

BARNSTABLE  
TOWN CLERK

**OLD KING'S HIGHWAY REGIONAL HISTORIC DISTRICT  
COMMISSION**

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07 SEP 26 P 3 :07

**Joseph F. Dugas, individually and as Trustee of the Dugas Family Irrevocable Trust, Marcy S. Santos, Louis Cataldo as Trustee of the Cataldo Family Trust, Clifford S. Macdermid, Dori J. MacDermid, James M. Rogers, Judith A. Rogers, John Field and Kristen Bearse, Appellants**

**Vs.**

**Decision No. 2007-6 & 2007-7**

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

On Tuesday, September 4, 2007 at 7:45 P.M., the Commission held a hearing at the Fire Station Community Room, 340 Route 6A, Yarmouth Port, Massachusetts, on Appeal #2007-6 & 2007-7 filed by Joseph F. Dugas, individually and as Trustee of the Dugas Family Irrevocable Trust, Marcy S. Santos, Louis Cataldo as Trustee of the Cataldo Family Trust, Clifford S. MacDermid, Dori J. MacDermid, James M. Rogers, Judith A. Rogers, John Field and Kristen Bearse, Appellants seeking reversal of a decision by the Barnstable Historic District Committee granting a Certificate of Appropriateness to Four Acres Realty Trust (Appeal No. 2007-6) for a single family dwelling with attached garage to be located on Lot 3 and (Appeal No. 2007-7) for a single family dwelling with attached garage to be located on Lot 4, 140 Maushop Avenue/Offshoot Road, Barnstable, Massachusetts.

Present were Mark Marinaccio, Sandwich; Peter Lomenzo, Dennis; Deborah Gray, Yarmouth; Roy W. Robinson, Jr., Brewster; Patricia Anderson, Barnstable; James R. Wilson, Commission Administrative Counsel; Joseph F. Dugas, Marcy Dugas, Louis Cataldo, James M. Rogers, Appellants; Paul Revere, III, Attorney for the Appellants; Howard Woollard, Applicant; and Michael D. Ford, Attorney for the Applicant.

Absent was Paul Leach, Orleans.

The Committee's decisions were filed with the Town Clerk on July 26, 2007. The appeals were entered with the Commission on August 6, 2007, within the 10-day appeal period.

**Stipulation:**

At the beginning of the hearing, the parties agreed that because the facts and circumstances appeared to be identical for each appeal that the issues raised by Appeal No 2007-6 & 2007-7 could be heard together in one hearing.

Additionally, the parties stipulated the proposed design of the exterior architectural features of the proposed dwellings and garages were not in dispute and that the issues

raised by the Appellant's appeal would only focus on the proposed modifications to the stone wall that had been approved by the issuance of a Certificate of Appropriateness without an application and/or the issuance of a Certificate for Demolition or Removal.

**The Applicant's Presentation:**

The Applicant's Attorney, Michael D. Ford, addressed the Commission and described the proposed project as consisting of two applications for the construction of two single family dwellings with attached garages to be located on Lots 3 & 4 with a common driveway. He reviewed a site plan showing the shared common driveway, the proposed dwellings, the stonewall and the twelve (12) and twenty-four (24) foot proposed openings in the wall that had been approved by the local committee.

He indicated the openings were shown on the landscape plan and discussed in depth at the public hearing before the local town committee and approved as a part of the Certificate of Appropriateness process.

He indicated that all the proposed buildings were to be located completely behind the stonewall. He suggested that the breaks were necessary to allow proper vehicle access to the proposed attached garages.

He pointed out that the Appellants and their Attorney were present at the local committee hearing and had been given a full opportunity to express their opposition to the proposed changes to the wall.

He acknowledged that the Appellant's appeal appeared to raise a legal question as to whether or not a local town committee could act on a proposed modification to an existing building, structure and/or other architectural feature with out requiring the filing of an application for a Certificate for Demolition or Removal. He went on to express the opinion that the law allowed the local committee the discretion to approve the modification in the wall with out the necessity of a Certificate for Demolition or removal.

Howard Woollard stated the breaks in the wall were required to accommodate an effort to locate the garage door openings away from frontal approach to the dwellings. He suggested that the local committee had expressed concern that too many dwellings were being constructed with their garage doors dominating the frontal elevation of new construction. He pointed out that the proposed driveways had been designed and located to address this concern and thereby had incorporated a more esthetically appropriate appearance for approaching the proposed dwellings.

He stated that the wall was fragmented and had existing breaks.

### **The Appellant's Presentation:**

The Appellant's Attorney, Paul Revere, III, began by pointing out the differences between a Certificate of Appropriateness and a Certificate for Demolition or Removal. He stated that a Certificate of Appropriateness deals with "visual appearance" of a building or structure while a Certificate for Demolition or Removal focuses on "historical or architectural value" and "public interest" in protecting a structure. He pointed out that the "public's view" of a building and/or structure was an important factor in judging the appropriateness of a proposed construction project while the "public view" had little or no role in a determination to grant or deny a Certificate for Demolition or Removal.

He reviewed the seven (7) reasons for the appeal set forth in the Appellants' Petitions For Appeal.

Reasons 1 & 2 alleged that the Committee erred by failing to address asserted prior violations of the Act. He stated that the Applicant had been granted permission to open another stonewall for an access way to the property and had failed to comply with a condition that the original stones would be kept on the site and used to properly complete modifications to the stonewall. He showed pictures of the cleared lots and suggested that other parts of stonewalls may have been altered by the Applicant without permission. He suggested that the Committee had a duty to refer the alleged violations to the Building Commissioner for a determination of existing compliance with the Act before granting the Certificate of Appropriateness to the Applicant.

Reasons 3, 4, 5 & 6 alleged that the town committee erred by allowing the Applicant to use a Certificate of Appropriateness to authorize the proposed modifications to the wall. He suggested that the Act required a separate Certificate for Demolition or Removal to alter the wall. He claimed that the public was not properly informed of the extent of the proposed project and the issue of the "public interest" was not fully addressed by the local committee during the local hearing process. He asserted that the Applicant failed to present any information that allowing the modifications to the wall would be in the "public interest."

Reason 7 alleged that the town committee erred by failing to require the Applicant to submit three items of information with the Application. These items were a proper plot plan, photographs of the property and an outline of proposed tree cutting and alterations to the grading of the lots. He stated that these items were required under the Commission's Guidelines (Section A.7. a., d. & e.).

### **The Town Committee's Presentation:**

Patricia Anderson addressed the Commission on behalf of the Barnstable Town Committee. She stated that the question of prior violations of the Historic District Act is in the hands of the town's Building Commissioner and reported that an Assistant Building Commissioner was present at the July 26<sup>th</sup> public hearing and heard the complaints of the Appellants. She indicated that the power to prosecute violations and the

duty to enforce the Historic District Act rests with the Building Commissioner (See Section 12 – Enforcement).

She reported that the policy of Barnstable Town Committee has been to allow, as a part of a Certificate of Appropriateness, modifications to a building or structure without requiring a separate Certificate for Demolition or Removal where the proposed work is incidental and does not involve the complete destruction of a building or structure. She indicated that in other applications permission has been granted for breaks in stonewalls have been approved within the process of granting a Certificate of Appropriateness.

She stated that Mr. Revere raised the issue of the absence of a Certificate for Demolition or Removal at the July 26<sup>th</sup> Town Committee hearing. She stated the Committee determined that because it was viewed as an “altering” or “modifying” as opposed to a “demolishing or removal” of an already fragmented wall, a separate application and certificate would not be necessary to approve the proposed openings in the wall.

**Public Comment:**

Louis Cataldo, an abutter, stated that the wall has been there for many years. He expressed concern about the construction trucks going in and out of the area. He indicated the neighborhood was very upset and concerned about the alleged removal of the stones from the site. He expressed the opinion that enforcement of the Historic District Act rested with the Commission.

Marcy Dugas, formerly Marcy S. Santos, stated that she felt that there has been a close relationship between the town committee and the Building Commissioner’s office. She claimed that the Applicant is in violation of the Historic District Act. She asserted that rocks that were removed for the first break have been removed from the site. She expressed the opinion that the Applicant should not be granted a Certificate of Appropriateness until all outstanding violations were properly addressed.

Jay Ehret, an abutter, stated that it was important that the proposed dwellings be placed in the location approved by the Town Committee behind the stonewall. He expressed concern and a wish that the Applicant be required to donate a Lot to open space.

**Applicant’s Rebuttal:**

The Applicant’s attorney, Michael D. Ford, began by stating that the Town Committee was not in error when it failed to base its determination on the Appellants claim that Applicant was in violation of the Old King’s Highway Act. He read SECTION 12 of the Act that states: “The Building Inspector in the affected town shall have the power and duty to enforce the provisions of this Act.” He suggested that it would be an error for the Committee to usurp the Building Commissioner’s power and/or duties under the Act.

Next, Mr. Ford read from other parts of the Act asserting that town committee acted properly upon the application for a Certificate of Appropriateness. He stated that under

SECTION 10c of the Act, "appropriateness" and "demolition" are linked and that a partial alteration can be incorporated in the permission granted under a Certificate for Appropriateness hearing process.

He suggested that the town committee had broad discretion in determining the procedure for reviewing a project. He stated that no evidence has been offered to show that the proposed breaks in the stonewall would be "detrimental to the public interest" or that the wall has great "architectural value or historical significance" that would support a determination that the town committee made a substantive error in granting permission for the alteration to the wall. He claimed that the Appellants have had more than adequate opportunity to offer evidence that the proposed alterations will harm the interests protected under the Historic District Act.

**Appellant's Rebuttal:**

The Appellant's Attorney, Paul Revere, III, reaffirmed his position that a separate Certificate for Demolition or Removal was necessary for a proper approval of the two proposed breaks in the wall.

He claimed that the matter needed to be remanded back to the local town committee to allow the review to go through the hearing procedure. He stated that the application needs a new public hearing before the local town committee with proper public notice and the town committee needs to make findings on a separate Certificate for Demolition or Removal application.

**Discussion:**

The members of the Commission reviewed the Minutes, plans, photographs and other items submitted for review during the hearing.

Chairman Robinson began by stating that he does not see the proposed alteration as a demolition or removal. He indicated that in his Town of Brewster openings in stonewalls have been approved with out requiring a Certificate for Demolition or Removal on a regular basis. He stated that driveways and entrances need to be relocated for good logical reasons and permissions are granted on a request for a Certificate of Appropriateness. He indicated that well over fifty (50%) of the applications for Certificate of Appropriateness involve some kind of change or alteration to an existing building and/or structure. He invited comment from the other Commissioners

Peter Lomenzo expressed his appreciation for the opportunity given by the parties to review the issues raised by the appeal. He complimented the attorneys on the quality of the presentations to the Commission that were presented during the hearing. He stated that he visited the site. He cautioned against limiting the review process to one feature or isolating the permitting process to one aspect of a project. The determination of appropriateness gives the Committee an opportunity to consider many factors and to better judge an application like the one under review. It is important to understand the

setting and design of the proposed dwellings. Additionally, he pointed out that stonewalls were movable monuments that changed or were altered to reflect the needs of the owners. He suggested that changes the location of entrances and exits for the keeping of live stock were common.

Deborah Gray indicated that she believed that a Certificate of Demolition or Removal was needed and that she agreed with Appellants that the wall is a "structure" and that the town committee should have required a Certificate for Demolition or Removal. She expressed the opinion that the Historic District Act is clear that SECTION 6 requires a Certificate for the removal of any portion of a structure. She stated that she interprets the openings to be a removal of a part of a structure and therefore a separate application and hearing ought to have taken place.

Mr. Marinaccio stated that he viewed the openings to be a "modification" to the wall that was not a "demolition or removal." He expressed the opinion that the wall would remain and the stones were not going to be removed from the site. He indicated that he agreed with Applicant and believed that the town committee did not make an error in its review of the application with out requiring a Certificate for Demolition or Removal.

Mrs. Gray stated that when an applicant seeks to replace a room or a large portion of an old building, her committee requires a Certificate for Demolition or Removal and that the proposed changes to the wall appear to be very similar to that kind of activity.

Mr. Robinson stated that he agreed with the use of a separate Certificate for Demolition or Removal in major projects. He suggested that if the project involves replacing a wing on a house or a major replacement, that two certificates should be required.

Mrs. Gray reiterated that in her opinion the openings in the wall is a big enough issue that warranted requiring a Certificate for Demolition or Removal. She supported the Appellants' request for a remand so that the matter would be reviewed in a separate procedure. She acknowledged that the town committee would probably grant the Certificate for Demolition or Removal, but that it was important that a separate procedure be followed.

Mr. Lomenzo stated that he felt that the local committee properly used their judgment to determine if a Certificate for Demolition or Removal would be required. He expressed his opinion that he agreed with that determination. He offered a motion to deny the appeal and affirm the action of the Barnstable Town Committee, which was seconded by Mark Marinaccio.

#### **The Commission findings:**

The Commission found as follows:

That the Barnstable Town Committee was not arbitrary or capricious in granting the Certificate of Appropriateness for Lots 3 & 4.

That the Barnstable Town Committee did not act erroneously in granting the two Certificate of Appropriateness while allegations of violations of the Historic District Act were being asserted by abutters.

That the Barnstable Town Committee acted properly in not requiring a Certificate for Demolition or Removal for the two proposed openings in the stonewall.

That the Barnstable Town Committee did not exceed its authority or exercise poor judgment in granting the Certificate of Appropriateness for Lots 3 & 4.

**Determination:**

As to Appeals #2007-6 &7, the decision of the Barnstable Committee to grant the Certificate of Appropriateness is affirmed (3-1-1).

Lemenzo, Marinaccio & Robinson – Voting Affirmative: Gray – Voting Negative:  
Anderson – Voting to Abstain.

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.

  
Roy W. Robinson, Jr.  
Chairperson