

Town of Barnstable

Growth Management Department
JoAnne Buntich, Interim Director

Follow-up Staff Report



Appeal 2009-004 – Kohler Appeal of Building Commissioner Seeking Enforcement

Appeal of the Commissioner's determination that no enforcement action is needed against Cape Resources Company. The appeal requested the Board overrule the Commissioner and order action against Cape Resources.

Date: October 17, 2009
To: **Zoning Board of Appeals**

Art Traczyk, Regulatory Review/Design Planner

Background:

This appeal has been active before the Board since January of 2009. A number of hearings were held and considerable testimony submitted. Based on that information submitted and the testimony taken, staff has generated the following conclusions that may assist the Board in making findings. The staff's conclusions support the Building Commissioner's actions. Should the Board agree with the conclusions, a draft motion to support the Commissioner is also included.

Appeal No. 2009-004 - Staff Conclusions:

1. Appeal No. 2009-004 is that of Peter and Rose Kohler who reside at 150 Chuckles Way, Marstons Mills, MA, appealing the Building Commissioner's September 22, 2008 determination that no enforcement action is needed with respect to the activities being carried on by Cape Resources Company at 280 Old Falmouth Road, Marstons Mills, MA. The appeal requested that the Zoning Board overrule the Commissioner's decision and order him to take action against Cape Resources including but not limited to revoking the 1996 variance, and/or issuing a Cease and Desist Order to the company.
2. The area is zoned Residence F and is in a Groundwater Protection Overlay District. The 21.32-acre Cape Resources site was initially used for a cranberry bog that, in

1973, changed to that of a sand and gravel excavation and stump dump operation. In 1975, a use variance for that operation was issued and later modified in 1978 and again in 1996. The 1996 modification was triggered in part due to an order by the Department of Environmental Protection for the removal of woodwaste from the site and to initiate the closure and capping of that activity. Thereafter, the operations of Cape Resources were to change to that of recycling. The subdivision that created Chuckles Way was approved by the Planning Board in 1986 and the Kohlers purchased the 150 Chuckles Way home in 1991.

3. Cape Resources' property is located to the southwestern part of the Kohler's property. There is a 50-foot subdivision open space buffer between the Kohler's property and the Cape Resources' property. Thereafter, there is an additional 320-foot buffer on Cape Resources' property that supports a 50-foot high planted berm upon which dust misters are located. Cape Resources operations are concentrated to the south end of its property as it fronts on Old Falmouth Road. The location of the operation is some 800 feet from the Kohler's property.¹
4. The 1996 plan submitted to the Zoning Board, in respect to that modification, was a "draft plan" as noted in Condition 7 of the variance. That variance reduced and restricted all activities of Cape Resources to an area delineated on the draft plan. As far as it can be clearly identified, the present day activities of Cape Resources are occurring within that activity area delineated on the approved draft plan.
5. The only existing exception to the layout that does not conform to the "draft plan" is a section of the westerly perimeter of the fire access road. Today, that side of the fire road remains as located prior to 1996. In the May 11, 2009 Centerville, Osterville, Marstons Mills Fire Department letter to the Board, no concern was expressed over the location of the access road. However, the Fire Department did express concern

¹ Measurements taken for Town's GIS maps, Cape Resources Existing Conditions Plan submitted to the ZBA file Appeal No. 2009-025, and Chuckles Way Subdivision Plan No. 633.

for that part of the fire road located on the southern side of the site, as per the draft plan, that is subject to flooding. The Fire Department noted that, with the proposed reconstruction of the perimeter road as proposed in a March 25, 2009 site plan², that issue should be cured.

6. The subject "Chipper Building", that the appellants have purported as being in violation of the plan, was authorized by the Building Division on January 3, 1997 by the issuance of Building Permit No. 20326. The final inspection of that building was made on July 20, 1998. It is located within that activity area delineated on the approved draft plan and in that approximate area that the proposed building was illustrated on the draft plan. If the appellants had an issue with that final location of the building, they should have appealed that building permit as prescribed in MGL Chapter 40A, or at least raised that issue before the final inspection was made. They did not.

7. With regards for the Appellants claim that Cape Resources is responsible for odor, fumes, dust, smoke, vibrations, noise and other causes to the neighborhood, it recognizes that the residential neighborhood in this area has issues and the Zoning Board is sensitive to how disruptive those causes are to the quality of life and enjoyment of home. However, no credible and conclusive evidence has been submitted that Cape Resources is the direct and sole perpetrator of the offenses and no evidence substantiates that the degree of these offences has exceeded some established or accepted threshold. In addition to the operations at Cape Resources, a number of non-residential land uses exists in the area including, the Town's Transfer Station and capped landfill, a horse farm, other recycling operations, landscape operations including growing and cultivation of plants, and a number of

² The March 25, 2009 site plan was submitted to Site Plan Review in preparation of EAC Disposal, Inc., application to the Board for a Modification of Variance No. 1996-14 (Appeal No. 2009-025 also now before the Board).

other industrial uses scattered along Old Falmouth Road, Flint Street and Osterville-Barnstable Road.

Possible Motion: *(Only if four or more vote to support the findings)*

Based upon the positive vote on the findings it is motioned that the Board reaffirms and upholds the September 22, 2008 determination of the Building Commissioner that no enforcement action is needed with respect to the activities being carried on by Cape Resources Company at 280 Old Falmouth Road, Marstons Mills, MA.