ARC uses energy for running pumps, powering grow lights for the algae, for heating sea water for the newly-spawned clams, and for maintaining temperature control for the algae growing areas. Banks of fluorescent lights create "sunlight" Containers are constantly rotated to maintain light for all. ARC uses a lot of electricity at a substantial cost to power its lights and pumps. It also uses fuel oil to power the boiler to heat water needed for the growing that is done indoors. Finally, the furnace to heat the building for ARC's personnel is powered by propane gas.

A major energy use study was done in 2009 in preparation for the analysis that resulted in a decision to attempt to erect a wind turbine. In the last four years before the 2009 study ARC reduced energy use by shifting the start of spawning from November to January. While that greatly reduced energy use, the effect is to limit production. This reduction in energy use then, has come with two serious consequences: it greatly constrains the production cycle, at times jeopardizing it, because ARC now waits well into the winter to start it seed production and it constrains and reduces ARC's overall capacity to produce seed. The reduction in production in an effort to conserve energy

costs has an adverse effect on both ARC's financial stability and its ability to supply its market.

ARC's Agricultural Status. ARC is an aquacultural farm and has been enrolled in the Massachusetts Department of Agricultural Resources Farm Energy Discount Program since the mid 1990's. To be eligible for this program, an entity has to qualify as being substantially engaged in the business of production, agriculture, or farming for an ultimate commercial purpose. ARC's insurance is provided through the Farm Family Insurance Program and it carries crop insurance on its shellfish through the Rural Community Insurance Services. ARC is identified on its Federal Income Tax returns with business code #112510, which denotes "aquaculture (including shellfish and finfish farms and hatcheries)." ARC has five company-owned vehicles and several trailers with commercial farm plates issued by the Commonwealth of Massachusetts Registry of Motor Vehicles. ARC is an agricultural enterprise for legal purposes.

Economic and cultural importance of shellfish. Shellfish farming itself is a well-documented historic business on Cape Cod. The farming of shellfish began shortly after the Revolutionary War, when native stocks of shellfish were depleted due to overharvesting. Seed to replenish shellfish beds began to be shipped to the Cape from natural beds stretching from Buzzards Bay to the Chesapeake Bay. During the 1800's, sailing ships were specially built to transport seed shellfish from Virginia to Cape Cod. The industry declined during the early 1900's due to shortages of shellfish seed, again caused by overharvesting and general mismanagement of the natural seedbeds to the

South. Shellfish farming on Cape Cod continued to decline through the early 1980's. ARC has brought this industry back to the point where hundreds of Cape Coders once again earn their living raising shellfish, but now in a sustainable manner. The shellfishing industry is an integral part of the cultural and economic history and well-being of the inhabitants of Barnstable County.

The Town of Dennis alone has issued 603 recreational shellfish permits and 31 aquacultural grants of one acre each for growing shellfish. Dennis is planning additional grants to commercial shellfish farmers and has 57 applications pending for grants. Shellfishing is an important commercial and recreational activity in Dennis

Importance of ARC to shellfishing industry. ARC sells shellfish seed to all Cape Cod Towns and for years has been the sole source of supply for the towns' shellfish propagation programs.. ARC is the only commercial hatchery in Massachusetts producing hard clam and oyster seed. There is no other hatchery in the Northeast capable of producing the quantity and quality of shellfish seed produced by ARC. ARC's developed stock is hardier and better able to survive in Cape Cod waters than any seed from the south. ARC supplies more than 60 farms on Cape Cod and Southeastern Massachusetts with shellfish seed.

Based on ARC's record of seed sales to growers over the past 10 years, the dollar value of shellfish produced from farming ARC's seed is estimated to be approximately five million dollars annually.

ARC is essential to sustaining the annual supply of shellfish seed throughout the coastal waters of Massachusetts. The majority of shellfish farmers in Massachusetts rely on

ARC as their source for shellfish seed. At least 75% of the shellfish seed grown on the Cape comes from ARC. The shellfish industry is fundamental to the maintenance of Cape Cod as a "contemporary landmark compatible with the historic, cultural, literary and aesthetic tradition of Barnstable County, as it existed in the early days of Cape Cod, and ... the promotion of its heritage." The Act, § 1.

Although other hatcheries exist outside of Massachusetts, the quantity and quality of the seed they produce is inferior to the seed ARC produces. Shellfish seed received from out of state suppliers is inferior in quality, having a higher mortality rate because the shellfish tend not to survive in quantities exceeding 50%, and are prone to disease. Shellfish seed grown in foreign waters with foreign food sources have increased levels of stress when planted in Cape Cod waters, which in turn, breeds disease in shellfish.

ARC produces vastly larger quantities and, through decades of work, ARC has developed a superior line of shellfish seed. ARC seed is older and more developed than seed purchased from other hatcheries. This increases the potential for survival of these ARC seeds as compared to seeds from other hatcheries. ARC's seed is disease resistant, and uniquely suited to Massachusetts coastal waters, factors critical to the success of the Massachusetts shellfish farming industry. ARC's crop utilizes a selective breeding program and performs well in that the seed grows fast and tends to survive. ARC seed has an approximate 75% survival rate, which is highly satisfactory in the shellfish industry.

If ARC were to close there would not be enough shellfish seed available for shellfish farmers on Cape Cod. Out of state shellfish hatcheries will not be able to meet increased

demand that will come as a result of ARC's closure and the increased amount of foreign seed would increase the chances of disease being introduced into local waters.

Energy use and turbine study. While its business is essentially sound, ARC consistently operates near to the break-even point in terms of profitability, ranging from a loss of $21,986.00 in 2006 to a profit of $160,292.00 in 2011. Through 2011, it has a retained earnings deficit of $243,118.00. Due to marketplace constraints and competition, the prices ARC can charge for mature shellfish products has remained relatively static over the past 10 to 12 years. As a result, ARC has been forced to become more and more efficient in its seed production, all the while trying to increase its production to compensate for the static prices. As noted above, however, ARC has been forced to curtail production to reduce one of its major business costs, its use of energy. ARC's proposed wind project would help ARC significantly reduce production costs, increase its production and enable it to resume its earlier start of spawning time.

ARC is presently at a point where it has worn out much of its infrastructure at the Dennis plant. The plant is more than 50 years old and has been subjected to extreme conditions both outside and in. The buildings are very leaky and energy inefficient. In the very near future, ARC must address a costly renovation to the plant, as well as to the seawall near the plant. The reasonable estimated costs of necessary repairs to ARC's buildings and seawall is about a million dollars.

ARC does not have sufficient funds to perform those repairs. To perform them, ARC would need to take out an approximately $1,000,000.00 loan. ARC does not operate profitably enough to assure that it could repay the loan. ARC's proposed wind energy

project would reduce its operating costs sufficiently to allow it to take out a loan to pay for the repairs and the cost of the turbine. Absent the turbine, however, it does not make business sense to take out the loan.

To deal with its energy and financial contraints, ARC wants to install an Elicon T600 wind turbine. The proposed turbine would generate approximately 1,500,000 kilowatt hours of energy annually. Based on ARC's historical energy needs, ARC will consume approximately 80% of the electricity the turbine is capable of producing. The remaining electricity will be sold back into the grid via what is known as the net metering process.

ARC has considered alternatives to the proposed turbine. For example, a smaller, 250 kilowatt turbine would not be feasible for ARC's needs because it would not generate sufficient electricity. Further, the costs associated with the construction and maintenance of smaller, 100-250 kilowatt turbines, are not significantly less than those for a 600 kilowatt turbine, thereby making the smaller turbine a much less efficient proposition on a dollars per kilowatt basis. Moreover, the smaller turbines, even turbines that are only 10 kilowatt hour turbines, stand at almost 100 feet or taller with the 250 kilowatt turbine standing at almost 200 feet tall at the tip of its blade. Thus, the smaller turbines are not significantly smaller and do not have notably less impact on the view toward Chapin Beach. They produce an insufficient amount of electricity, and are less efficient on a cost of construction basis.

Another alternative considered by ARC is the installation of its turbine in the overlay district of Dennis. However, it is impractical to construct a turbine for ARC in

the overlay district because there is insufficient wind to generate enough electricity to make the turbine project financially viable for ARC or to even provide sufficient electricity for ARC. Moreover, the same turbine erected in the overlay district would still impact views.

Between the first report of its expert in November, 2008 and a second report of June 30, 2010, ARC actually moved the proposed site of the turbine on its property further away from the road and the dunes. The turbine is currently proposed to be sited as far away from the road on ARC's property as is possible. ARC cannot move the turbine any further away from the road because there is no buildable area on which to site the turbine other than in the sand dunes, where construction would not be permitted.

The owners of ARC are, of course, interested in making a profit. However, they are also very dedicated to their mission of invigorating and protecting the shellfish industry. The ARC property is worth about four million dollars for development purposes. If profit was their only concern, ARC's owners could close its operations instead of taking on additional debt and sell the property to developers. This would be a direct loss, not only to ARC's employees but to the shellfishing industry and the economy and culture of Cape Cod and all its towns. Without a successful ARC operation, the shellfish industry could not play its role in the maintenance of Cape Cod as a "contemporary landmark compatible with the historic, cultural, literary and aesthetic tradition of Barnstable County, as it existed in the early days of Cape Cod, and ... the promotion of its heritage." The Act, § 1.

Energy Advantages of Proposed Wind Device. The construction of the turbine would allow ARC to obtain all of its energy from the wind generated electricity; meaning ARC would be able to stop buying electricity and stop buying and using oil and propane. This would allow ARC to stop spending the approximately $100,000 per year it incurs in energy costs. It also would be able to provide clean, electricity it does not use back into the grid for use by others.

Cape Cod will be adversely impacted by sea level rise that accompanies global climate change. There has been a 10 inch sea level rise since 1939 in Buzzards Bay and that the sea level is expected to rise another 3 feet within the next 50 years. Cape Cod will stand to lose significant portions of land as a result of the sea level rise. Every single wind turbine project advances the cause of minimizing climate change and the resulting impacts. The installation of the proposed wind turbine will remove some level of environmental impact that otherwise could have lasting impact on the historical uses associated with marine resources adjacent to the ARC facility. Moreover, through the elimination of fossil fuels and propane use, the ARC wind turbine will eliminate a potential environmental risk related to emissions, spills or failure of fossil fuel and containment systems during natural or anthropogenic events>

The wind turbine would provide an energy advantage in terms of both decreasing ARC's energy costs, increasing the availability of clean energy to the grid, and decreasing the use of fossil fuels and the resulting negative global climate change they cause.

CONCLUSIONS OF LAW

The Act

The Act creates the Old King's Highway Regional Historic District in Barnstable County in portions of the towns along Route 6A, the Old King's Highway, including Sandwich, Barnstable, Yarmouth, Dennis, Brewster and Orleans, generally encompassing the area between Route 6 on the north and Cape Cod Bay to the south. The Act states its purpose in § 1.

> "The purpose of this Act is to promote the general welfare of the inhabitants of the applicable regional member towns so included, through the promotion of the educational, cultural, economic, aesthetic and literary significance through the preservation and protection of buildings, settings and places within the boundaries of the regional district and through the development and maintenance of appropriate settings and the exterior appearance of such buildings and places, so as to preserve and maintain such regional district as a contemporary landmark compatible with the historic, cultural, literary and aesthetic tradition of Barnstable County, as it existed in the early days of Cape Cod, and through the promotion of its heritage."(emphasis added)

Each town in the District has its own town historic district committee. No structure may be erected or have its exterior appearance changed without a certificate of appropriateness from the town historic district committee. In passing upon appropriateness the Town Committee is directed by § 10 of the Act to consider numerous things, all bearing upon the appearance of the structure and its congruity with any existing structures or surroundings.[1]"The purpose of the statute is to suppress the obviously incongruous." *Sleeper v. Old King's Highway Regional Historic Dist. Commission*, 11 Mass.App.Ct. 571, 574 (1981), citing

[1] Section 10 also permits the Town Committee to consider "hardship." The committee did not purport to do so here. ARC does not pursue such a claim and the Court does not consider it.

Gumley v. Selectmen of Nantucket, 371 Mass. 718, 724 (1977). Since the wind turbine, whatever its aesthetic merits, is certainly incongruous, that would end the discussion, if there were not more to the Act. In 1982 the legislature amended the listing in § 10 of the Act of the physical features to be considered by the Town Committee "[i]n passing upon appropriateness" by adding a non-visual consideration. St. 1982, c. 339, § 5 amended § 10 by adding the following requirement:

"The committee shall consider the energy advantage of any proposed solar or wind device."

In "passing upon the appropriateness" of the wind turbine the Dennis Town Commercial was obliged to consider both the effect of the visual aspects of the wind turbine upon its proposed setting and surroundings and the energy advantages of the wind device. In weighing these competing interests, the Town Committee would appropriately consider the purpose set out in § 1 of the Act. A person "aggrieved" by the Town Committee's decision may appeal to the Regional Commission. The Regional Commission may annul the decision, if it finds that the Town Committee "exceeded its authority or exercised poor judgment, was arbitrary, capricious, or erroneous in its action." The Act, § 11. Any appeal from the Regional Commission is to the district court which finds the facts and determines whether it finds the decision of the Regional Commission to "exceed the authority of the Commission."

Standard of Review

The statutorily assigned roles of the Town Committee and the Regional Commission are important and, in the present case, decisive.

"A person aggrieved by a local committee's decision may appeal to the regional commission under § 11 of the Act, as amended. The regional commission can annul or revise the local committee's determination only if the local committee 'exceeded its authority or exercised poor judgment, was arbitrary, capricious, or erroneous in its action.' [the Act, § 11] 'The regional commission's initial function is not to exercise its independent judgment on the facts, but rather to determine whether the local committee erred in some respect.'" *Harris v. Old King's Highway Regional Historic Dist. Com'n*, 421 Mass. 612, 615 (1996), citing *Gumley v. Selectmen of Nantucket,* 371 Mass. 718, 723 (1977).

Interpreting the statute creating the Historic Nantucket District, identical in material respects to the Act,[2] the Supreme Judicial Court held:

> Reading the statute as a whole, we think it confers on the [Town Committee] a substantial measure of discretionary power with respect to 'the appropriateness of exterior architectural features' and congruity to historic aspects of the surroundings and the district. The provision for appeal to the [Commission] is not to be taken as transferring that discretionary power to the [Commission]. It seems intended either to confine the power of the [Town Committee] within authorized limits, or to prevent its abuse, for example, by decisions based on peculiar individual tastes. The statutory language does not grant to the [Commission] the 'broad powers' [granted to a zoning board of appeals by c. 40A, the zoning statute.] *Gumley v. Board of Selectmen of Nantucket*, 371 Mass. 718, 723 (1977).

It was for the Town Committee to weigh the cultural, economic and aesthetic benefits to the inhabitants of the towns in the Historic District of preventing the erection of the proposed wind turbine against the cultural and economic benefits to the same persons of ensuring the continued operations of ARC, as well as the "energy advantage" of the proposed wind turbine. "[The

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[2] A confusing difference is that the local committee in the Nantucket legislation is called the "commission" while the reviewing body is called the "board."

Town Committee] has discretionary power in acting on [the application]. It must act fairly and reasonably on the application presented to it, keeping in mind the purposes of the statute. The decision of the [Town Committee] cannot be disturbed either by the [Regional Commission] or the court 'unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary.'" *Gumley*, 371 Mass. at 734. While the cases do not use the phrase, the SJC's description of the standard of review by the Regional Commission suggests something very much like review for abuse of discretion.

Finally, it is not open to the Regional Commission to change this statutory assignment of authority or circumvent the Town Committee's obligation to consider the energy advantage of a proposed wind device by adopting regulations which, if adhered to as urged by the Regional Commission, would affectively bar any modern wind turbine which could not be concealed behind a building or sand dune.

The Review of the Court

As required by § 11 of the Act, I have heard (or, to the extent it was undisputed, read) the evidence and found the facts which are detailed above. Much of the evidence was taken in writing because nearly all of it was not in dispute.[3] Contested matters were largely confined to opinions and conclusions. Given the facts found by me, the decision of the Town Committee was not

[3] The Court expresses appreciation to counsel who prepared and submitted detailed statements of proposed testimony, so that contested facts could be isolated. The effect was to shorten the trial from an estimated two or three weeks to three days.

unreasonable. Therefore, the Regional Commission exceeded its authority by annulling the decision of the Town Committee.

Standing

The decision of the Town Committee was appealed to the Regional Commission by Rosemarie Austin of Dennis. From her home which is about three-quarters of a mile as the crow flies from the ARC facility Ms. Austin has a view of the marshes, conservation land and Cape Cod Bay in the distance, unobstructed by any structures other than ARC's large and dilapidated-appearing buildings. Neither Ms. Austin's home nor her neighborhood may be said to have themselves any historic significance. Although the issue of her standing was apparently not argued before the Regional Commission, standing as a "person aggrieved" is a jurisdictional issue and can be raised at any time. *Warrington v. Zoning Board of Appeals of Rutland*, 78 Mass. App. Ct. 903 (2010).

Austin is not an abutter to ARC's property. Indeed, the Court is aware of no actual abutters to ARC but Cape Cod Bay, marsh and conservation land, Chapin Beach and Chase Garden Creek. As she is not an abutter, Austin must at the outset "assert 'a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest. (citations omitted). Of particular importance, the right or interest asserted must be one that the statute under which a plaintiff claims aggrievement intends to protect." *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 27-28 (2006).

"The purpose of the [Old King's Highway Regional Historic District] statute is to suppress the obviously incongruous."*Sleeper v. Old King's Highway Regional Historic Dist. Commission,* 11 Mass.App.Ct. 571, 574 (1981). The statute at its threshold is concerned with the visual appearance of things. Where a zoning ordinance requires consideration of the visual impact on a neighborhood, "in order for a[n] [allegedly aggrieved person] to establish standing based on the impairment of an interest protected by [the] zoning bylaw, [that person] would need to show a particularized harm to [her] own property and a detrimental impact on the neighborhood's visual character." *Kenner v. Zoning Bd. of Appeals of Chatham*, 459 Mass. 115, 121 (2011). The site of the proposed turbine is visible from several spots around the edge of marsh and conservation land to which the public has access. The wind turbine would be very visible from Austin's property. Whatever else may be said of the appearance of the wind turbine, it certainly must be said to be incongruous in this setting, the very interest addressed by the Act. I find that the wind turbine would have a negative effect, albeit one not calculable to a specific amount based on the evidence before the court, on the value of Ms. Austin's property. As a "visual abutter," Austin has a more particularized detriment from the project and thus had standing to appeal from the decision of the Town Committee

ARC'S Claim of Agricultural Exemption

Given the Court's decision on the merits, the issue is moot, but it should be noted that ARC argues that it is exempt from the requirement in § 6 of the Act

that it obtain a certificate of appropriateness in the first place on the ground that, pursuant to c. 40A, § 3,

> "[n]o zoning ordinance or by-law shall…prohibit, unreasonably regulate, or require a special permit for the use of land for the primary purpose of commercial agriculture, [or] aquaculture…nor prohibit, unreasonably regulate, or require a special permit for the use…or construction of structures thereon for the primary purpose of commercial…aquaculture…"

The statute gives protection to farm building construction from zoning ordinances and by-laws, so let it be noted that there is no zoning ordinance or by-law involved in the instant case. ARC, however, relies upon *Newbury Junior College v. Town of Brookline*,19 Mass.App.Ct. 197 (1985) for the proposition that a municipality cannot enforce a state law that may be at cross-purposes with the protection for farms against land use regulation in c. 40A, § 3. That position is incorrect. In *Newbury* a town, barred by c. 40A, § 3 from using its zoning powers to prevent educational use of a dormitory, was also prohibited from misusing its power to license boarding houses and dormitories under c. 140, to prevent the plaintiff's exiting use of a building as a college dormitory. The court held:

"We are of opinion that a municipality may not, through the exercise of its power under G.L. c. 140, § 23, undo the Dover Amendment by forbidding the use of land for educational purposes on 207 general grounds of adverse impact on the neighborhood or similar land use consideration. A dormitory license may be denied

> because the facilities are physically inadequate, because the applicant institution has a bad record in running dormitories, or because supervisors are unqualified, or of bad character. A dormitory license may not be denied merely because the licensing body thinks that the educational use would not be good for the neighborhood. A municipality "cannot achieve indirectly that which it is forbidden to achieve directly." [citation omitted] The trial judge expressed the idea in a similar vein: 'The courts have repeatedly said that educational use cannot be prohibited by zoning. To allow such use to be prohibited by any backdoor method ... is ... wrong.'" *Newbury Junior College v. Town of Brookline*,19 Mass.App.Ct. 197, 206-207 (1985).

The instant case is different. The Town of Dennis is not trying to prevent ARC from using the property as a farm. *Newbury* does not state that the exemptions in c. 40A, § 3 take priority over all other statutes. It merely says the other statutes cannot be abused to circumvent the exemptions.

Moreover, the issue is not one for this proceeding. ARC has applied for a certificate of appropriateness. It is not entitled to a certificate of appropriateness on the argument that it does not have to apply for one.

Order for Judgment

The decision of the Old King's Highway Regional Historic District Commission is revoked and reversed. The decision of the Town of Dennis Old King's Highway Regional Historic District Committee to issue the Certificate of Appropriateness is affirmed.

Pursuant to St. 1973, c. 470, § 11, neither party is to have costs.

So ordered.

January 25, 2013

Brian R. Merrick, J.

Commonwealth of Massachusetts

BARNSTABLE, ss.

District Court Department
Orleans Division
No. 1026-CV-0662

AQUACULTURAL RESEARCH CORPORATION and
TOWN OF DENNIS,
Plaintiffs

vs.

MEMORANDUM AND ORDER ON
DEFENDANT'S MOTION TO
ALTER OR AMEND

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION and
ROSEMARIE AUSTIN,
Defendants

The defendant Old King's Highway Regional Historic District Commission (OKHRHDC) has moved to alter or amend the court's findings of fact and conclusions of law pursuant to Mass. R. Civ. P. 59(e).

OKHRHDC's Requested Findings of Fact.

In general OKHRHDC's Requested Findings of Fact have been dealt with in stipulations and in the court's findings. However, the court will formally take judicial notice that the Regulations of the Old King's Highway Regional Historic District Commission include certain "Guidelines." which include section B. "Recommendations to Applicants" including the following:

5. Energy Conscious Design: Applicants may consider alternative energy resources when submitting proposals. Skylights, solar panels and wind generators may be approved provided the system will function in a practical manner and adhere to the following:

a. Minimum visual impact on the surrounding neighborhood.

.....

f. Extensive use of vegetation and landscaping so as to minimize the visual impact of the system.

g. Devices should be designed and constructed in such manner as to blend with existing features in the immediate area.

h. Wind generator towers should be located as far as possible from the street line so as to minimize the visual impact of the device.

The wind turbine here does not strictly follow OKHRHDC's "Guidelines" to the extent they include "Recommendations to Applicants" 5a, 5f and 5g. If it is OKHRHDC's position that the "Recommendation" or "Guidelines" are in fact, binding regulations, such regulations would be illegal. OKHRHDC's rule making authority is governed by The Act, § 5, ¶ 7 provides

> "The Commission shall establish rules and regulations from time to time for the administration of the Regional District which shall be followed by the local town committees ...."

That authority to establish rules and regulations for "administration" of the Regional District does not include authority to preempt the substantive discretion of the town committees in performing their function as set out in detail in the Court's "Findings of Fact, Conclusions of Law and Order for Judgment." As is also noted in that decision, such a regulation, applied literally, would prevent consideration of a modern wind turbine and would be repugnant to the requirement of St. 1982, c. 339, § 5 That "[t]he Committee consider the energy advantage of any proposed solar or wind device." A regulation may not be enforced if it exceeds the authority given to the regulatory body, *Atlanticare Medical Center v. Comm'r of Div. of Medical*

Assistance, 439 Mass. 114 (2003), or is repugnant to the statute. A.J. Cella, Administrative Law and Practice, § 742, 39 Mass. Prac. at 125.

The statute does give OKHRHDC some preemptive discretion, but that is only to exempt certain features or geographical areas from the requirements of the Act, not to add substantive requirements for the town committee to apply beyond those in the statute. The Act, § 7, ¶ 4 and 5.

OKHRHDC's Requested Conclusions of Law

While the substance of any proposed conclusions of law was dealt with in the Court's "Findings of Fact, Conclusions of Law and Order for Judgment," the Court makes the following rulings on OKHRHDC's Requested Conclusions of Law mentioned in the motion:

4. Denied.

6. Denied. The language obviously is applicable to modification of existing structures as a new structure can have no "historic value and significance."

7. Denied as immaterial to facts found.

9. Denied as immaterial as not including all factors to be considered.

11. This is specifically ruled on in the Court's Conclusions of Law.

13. Allowed. No factor is "entitled" to greater weight under the statute. The weight is for the discretion of the Town Committee.

14. Denied as assuming facts not found by the Court.

15. Denied as irrelevant to facts found by the Court.

16. Denied as assuming facts not found by the Court and irrelevant to facts found by the Court.

18. Denied as inconsistent with facts found by the court.

19. Denied as inconsistent with facts found by the court.

20. Denied.

21. Denied.

22. Denied

Order

The motion of the defendant OKHRHDC is ALLOWED to the extent noted above. Otherwise it is DENIED.

April 22, 2013

Brian R. Merrick, J.

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION
P.O. Box 140, Barnstable, Massachusetts 02630-0140

STANDING

"Person Aggrieved"

Aquacultural Research Corporation, and another[1] *vs.* Old King's Highway Regional Historic District Commission, and another[2]

Southern District—May 30, 2014.
Present: Williams, PJ., Hand & Ostrach, JJ.

Real property, Standing to oppose certificate of appropriateness for wind turbine. *Municipal*, Historic district.

Opinion vacating District Court judge's standing determination and restoring plaintiff's certificate of appropriateness. Appealed from a judgment entered by Merrick, J.,[3] in Orleans District Court.

Michael P. Sams for the plaintiff.
Matthew L. McGinnis for the defendant Commission.
Rosemarie Austin, pro se.
Michele E. Randazzo for intervenor town of Dennis.
Bruce P. Gilmore for amicus curiae town of Yarmouth.

Williams, P.J. The Old King's Highway Regional Historic District ("District") encompasses a sizable swath of Cape Cod surrounding Route 6A (Old King's Highway) in several Cape towns.[4] The statute governing the District, St. 1973, c. 470,

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[1] Town of Dennis, as intervenor. We acknowledge the amicus curiae brief submitted by the town of Yarmouth.

[2] Rosemarie Austin.

[3] The Honorable Brian R. Merrick, now retired, was a member of the Southern District of the Appellate Division at the time of the hearing of this appeal. He did not take part in the hearing or in any other aspect of the appeal.

[4] The history of the Old King's Highway itself is somewhat foggy. One writer sought to determine which "Old King" the road commemorated, assuming it was King George III — "but it's much older than that — a late 17th century extension of the King's Highway from Plimouth ... [and] one of America's most scenic highways." The Old King's Highway: Route 6A Cape Cod, at www.miladysboudoir.wordpress.com/2012/10/10/the-old-kings-highway-route-6a-cape-cod (last viewed May 30, 2014). Other commentators are unconvinced of the provenance of the road: "Route 6A is of far more recent vintage than colonial times. 'The name "Old King's Highway" is a publicity gimmick.' ... The road was built largely in the 1920s when cars began replacing trains." Kandell, A Road Less Traveled: Cape Cod's Two-Lane Route 6A Offers a Direct Conduit to a New England of Yesteryear, Smithsonian Mag. (April, 2005), at www.smithsonianmag.com/travel/a-road-less-traveled-79489150/ (last viewed May 30, 2014). Surely, though, the presence of numerous authentic colonial buildings fronting the road suggests that if its name is of 20th century origin, its track is not.

as amended ("the Act"),[5] requires a person seeking to construct or alter a structure within its ambit to obtain a certificate of appropriateness ("certificate") from the relevant Town Committee in order to allow any such project to proceed.[6] Any "person aggrieved" by a committee decision about an application may appeal that decision to the Regional Commission ("Commission"), and any "person aggrieved" by a Commission decision may seek review thereof in the District Court having jurisdiction over the town where the subject property is located.[7] Here, the plaintiff, Aquacultural Research Corporation ("ARC"), sought and received a certificate from the Dennis Committee to erect a wind turbine on its property. A Dennis resident, Rosemarie Austin ("Austin"), appealed that decision to the Commission, which

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[5] St. 1973, c. 470; as amended, St. 1975, c. 298 and c. 845; as amended, St. 1976, c. 273; as amended, St. 1977, c. 38 and c. 503; as amended, St. 1978, c. 436; as amended, St. 1979, c. 631; as amended, St. 1982, c. 338; as amended, St. 1994, c. 90; and as amended, St. 2007, c. 220.

Section 4 of the Act empowers the Commission to issue rules and regulations, which have been promulgated in a "Bulletin." See, e.g., *Rudders* v. *Building Comm'r of Barnstable,* 51 Mass. App. Ct. 108, 111 n.8 (2001). The decision of the trial court, and ours, is grounded in the language of the Act itself, and not in these more detailed regulations.

[6] Section 6 of the Act provides in pertinent part that "[n]o building, structure or part thereof, except as hereinafter provided, shall be erected within the district unless and until an application for a certificate of appropriateness as to the exterior architectural features shall have been filed with the committee."

[7] Section 11 of the Act provides in pertinent part:

> Any person aggrieved by the determination of the committee ..., whether or not previously a party to the proceeding, may, within ten days after filing of a notice of such determination with the town clerk ..., appeal to the commission. The commission shall, within thirty days after receipt of such appeal in writing from the aggrieved, hear all pertinent evidence and determine the facts, and if, upon the facts so determined, the commission finds that the committee exceeded its authority or exercised poor judgment, was arbitrary, capricious, or erroneous in its action, the commission shall annul the committee determination or approval and remand the case to said committee for further action or revise the determination of the committee and issue the appropriate certificate or deny it.
>
> Any person aggrieved by the action of the commission, may, within twenty days after notice of said decision has been filed with the town clerk of the affected town, appeal to the district court having jurisdiction over the affected town. ...
>
> Said district court may hear all pertinent evidence and determine the facts and if, upon the facts so determined, such determination or approval is found to exceed the authority of the commission, said district court may modify ... the decision ... and shall have all of the powers to act in the matter that are available to a court of general equity jurisdiction.

found that the Dennis Committee had exercised poor judgment and so annulled that decision and denied the application. ARC, in turn, appealed that decision to the Orleans District Court. The trial judge found that the Commission had exceeded its authority, and reversed that decision, thus affirming the Dennis Committee's decision to issue the certificate. Included in the trial judge's decision was his conclusion that Austin had standing to have appealed to the Commission from the Dennis Committee because she was a "visual abutter" as to the proposed turbine and the value of her property might be devalued were the turbine erected. Because we find that that determination was error as a matter of law, we do not reach the merits of the case, since it should not have progressed beyond the Dennis Committee's decision. We vacate the trial court's decision. Although we do so, the result remains the same. The effect of our decision is that the case returns to where it stood before the appeal to the Commission: with the issuance by the Dennis Committee to ARC of the certificate.

The Legislature originally enacted the Act in 1973 to promote the welfare of the District through "the preservation and protection of buildings, setting and places ... and through the development and maintenance of appropriate settings, the exterior appearance of such buildings and places, so as to preserve and maintain such regional district as a contemporary landmark compatible with the historic, cultural, literary and aesthetic tradition of Barnstable county, as it existed in the early days of Cape Cod, and through the promotion of these past historic associations of Barnstable county." Act, §1.[8] See *Harris* v. *Old King's Highway Regional Historic Dist. Comm'n,* 421 Mass. 612, 614-615 (1996). See also *MacRobbie* v. *Old King's Highway Regional Historic Dist. Comm'n,* 1992 Mass. App. Div. 42, 43 (purposes of Act "primarily to preserve historical landmarks and insure compatibility with other structures").

ARC wished to construct a 600-kilowatt wind turbine on its 39.7-acre Dennis property to help defray its costs as a shellfish cultivator and wholesaler.[9] ARC's property is bounded by Chapin Memorial Beach, Chase Garden Creek (the boundary between Dennis and Yarmouth), and conservation land. Existing buildings on ARC's

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[8] Section 1 of the Act, as amended by St. 1982, c. 338, §1, now reads in its entirety:

> The purpose of this act is to promote the general welfare of the inhabitants of the applicable regional member towns so included, through the promotion of the educational, cultural, economic, aesthetic and literary significance through the preservation and protection of buildings, settings and places within the boundaries of the regional district and through the development and maintenance of appropriate settings and the exterior appearance of such buildings and places, so as to preserve and maintain such regional district as a contemporary landmark compatible with the historic, cultural, literary and aesthetic tradition of Barnstable county, as it existed in the early days of Cape Cod, and through the promotion of its heritage.

[9] "Aquaculture" is "the artificial cultivation of shellfish planted in trays or pens and protected by netting." *Davis* v. *Zoning Bd. of Chatham,* 52 Mass. App. Ct. 349, 351 n.6 (2001).

land, including a warehouse, greenhouse, and a main building containing a hatchery, are one-story structures. The proposed turbine would be 164 feet tall from its base to the hub of the blades, and 242 feet tall from its base to a fully vertical blade tip. The base would be 10 feet in diameter, and would be set in a concrete-slab foundation 50 feet in diameter.

In July, 2010, ARC applied to the Dennis Committee for a certificate of appropriateness so that it could begin constructing the proposed turbine. After two public hearings, the Committee approved ARC's application.[10]

In September, 2010, Austin appealed the Dennis Committee's approval to the Commission. Following a public hearing later that month, the Commission determined pursuant to §11 of the Act that the Dennis Committee had exercised poor judgment in approving ARC's application. The Commission did not address Austin's standing as an aggrieved person entitled to have appealed the Dennis Committee's decision.[11] The Commission, apparently assuming jurisdiction to consider such an appeal, denied ARC a certificate of appropriateness for the proposed turbine on the

[10] Austin attended the public meeting on August 11, 2010. She asked if ARC had a plan should the turbine bother "neighbors" with noise or "flicker" problems, and whether hours of use of the turbine could be limited. She apparently reported that the ARC "property is in complete disarray," thus engendering a worry about upkeep of the turbine. And she inquired if the size of the turbine could be limited to provide ARC only with the energy it required.

[11] We note the apparent total absence of any consideration by the Commission of the issue of Austin's status as a "person aggrieved" so as properly to be before the Commission at all. The Commission's 14-page "Decision for Appeal No. 2010-7" of October 25, 2010 reviewed the presentations of numerous people who attended a public hearing in September. Among those presenters was Austin, described only as being "of Dennis." Austin had appealed to the Commission on behalf of herself and neighbors. In her appeal notice, she declared that a 242-feet-tall turbine, visible from "all surrounding sides" in a flat landscape, part of which is a "pristine historic area," constituted a "direct violation" of the Act. Such turbines, she stated, "were not in demand" when the Act was drafted. The proposed turbine was, simply, "too large a structure for this area." At the hearing, Austin claimed to the Commission that the Dennis Committee had "exercised poor judgment" by failing adequately to weigh such information about the proposed turbine. Specifically, she asserted that the Dennis Committee had not addressed the "industrial and commercial" nature of the turbine, which was planned for an area zoned for residential use, and that the maximum permitted height for a turbine in such a zone was only 45 feet and not the proposed 242-feet height. None of the five areas in Dennis where turbines had been authorized fell within the District. She expressed concern about the groundwater table at the planned turbine foundation site. Finally, she argued that the Dennis Committee had failed to consider the adverse impact the turbine would exert "on an environmentally sensitive residential part of the" District. In rebuttal to part of ARC's presentation, Austin also wondered whether ownership of the turbine would pass to a purchaser of ARC's property should ARC sell it.

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ground that the Dennis Committee had exercised "poor judgment" in granting the certificate.

ARC — unquestionably a "person aggrieved" — then appealed the Commission's decision to the Orleans District Court, seeking annulment of that decision and an order that the desired certificate be issued. The trial judge allowed the town of Dennis to intervene, and denied the motion of the town of Yarmouth to do so. After two years of litigation, a three-day trial began in January, 2013; much evidence was admitted in written form to reduce the number of trial days. In February, 2013, the trial judge issued a comprehensive 23-page opinion, reversing the Commission's decision and reinstating the Dennis Committee's decision to grant ARC a certificate of appropriateness. Because we find that Austin was not a proper "person aggrieved" to have appealed the decision of the Dennis Committee to the Commission, we do not reach any other issues presented in the trial judge's decision or raised in this appeal.

The trial judge in such appeals "may hear all pertinent evidence and determine the facts." Act, §11. See, e.g., *Anderson* v. *Old King's Highway Regional Historic Dist. Comm'n,* 397 Mass. 609, 611 (1986). "The judge's findings of fact are 'final and conclusive.'" *Anderson, supra,* quoting Act, §11. We review the implicit finding of the trial court regarding standing without regard to the lack of attention by the Commission to the issue. The trial court must find, or not, that a person had standing to have appealed to the Commission and not just to have appealed to the District Court. Usually, those parties have been the same,[12] but here they are not. ARC obviously had standing to have appealed the Commission's decision to the District Court. Austin, we must conclude, did not enjoy such standing.

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However valid these views might have been, they are general and policy-oriented and devoid of any facts specific to Austin or her property: they patently could not support her standing as a "person aggrieved" for the purposes of appealing the Dennis Committee's decision. The most that can be inferred about Austin from the Commission's decision is that she lived in, or was from, Dennis. The Commission did not determine from Austin's notice of appeal whether she was a proper "person aggrieved" so as to qualify to proceed. And it made no reference in its decision to a "person aggrieved" so as to trigger an appeal at all; it simply noted that the appeal had been "entered" with the Commission within the requisite time period. The lack of any "standing" evidence would seem to mandate a conclusion that the only proper option open to the Commission would have been to dismiss Austin's appeal because she simply did not qualify under §11 of the Act to have generated an appeal at all. Any other outcome seems wholly unsupported.

[12] See *Harris* v. *Old King's Highway Regional Historic Dist. Comm'n,* 421 Mass. 612 (1996); *Anderson* v. *Old King's Highway Regional Historic Dist. Comm'n,* 397 Mass. 609 (1986); *Sleeper* v. *Old King's Highway Regional Historic Dist. Comm'n,* 11 Mass. App. Ct. 571 (1981); *Mason* v. *Old King's Highway Regional Historic Dist. Comm'n,* 2001 Mass. App. Div. 125; *MacRobbie* v. *Old King's Highway Historic Dist. Comm'n,* 1992 Mass. App. Div. 42; *Paananen* v. *Old King's Highway Regional Historic Dist. Comm'n,* 1991 Mass. App. Div. 135. Cf. *Allen* v. *Old King's Highway Regional Historic Dist.,* 2000 Mass. App. Div. 330.

The trial judge devoted two pages of his decision to the issue of her standing, which had been raised at trial by the intervenor town of Dennis.[13] Noting that the issue of Austin's standing "was apparently not argued" before the Commission, the trial judge declared, correctly, that the question of one's standing — in the language of the Act, as a "person aggrieved" — is a jurisdictional issue that may be raised at any time. *Warrington* v. *Zoning Bd. of Appeals of Rutland,* 78 Mass. App. Ct. 903, 904-905 (2010), citing, inter alia, *Planning Bd. of Marshfield* v. *Zoning Bd. of Appeals of Pembroke,* 427 Mass. 699, 703 (1998), and *Barvenik* v. *Aldermen of Newton,* 33 Mass. App. Ct. 129, 131 (1992) (status as "party aggrieved" is status conferring standing to prosecute an appeal; standing is an issue of subject matter jurisdiction that cannot be waived and may be raised at any stage of proceedings).[14]

The trial judge found that Austin is not an abutter to the ARC property. Her home, which is otherwise undescribed, is "about three-quarters of a mile as the crow flies from the ARC facility."[15] Neither Austin's home nor her neighborhood has "any historic significance." Austin's view (whether from her house or elsewhere on her property is not known) encompasses marshes, conservation land, and, in the distance, Cape Cod Bay, and that view is unobstructed except by ARC's "large and dilapidated-appearing buildings." The proposed turbine "would be very visible from Austin's property," although no specifics about such a potential view were provided. She

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[13] The Commission argues that the trial judge's decision to have allowed the town of Dennis to intervene in the action was in error. Even assuming that the argument is properly raised, given its casual treatment — a footnote in the brief — see *Waters* v. *Western World Ins. Co,* No. 11-P-2124, at n.7 (Mass. App. Ct. Feb. 12, 2013) (unpublished Rule 1:28 decision), citing *Commonwealth* v. *Clerk-Magistrate of W. Roxbury Div. of the Dist. Ct. Dept.,* 439 Mass. 352, 361 n.7 (2003), we need not decide whether that intervention was proper since ARC has also pressed the issue of Austin's lack of standing. But see *Allen, supra* at 331 n.5 (inappropriate for town officers to appeal rulings of Regional Commission absent specific authorization of town). See also, e.g., *Thornton* v. *Kuzborski,* No. 11-P-1942 (Mass. App. Ct. March 14, 2013) (unpublished Rule 1:28 decision), citing *Nature Church* v. *Assessors of Belchertown,* 384 Mass. 811, 812 (1981), and Mass. R. Civ. P., Rule 12(h)(3) (obligation of trial judge to address issue of standing).

[14] Although the Act has aspects of being sui generis, some of its language reflects, sometimes exactly, language from zoning laws or other historic-district acts. As the Appellate Division remarked in *Mason, supra* at 127, "where the issues of land use and preservation are common themes of both the zoning laws and the [Act], it is logical to presume ... that the Legislature had in mind the existing judicial interpretation of zoning appeal requirements when it chose virtually identical language for appeals taken under the [Act]." See also, e.g., *Harris, supra* at 615 (standard of review in district court analogous to special-permit granting power provided in local zoning bylaws); *Allen, supra* at 332 (Appellate Division relied upon some zoning law precedent but eschewed reliance on decisions arising under G.L.c. 40C, the Historic Districts Act).

[15] ARC's property encompasses nearly 40 acres. Whether the distance cited would be from Austin's house to the proposed site of the turbine is unknown.

would thus be a "visual abutter." The trial judge suggested that the turbine would be "incongruous in this setting," and that its presence would have a "negative effect, albeit one not calculable to a specific amount based on the evidence before the court, on the value of Ms. Austin's property."[16]

Because Austin is not an abutter, the trial judge, quoting *Standerwick* v. *Zoning Bd. of Appeals of Andover,* 447 Mass. 20, 27-28 (2006), observed that she must, as a threshold matter, "assert 'a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest.' (Citation omitted.) Of particular importance, the right or interest asserted must be one that the statute under which a plaintiff claims aggrievement intends to protect."

He observed that the purpose of the Act "is to suppress the obviously incongruous," *Sleeper* v. *Old King's Highway Regional Historic Dist. Comm'n,* 11 Mass. App. Ct. 571, 574 (1981), and characterized the Act as being "concerned with the visual appearance of things." And when a zoning ordinance demands consideration of the visual impact of a proposed structure on a neighborhood, "in order for a[n] [allegedly aggrieved person] to establish standing based on the impairment of an interest protected by [the] zoning bylaw, [that person] would need to show a particularized harm to [her] own property and a detrimental impact on the neighborhood's visual character." *Kenner* v. *Zoning Bd. of Appeals of Chatham,* 459 Mass. 115, 121 (2011). He concluded that "[a]s a 'visual abutter,' Austin has a more particularized detriment from the project and thus had standing to appeal from the decision of the [Dennis] Committee."

We have found no authority, anywhere, sanctioning the concept of one's status as a "visual abutter" (or even using that term) so as to qualify him or her as a "person aggrieved" under this Act or any similar statute, or to otherwise confer standing on a person.

The fullest explication of assessing whether someone is a "person aggrieved" within the meaning of the Act remains the Appellate Division's opinion of *Allen* v. *Old King's Highway Regional Historic Dist.,* 2000 Mass. App. Div. 330. In *Allen,* which

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[16] A Joint Amended Pretrial Memorandum that is part of our record recited Austin's historical ties to, and her enjoyment of, the "Black Flats Marsh" area of Dennis. It suggested that a "recent appraisal" (the June 24, 2011 report of Frances M. Cross) valued her home at $720,000.00 and mentioned a "recent report" (otherwise undescribed and not found in the record) that "indicates" that the purposed turbine "could cause a depreciation of 20-25% in value" to the home. The trial judge did not note these unsubstantiated observations in his decision.

A review of the record suggests little beyond what the judge — conclusively — found. Austin lives at 27 Spadoni Way, Dennis. She has not placed that house on the market. She can see ARC buildings from her backyard. Somewhat tellingly, she was chosen as the "person aggrieved" to appeal the Dennis Committee's decision from among 92 people in Dennis and Yarmouth, on whose "behalf" she appealed, by dint of her surname being first alphabetically. She considered a "person aggrieved" to be someone who "lives in that district." At trial, she produced two consultants, a real estate appraiser and a real estate developer. The most pointed opinion from either witness was that wind turbines negatively affect real estate values; testimony as to any diminution of value of the Austin home was disallowed.

concerned the proposed addition to a house in Sandwich, none of the six plaintiffs was an abutter to the subject property. The nearest plaintiff lived "four houses" away from the subject residence, and the farthest lived about five miles away. *Id.* at 331. At least some of the plaintiffs were members of the Sandwich Town Committee, which had denied the application for a certificate of appropriateness in the first instance.[17]

Allen stressed that when the Legislature created the Commission, it did not intend "to create a private right on the part of citizens of a community to enforce the provisions of the Act." *Id.* at 331. A purported plaintiff's burden of establishing status as a "person aggrieved" is not a "procedural nicety," but rather "goes to the very heart of the court's authority to hear and determine the cause." *Id.*, citing, inter alia, *Marotta* v. *Board of Appeals of Revere,* 336 Mass. 199, 204 (1957). See also *Coalition to Preserve Belmont Uplands & Winn Brook Neighborhood* v. *Department of Envtl. Protection,* No. 12-P-526 (Mass. App. Ct. Sept. 9, 2013) (unpublished Rule 1:28 decision), citing *Planning Bd. of Marshfield* v. *Board of Appeals of Pembroke,* 427 Mass. 699, 703 (1998) (lack of standing goes directly to subject matter of court).

Someone's proximity to the subject property does not automatically confer "standing" upon that person, *Allen, supra* at 331, citing *Marotta, supra* at 203, and would, presumably, not automatically establish one as being a "person aggrieved."

As *Allen* noted, the District encompassed by the Act

> is a large one.[18] To suggest that any inhabitant or property owner in so large a district may invoke the judicial review provisions of the Act without making a plausible claim of a *definite violation of a private right* would be inconsistent with the purposes of the Act by enlarging the class of potential plaintiffs who might attack the decision of the commission solely on aesthetic or other subjective grounds. To put the commission and the applicants to the expense of litigation when assailed from so large a quarter would not be consistent with the fair balance between the reasonable expectation of property owners to the use of their land and the preservation of antiquity espoused by the Act (emphasis added).

Id. at 332. Once evidence is offered challenging the presumption of aggrievement, that presumption evaporates, and the issue of jurisdiction must be considered anew. *Id.* at 331, citing *Waltham Motor Inn, Inc.* v. *LaCava,* 3 Mass. App. Ct. 210, 217 (1975). As *Allen* emphasized, simple civic interest in enforcing historic zoning is

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[17] The Appellate Division concluded that nothing in the Act permitted committee members acting as such to appeal rulings of the Commission, and that it would have been inappropriate for them to have done so. *Allen, supra* at 331 & n.5. See also *Dennis Housing Corp.* v. *Zoning Bd. of Appeals of Dennis,* 439 Mass. 71 (2003).

[18] Several sources describe the District as "the largest historic district in the nation." See, e.g., Town of Dennis, Old Kings Regional Historic District Committee, at www.town.dennis.ma.us/Pages/DennisMa_Historic/OldKings (last viewed on May 30, 2014); Town of Barnstable, Old Kings Highway Historic District Committee, at www.town.barnstable.ma.us/OldKingsHighway/ (last viewed on May 30, 2014).

insufficient to confer standing. *Id.* at 331, citing *Amherst Growth Study Comm., Inc.* v. *Board of Appeals of Amherst,* 1 Mass. App. Ct. 826 (1973). Indeed, one "zealous in the enforcement of the laws but without a judicially recognized private interest is not a 'person aggrieved.'" *Id.*, citing *Godfrey* v. *Building Comm'r of Boston,* 263 Mass. 589, 590 (1928). Such zeal is precisely what Austin demonstrated before the Commission and the District Court.

Further, "[s]ubjective and unspecified fears about the possible impairment of aesthetics or neighborhood appearance, incompatible architectural styles, the diminishment of close neighborhood feeling, or the loss of open or natural space are all considered insufficient bases for aggrievement under Massachusetts law." *Id.*, quoting *Barvenik, supra* at 132-133. And the Division in *Allen* found language in *Harvard Sq. Defense Fund, Inc.* v. *Planning Bd. of Cambridge,* 27 Mass. App. Ct. 491 (1989), to be "apt and germane": concerns about "diminished open space, incompatible architectural styles, the belittling of historical buildings, and the diminished enjoyment of the 'village feeling'" boiled down to "the expression of aesthetic views and speculative opinions," which "do not establish a plausible claim of a definite violation of a private right, property interest or legal interest sufficient" to confer standing on a prospective plaintiff. *Allen, supra* at 331-332, quoting *Harvard Sq. Defense Fund, Inc., supra* at 493. Austin's concerns with the proposed turbine are exactly these: that its looming presence would be detrimental to the character of the area generally, that it would tarnish the view from her home (although even this apprehension was not sharply expressed), and that it might reduce the value of her home (which, again, was itself not even described, and the value was not quantified in any way, notably through any acceptable opinion).

The Division in *Allen* specifically rejected argument that determining "person aggrieved" status should be made under "the more liberal interpretation" for deciding standing under G.L.c. 40C, the Historic Districts Act. *Allen, supra* at 332. The Division concluded that G.L.c. 40C did not apply to the Act and that the "liberal definition of 'aggrieved persons' is inapposite to cases arising under the [Act]." *Id.* Cf. *Home Bldrs. Ass'n of Cape Cod, Inc.* v. *Cape Cod Comm'n,* 441 Mass. 724, 733 (2004) (standing requirements in declaratory judgment proceedings should be liberally construed). We observe, however, that recently, the plaintiffs in *Kelley* v. *Cambridge Historical Comm'n,* 84 Mass. App. Ct. 166 (2013), proceeding under G.L.c. 40C, were found to lack standing even under what the Division in *Allen* had considered in 2000 to be that statute's "liberal" approach. The *Kelley* plaintiffs were neighbors but not abutters to a historical church, to which changes were planned. Those neighbors' proximity to the church was "beside the point," and alleged harms such as increased traffic, diminished public parking, impaired snow removal, and "aesthetic impacts (e.g., their having to look at a 'prison wall')" did not confer standing absent a showing that their harm was distinct from that suffered by the public at large. *Id.* at 180-181. Such an "aesthetic impact" is precisely Austin's chief claim to standing. As in *Kelley,* such an impact must fall short of achieving standing.

However mindful we are that the aim of the Act is to preserve the District as a "landmark compatible with the historic, cultural, literary and aesthetic tradition" of Cape Cod, as it existed "in the early days," Austin's aesthetic concerns, even paired with the speculative diminution of the value of her property, are not enough to have supported a conclusion by the trial court that she qualified as a person aggrieved so

as to challenge the decision of the Dennis Committee before the Commission. Because of that deficiency, we vacate the judgment of the Orleans District Court, recognizing that the effect of this decision is to restore the case to the point it existed when the Dennis Committee issued to ARC its certificate of appropriateness.

The judgment of the Orleans District Court is vacated.

So ordered.

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION
P.O. Box 140, Barnstable, Massachusetts 02630-0140

STANDARD OF REVIEW

(Part 2)

"Court Review"

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION

P.O. Box 140, Barnstable, Massachusetts 02630-0140
Tel: 508-775-1766

Arthur La Franchise, Appellant

Vs. **Decision for Appeal No. 2012-1**

Old King's Highway Regional Historic District Committee for the Town of Yarmouth

On Tuesday, February 7, 2012 at 1:30 P.M., the Commission held a hearing at the West Barnstable Fire Station Meeting Room, 2160 Meeting House Way (Route 149), West Barnstable, Massachusetts, on Appeal # 2012-1 filed by Arthur La Franchise seeking reversal of the Yarmouth Historic District Committee's granting of a Certificate of Appropriateness to the Seven Hills Foundation for the construction of a five bedroom home to be located at 19 Centerboard lane, South Yarmouth, Massachusetts.

Present were Chairman Peter T. Lomenzo, Jr., Dennis; Lawrence Houghton, Brewster; William Collins, Sandwich; Carrie Bearse, Barnstable; Richard Gegenwarth, Yarmouth; James R. Wilson, Commission Administrative Counsel; Paul Revere, III, Attorney for the Appellant and Arthur La Franchise, Appellant; Lucille B. Brennan, Attorney for the Applicant; David M. Sorgman and Luanne Perry of Group 7 Design, Designer for the Applicant; and Richard Martell, Construction Manager for the Applicant, Seven Hills Foundation.

Absent was Paul Leach, Orleans.

The Yarmouth Town Committee's decision was filed with the Town Clerk on January 11, 2012. The appeal was entered with the Commission on January 20, 2012, within the 10-day appeal period.

Copies of the Appeal Petition with attachments, Town's Decision, Application, Plans and Minutes from the Town Committee's hearings were distributed to the Commissioners for review.

Applicant's Presentation:

David M. Sorgman of Group 7 Design, addressed the Commission on behalf of the Applicant's Application. He described the proposed dwelling as being designed to accommodate five (5) female residents with disabilities in a non-institutional environment. He claimed that many of the exterior design features were selected to give a "residential" character and to avoid a "commercial" appearance to the building. He indicated that handicap ramps and other similar institutional style features had been omitted from the design.

He reported that many design concessions had been incorporated into the final plans. He showed the Commissioners the original submitted plans and highlighted the changes in entrance design and other changes in location, size and materials that were reflected in the final set of plans and specifications approved by the Yarmouth Town Committee.

He compared the proposed dwelling with other houses located in the neighborhood and pointed out that many exceeded the height (one story vs. two story) and size (square footage of floor space). He described the large 1.10-acre size of the Applicant's lot and the proposed dwelling's substantial setback from the Centerboard Lane. He also described the landscape plan and compared the smaller size of the proposed driveway with the Appellant's and other homes located with in the immediate neighborhood.

Commissioner Collins asked the height of the proposed building, which was identified as being 21 feet, 6 inches to the ridgeline.

Chairman Lomenzo asked for clarification of the various changes that had been discussed at the September, October and January public meetings before the Yarmouth Town Committee, which was described in more detail by Mr. Sorgman.

The Appellant's Presentation:

Attorney Paul Revere, III addressed the Commission on behalf of the Appellant, Arthur La Franchise. He identified his client as an immediate abutter and therefore declared him to be "a person aggrieved" under the Historic District Act.

He claimed that while the application process had taken three meetings and involved many modifications to original proposed building, the final submission represented only one major redesign and the deletion of features that were obviously inappropriate for the Historic District.

He suggested that the proposed use as a home for five women with disabilities was not a proper factor to be considered by the Town Committee. He asserted that the Yarmouth Town Committee had been wrongfully influenced by the proposed use and argued that the building should be judged solely on its harmony of appearance with other single-family dwellings located in the immediate neighborhood.

He described the proposed building as being "a large ranch" that was lacking in Cape Cod character or tradition. He suggested that square footage was too great and that the five parking spaces for the residents would be excessive for the neighborhood. He criticized the large size of the driveway.

He concluded by claiming that the Town Committee exercised poor judgment in its action of approving the proposed group home at the proposed site. He requested that the determination be annulled and returned to the local Town Committee for further review.

Additionally, he suggested that the five-bedroom use might violate Title V of the State Environmental Code and suggested that the health code issue should be resolved before a Certificate of Appropriateness is granted for the proposed building.

Commissioner Collins asked for a clarification of the parking space concern. Attorney Revere indicated that the size of the parking area was reflective of the overall excessive size and use of the project. He pointed out that there would be two employees on site per day, visitors, and a large van would be needed to transport the residents. He claimed that this would give a "commercial appearance" to the property.

Commissioner Houghton stated that he had visited the site and observed two vans and a very large circular driveway on the abutting property next door.

Chairman Lomenzo asked if all of the Commissioners had visited the site and had observed the other homes in the neighborhood. All the Commissioners indicated that they had all visited the site prior to the hearing.

Chairman Lomenzo asked for a clarification of the purpose for requesting a remand of the project. Attorney Revere indicated that his Client wanted the size of the building reduced and the Title V septic issue resolved.

The Town Committee's Presentation:

Richard Gegenwarth addressed the Commission in support of the Yarmouth Town Committee decision to approve the proposed dwelling. He pointed out that Cape Cod ranches have a greater roof pitch than western style ranches. He indicated that the Applicant's proposed dwelling has an eight (8) inch pitch, which is typical of many other houses located within the Historic District. He pointed out that many of the houses in the neighborhood have large blacktop driveways. He showed the Commissioners photographs in support of this observation.

He described the Appellant's property (23 Centerboard Lane) located on the northeast side of the Applicant's lot and pointed out in photographs the large blacktop driveway and six (6) vehicles parked in the yard.

He described the neighbor's property (15 Centerboard Lane) located on the South side of the Applicant's lot and pointed out its comparable size and exterior features.

He pointed out other houses in the neighborhood that were larger than the proposed dwelling and suggested that the Town Committee found the size to be compatible with the other houses located in the neighborhood.

He pointed out that the 2,900 square feet of paved driveway and parking area was less than that of the neighbors and therefore compatible with the neighborhood.

He showed the Commissioners the final landscape plan and suggested that it would enhance the aesthetic quality of the neighborhood. He described the proposed plantings and the relatively large (2.5 inch caliber) trees to be planted by the Applicant.

Commissioner Collins asked for clarification of the amount of modification and changes that occurred during the review process. Mr. Gegenwarth highlighted the changes to the site plan, front of the building, deletion of the garage, changes in siding, doors, windows and other exterior architectural features that were modified in an effort to address neighborhood and Town Committee concerns.

Commissioner Carrie asked when the issue of size had been raised and addressed. Mr. Gegenwarth indicated that the initial concerns were focused on the original proposed design features of the building and that the size issue was addressed in the final revised plans that were presented at the January meeting.

Chairman Lomenzo asked about the amount of public participation in the meetings. Mr. Gegenwarth indicated that the public attendance at the meeting grew as the review process progressed with the largest public participation occurring at the final January meeting.

Public Comment:

Chairman Lomenzo asked for public comment on the appeal.

Raymond Scichilone of 48 Cranberry Lane, South Yarmouth, Massachusetts stated that he was part of a group of about forty (40) neighbors that opposed the project. He indicated concern about the size of the proposed building and possible traffic problems that the proposed driveway could create. He also indicated that the lot would need to be clear-cut during construction and that it would take five to seven years for the landscaping to properly establish itself.

Bruce Scott of 15 Centerboard Lane, South Yarmouth, Massachusetts identified himself as the abutter on the south side of the proposed project. He stated that he felt that a four-bedroom building would be more appropriate for the neighborhood.

Arthur La Franchise (Appellant) of 23 Centerboard Lane, South Yarmouth, Massachusetts suggested that the exposure of five vehicles parked in a row was not appropriate for a residential neighborhood. He also expressed concern about the removal of trees during construction trash removal by large trucks after construction.

Applicant's Rebuttal:

David Gorgman reaffirmed that the proposed building is designed to look like a home and to fit into the residential neighborhood. He described the building as being similar to other residences in the neighborhood and suggested that the driveway was very much like

the Appellant's paved driveway. He showed more photographs of the Appellant's paved driveway, vans and other vehicles located on his property.

He claimed that the septic system had already been engineered to meet the requirements of Title V and suggested that other authorities would address it.

He disputed the claim that the proposed dwelling would be too large for the neighborhood by again pointing out other larger house that were located in the neighborhood. On the issue of the ranch style of the proposed building, he pointed out that the house across the Street had a ranch style and had the same seventy-four foot length as the Applicant's proposed building.

He concluded by claiming that proposed building was smaller and in harmony with the residential character of the neighborhood.

He requested that the Town committee's determination be affirmed.

Appellant's Rebuttal:

Attorney Revere suggested that the proposed use as a group home was driving the large size of the foot print of the proposed building and its related driveway and parking area. He suggested that the excessive number of parked cars in located on his client's property was a matter for enforcement but should not be a reason to permit the proposed project.

He requested that the decision of the Town Committee be annulled and the application be remanded to the Town Committee for additional study and review.

Town Committee Rebuttal:

Mr. Gegenwarth stated that the proposed dwelling is in keeping with the character of the neighborhood. He indicated that the scale, height, width, style, color, siding, trim, roofing material and other exterior architectural features were in harmony with the other buildings in the immediate neighborhood.

He concluded by suggesting that the proposed building with its landscaping plan would be an improvement to the aesthetic appearance of the neighborhood and asked that the decision be affirmed.

Commission Discussion:

William Collins of Sandwich began the discussion by stating that it appeared that the Town Committee was very thorough and open in its review of the proposed project. He indicated that the Yarmouth Town Committee appeared to have the authority to deal with the proposed project and asked for changes that the Applicant adopted in the final plans. The Town Committee did not appear to exceed its authority or act in an arbitrary or

capricious manner. He suggested that the only issue is whether or not the Yarmouth Town Committee exercised poor judgment in its approval of the revised plans.

He stated that the final plans appear to reflect features that are similar to the features of other buildings located in the neighborhood. He noted that he had visited the site and observed that the proposed building would appear to be in harmony with the exterior features other buildings located nearby. He therefore concluded that he did not believe that the Town Committee had exercised poor judgment or acted improperly.

Lawrence Houghton of Brewster stated that he spent a lot of time observing the homes in the neighborhood and expressed the opinion that he could not find a bases to believe that the Town Committee had made an error in approving the application. He indicated that he felt that the proposed dwelling was the right size for the lot and suggested that its exterior architectural features would fit in the neighborhood.

Carrie Bearse of Barnstable stated that she agreed with Mr. Collins and Mr. Houghton and expressed the opinion that the Yarmouth Town Committee did not make an error in approving the final plans. She stated that she examined the neighborhood and observed the many similar homes, some larger and some smaller, and felt that the proposed building was reasonably compatible in size, style and appearance. She expressed the opinion that the proposed dwelling looks like a single family home and does not look like a "commercial or institutional style" building. She concluded by stating that she felt that Yarmouth Town Committee acted properly in approving the application.

Chairman Lomenzo of Dennis stated that he spent a good deal of time visiting the site prior to the hearing. He thanked the parties for the depth of their presentations and indicated that he felt that the Yarmouth Town Committee did not make an error in approving the five bedroom dwelling at its proposed location.

He called for a motion to vote on the appeal.

Mr. Collins moved, seconded by Ms. Bearse, to affirm the decision of the Yarmouth Town Committee in their determination to issue a Certificate of Appropriateness for the proposed five bedroom dwelling to be located at 19 Centerboard Lane, South Yarmouth, Massachusetts.

The motion carried by a vote of 4-0-1. (Collins, Bearse, Houghton & Lomenzo in favor and Gegenwarth abstaining)

The Commission findings:

The Commission found as follows:

The Yarmouth Town Committee did not act in an arbitrary, capricious or erroneous manner in granting a Certificate of Appropriateness for the proposed dwelling to be located at 19 Centerboard Lane, South Yarmouth, Massachusetts.

The Yarmouth Town Committee did not exceed its authority in granting a Certificate of Appropriateness for the proposed dwelling to be located at 19 Centerboard Lane, South Yarmouth, Massachusetts.

The Yarmouth Town Committee did not exercise poor judgment in granting a Certificate of Appropriateness for a new dwelling to be located at 19 Centerboard Lane, South Yarmouth, Massachusetts.

The Yarmouth Town Committee decision of January 9, 2012, to issue a Certificate of Appropriateness to the Applicant should be affirmed.

Commission's Determination:

As to Appeal #2012-1, the Decision of the Yarmouth Town Committee in granting a Certificate of Appropriateness for a new dwelling to be located at 19 Centerboard Lane, South Yarmouth, Massachusetts is affirmed. (4-0-1).

Any person aggrieved by this decision has a right to appeal to the District Court Department, Barnstable Division, within 20 days of the filing of this decision with the Yarmouth Town Clerk.

Dated: February 21, 2012

Peter T. Lomenzo, Jr., Chairperson

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS

DISTRICT COURT DEPARTMENT
BARNSTABLE DISTRIC COURT
No. 12 CV 0230

ARTHUR LA FRANCISE
Plaintiff
VS.

RICHARD GEGENWARTH, PETER LOMENZO,
CARRIE BEARSE, WILLIAM COLLINS,
LAWRENCE HOUGHTON and PAUL LEACH
As they are members and are Collectively the
OLD KING'S HIGHWAY REGIONAL
HISTORIC DISTRICT COMMISSION and
SEVEN HILLS COMMUNITY SERVICES, INC.
Defendants

DECISION

The plaintiff seeks judicial review of a decision of the Old King's Highway Regional District Commission ("Commission") affirming a decision by the Yarmouth Town Committee ("Committee") to issue a certificate of appropriateness to Seven Hills Community Services, Inc. ("applicant") for the construction of a group home located at 19 Centerboard Lane, South Yarmouth, Massachusetts.
A hearing on the matter was conducted on October 26, 2012. Six exhibits were introduced; four witnesses testified. In addition, the parties entered into a "Stipulation of Facts".

FINDINGS:

The Committee heard from both the designer, on behalf of the applicant, and the plaintiff, who is an abutter, concerning the proposed construction of the group home. After the initial hearing, the applicant was asked to revise the design to make it look less "commercial". At a second hearing the Committee concluded that the design was "vastly improved". However, the Committee still felt that the overall design could still be improved, and requested that the applicant come back with a modified design. At the third hearing, the project was approved. Some of the changes included a reduction in the overall size of the building, the elimination of the garage and dumpster, the addition of 6 over 6 windows, elimination of retaining walls and a new landscaping proposal.

At the Commission hearing, the designer again made a presentation of behalf of the applicant and apprised the Commission of the changes made to the design. Attorney Paul Revere addressed the Commission on behalf of the plaintiff. Committee chairman Richard Gegenwarth addressed the Commission in support of the Committee's decision to approve the project. Public comment in opposition to the project was presented.

RULING:

Under Section 11 of the Old King's Highway Regional Historic District Act, a person aggrieved by the action of the Commission may appeal its decision to the District Court. The standard of review is whether the Commission exceeded its authority in voting to approve the project. The standard of review is analogous to that governing the exercise of the power to grant or deny 'special permits' under a local zoning bylaw.

The decisions of the Committee and the Commission were made after careful consideration and full hearings at which all parties made presentations. The Committee required the applicant to modify the design to make the building more aesthetically pleasing and compatible with the other houses in the neighborhood. The decision of the Committee was reasonable; the Commission did not exceed its authority in affirming the Committee's decision. Accordingly, the plaintiff's appeal is dismissed.

By the Court,

Joan E. Lynch
Associate Justice

November 2, 2012

OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT COMMISSION
P.O. Box 140, Barnstable, Massachusetts 02630-0140

MOOTNESS

"All ARC Findings and Rulings vacated and nullified"

NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCReporter@sjc.state.ma.us

14-P-1650 Appeals Court

AQUACULTURAL RESEARCH CORPORATION & another[1] vs. ROSEMARIE AUSTIN & another.[2]

Barnstable. October 1, 2015. - November 9, 2015.

Present: Kafker, C.J., Katzmann, & Rubin, JJ.

Moot Question. Practice, Civil, Moot case, Vacation of judgment.

Civil action commenced in the Orleans Division of the District Court Department on November 12, 2010.

The case was heard by Brian R. Merrick, J.

Matthew L. McGinnis for Old Kings Highway regional historic district commission.
Michele E. Randazzo for town of Dennis.
Bruce P. Gilmore, for town of Yarmouth, amicus curiae, submitted a brief.

KAFKER, C.J. The primary issue presented in this appeal is the proper application of mootness principles. In particular,

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[1] Town of Dennis, intervener.

[2] Old King's Highway regional historic district commission (regional commission).

we first must decide whether a legal challenge to a permitting process for a wind turbine is mooted by a conservation restriction precluding the construction of the wind turbine. If so, we then must decide the status of the unreviewed town committee, regional commission, and court decisions. We conclude that the case is moot and vacate all of the unreviewed decisions.[3]

The procedural posture of the case is as follows. In 2010, Aquacultural Research Corporation (ARC) sought approval to construct a 242-foot-tall wind turbine on its property in the town of Dennis (town). Pursuant to the Old King's Highway Regional Historic District Act (Act),[4,5] ARC applied to the town's Old King's Highway regional historic district committee (town committee) for a certificate of appropriateness.[6] After

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[3] We acknowledge the amicus brief submitted by the town of Yarmouth.

[4] St. 1973, c. 470, as amended through St. 2007, c. 220.

[5] The purpose of the Act is to "preserve and maintain [the Old King's Highway regional historic district (district)] as a contemporary landmark compatible with the historic, cultural[,] literary and aesthetic tradition of Barnstable county, as it existed in the early days of Cape Cod." St. 1973, c. 470, § 1, as amended by St. 1982, c. 338, § 1.

[6] The Act requires each member town of the district to appoint a town historic district committee responsible for issuing certificates of appropriateness for certain building and demolition projects. St. 1973, c. 470, §§ 5, 6, as amended by St. 1975, c. 845, §§ 5, 6. Specifically, the Act states, in part, "No building, structure, or part thereof, except as

the town committee issued the certificate, Rosemarie Austin, a town resident, appealed as an abutter[7] to the Old King's Highway regional historic district commission (regional commission), pursuant to § 11 of the Act.[8] Austin claimed that the proposed wind turbine, which would be located approximately three-quarters of one mile from her property, would violate the Act and devalue her property.

Following a hearing, the regional commission found that the town committee "exercised poor judgment in approving the 600-kilowatt wind turbine at the proposed location."[9] Based on this

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hereinafter provided, shall be erected within the District unless and until an application for a certificate of appropriateness as to the exterior architectural features shall have been filed with the Committee. Either a certificate of appropriateness or a certificate of exemption shall be issued by the Committee before erection." St. 1973, c. 470, § 6, as amended by St. 1975, c. 845, § 5.

[7] The regional commission's petition for appeal requires an appellant to indicate the "relationship of the appellant to the subject of appeal." In her petition, Austin claimed to be an abutter.

[8] "Any person aggrieved by the determination of the [town] committee . . . whether or not previously a party to the proceeding, may, within ten (10) days after filing of a notice of such determination with the town clerk, . . . appeal to the [regional] commission." St. 1973, c. 470, § 11, as amended by St. 1975, c. 845, § 13.

[9] Upon timely notice of appeal, the regional commission must "hear all pertinent evidence and determine the facts, and if, upon the facts so determined, the [regional] commission finds that the [town] committee exceeded its authority or exercised poor judgment, was arbitrary, capricious, or erroneous in its actions, the [regional] commission shall annul the [town]

finding, the regional commission annulled the town committee decision and denied ARC's application for the certificate of appropriateness. ARC, and the town as intervener, then appealed to the Orleans Division of the District Court Department. Following a bench trial, a District Court judge revoked and reversed the decision of the regional commission and affirmed the decision of the town committee, finding that although Austin had standing to appeal as a "visual abutter,"[10] the regional commission had "exceeded its authority by annulling the decision of the" town committee. The regional commission and Austin next appealed to the Appellate Division of the District Court Department. After concluding that the trial judge erred in finding Austin had standing as a visual abutter, the Appellate Division vacated the judgment of the District Court and restored the town committee's approval of ARC's certificate.[11] The

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committee determination" and either remand to the town committee or revise the determination. St. 1973, c. 470, § 11, as amended by St. 1975, c. 845, § 13.

[10] The judge noted that although Austin's property did not abut ARC's property, "the [Act] at its threshold is concerned with the visual appearance of things," and because the site of the proposed wind turbine "would be very visible from Austin's property" and would negatively impact her property, she was a "visual abutter."

[11] The Appellate Division decision states, "We have found no authority, anywhere, sanctioning the concept of one's status as a 'visual abutter' (or even using that term) so as to qualify him or her as a 'person aggrieved' under this Act or any similar statute, or to otherwise confer standing on a person."

regional commission and Austin timely filed notice of appeal from the Appellate Division decision and order in this court in October, 2014.[12]

On June 26, 2015, ARC granted a conservation restriction on its property to the town and others.[13] The conservation restriction specifically prohibits the "[c]onstruction or placing . . . [of any] windmill, wind turbine, [or] wind generator" on ARC's property.[14] Therefore, regardless of any certificate of appropriateness, no wind turbine may presently be built on the property at issue.

"Litigation ordinarily is considered moot when the party claiming to be aggrieved ceases to have a personal stake in its outcome." Taylor v. Board of Appeals of Lexington, 451 Mass. 270, 274 (2008), quoting from Attorney Gen. v. Commissioner of Ins., 442 Mass 793, 810 (2004). Because the certificate of appropriateness is now inoperative and of no present or future effect as a result of ARC's subsequent grant of the conservation

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[12] Austin filed notices of joinder in the regional commission's opening and reply briefs.

[13] The Commissioners of the County of Barnstable, the town of Yarmouth, and the Dennis Conservation Trust.

[14] The conservation restriction was approved by the Secretary of the Executive Office of Energy and Environmental Affairs, pursuant to G. L. c. 184, § 32, and was recorded in the Barnstable County registry of deeds at book 28969, pages 78-112, on June 26, 2015.

restriction precluding the construction of the wind turbine, any action by this court purporting to affirm the certificate's issuance by the town committee or the certificate's later annulment by the regional commission would involve the "adjudication of [a] hypothetical dispute[]." Lockhart v. Attorney Gen., 390 Mass. 780, 782 (1984). ARC no longer has any personal stake in the certificate of appropriateness for the wind turbine. The same is true for Austin and the regional commission. Therefore, the underlying litigation is moot.

Relying on Ott v. Boston Edison Co., the town argues that, even if the instant case is moot, this court should exercise its discretion and address the issues of visual abutter standing and the scope of review of local committee decisions under the Act. 413 Mass. 680, 683 (1992). "We have on occasion exercised our discretion to answer questions in moot cases where certain conditions existed: (1) the issue was fully argued on both sides; (2) the question was certain, or at least very likely, to arise again in similar factual circumstances; (3) where appellate review could not be obtained before the recurring question would again be moot; and (4) most importantly, the issue was of public importance." Ibid. This is not, however, such an exceptional case. The particular standing question before us is fact-specific and should not be decided in a theoretical case. See Lockhart v. Attorney Gen., supra at 784.

Moreover, the more general issues of visual abutter standing and the scope of review of local committee decisions under the Act are not the type of evanescent, time-defined actions that will likely evade review in subsequent decisions. See, e.g., Roe v. Wade, 410 U.S. 113, 125 (1973) (pregnancy litigation will seldom survive time necessary for appellate review); Superintendent of Worcester State Hosp. v. Hagberg, 374 Mass. 271, 274 (1978) (commitment orders to mental health facilities are for limited duration and usually expire before appellate review); Doe v. Superintendent of Schs. of Worcester, 421 Mass. 117, 123 (1995) (suspended student is often readmitted before appeal of school discipline action can be heard). Accordingly, we decline to exercise our discretion to decide this moot case.

The next question we address is the status of the decisions left unreviewed because of the mootness determination. "[W]here a case becomes moot on appeal, we 'vacate the [judgment] appealed from with a notation that the decision is not on the merits, and remand the case to the [lower court] with directions to dismiss the [complaint].'" Building Commr. of Cambridge v. Building Code Appeals Bd., 34 Mass. App. Ct. 696, 700 (1993), quoting from Reilly v. School Comm. of Boston, 362 Mass. 689, 696 (1972). See United States v. Munsingwear, 340 U.S. 36, 39 (1950) ("The established practice of the Court in dealing with a civil case from a court in the federal system which has become

moot while on its way here . . . is to reverse or vacate the judgment below and remand with a direction to dismiss").[15] We shall vacate the judgment below in part because parties that "may not obtain an appellate review of the decree on the merits [due to mootness] . . . should be free of collateral estoppel consequences of that decree if any issues of fact or law determined by the judge below should perchance reappear in future litigation between the parties." Reilly v. School Comm. of Boston, supra. See United States v. Munsingwear, supra at 40 (when underlying judgment is vacated, "the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary").[16]

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[15] A different analysis applies when the case is moot because it has been settled after the appeal was filed. See U.S. Bancorp Mort. Corp. v. Bonner Mall Partnership, 513 U.S. 18 (1994). "Where mootness results from settlement, however, the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur." Id. at 25.

[16] We also recognize that there is an "equitable tradition of vacatur." U.S. Bancorp Mort. Corp. v. Bonner Mall Partnership, supra ("A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment"). This involves a consideration of the "nature and character of the conditions which have caused the case to become moot," including who is responsible for rendering the case moot and who has prevailed below. Id. at 24. For example different equitable considerations would apply to a vacatur action brought by a party that has lost below who unilaterally has taken action to render the case moot. Id. at 25. In the instant case, the prevailing parties below, the town and ARC, negotiated the conservation restriction responsible for

In the instant case there appears to be residual concern among the litigants about the status of the standing analyses in the unreviewed decisions. Indeed, this concern, as well as argument regarding the scope of review under the Act more generally, seems to be the primary reason why the appeal has not been voluntarily dismissed. Regardless, as we are vacating the judgment of the District Court and the decision and order of the Appellate Division both as moot, any and all potential collateral estoppel consequences of their standing analyses are thereby eliminated. Their standing analyses cannot, therefore, be used as either a sword or a shield in any subsequent litigation between the parties.

Furthermore, in accordance with A. L. Mechling Barge Lines, Inc. v. United States, 368 U.S. 324, 329 (1961), we also shall order that the decisions of the town committee and the regional commission be vacated for the same reasons. In A. L. Mechling Barge Lines, Inc., the United States Supreme Court held that the principles justifying vacatur of judgments of the United States District Courts due to mootness are "at least equally applicable to unreviewed administrative orders." Ibid. See Atlanta Gas Light Co. v. Federal Energy Regulatory Commn., 140 F.3d 1392, 1403 (11th Cir. 1998) ("In accord with Mechling and Munsingwear,

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rendering the case moot. See ibid. (vacatur appropriate "when mootness results from unilateral action of the party who prevailed below").

we vacate the 1991 and 1992 [Federal Energy Regulatory Commission] Orders"); Tennessee Gas Pipeline Co. v. Federal Power Commn., 606 F.2d 1373, 1382 (D.C. Cir. 1979) ("We follow the course set out in Munsingwear and Mechling and, accordingly, vacate the order which we decline to review"); Hollister Ranch Owners' Assn. v. Federal Energy Regulatory Commn., 759 F.2d 898, 902 (D.C. Cir. 1985) (applying Munsingwear and Mechling in vacating unreviewed order of Federal Energy Regulatory Commission as moot); Radiofone, Inc. v. Federal Communications Commn., 759 F.2d 936, 938 (D.C. Cir. 1985) ("All members of the court are in agreement that this case is moot and that we must vacate the agency's order pursuant to [Munsingwear] and [Mechling]"); Beethoven.com LLC v. Librarian of Congress, 394 F.3d 939, 951 (D.C. Cir. 2005) (vacating order of Librarian of Congress as moot).

The decision and order of the Appellate Division is vacated, not on the merits but because it is moot. We remand to the Appellate Division with direction that the District Court judgment must be vacated and a new judgment shall enter vacating the decisions of the town committee and regional commission as now moot.

So ordered.