

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

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TOWN OF ORLEANS  
TOWN CLERKS OFFICE

**The Community of Jesus, Inc., Appellant/Applicant**

**Vs.**

**Decision #2007-8**

**Old King's Highway Regional Historic  
District Committee For the Town of Orleans**

On Tuesday, October 2, 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 #2007-8 filed by The Community of Jesus, Inc., seeking reversal of a decision by the Orleans Historic District Committee denying a Certificate of Appropriateness covering a 100 foot Bell Tower to be located at 5 Bay View Drive, Orleans, Massachusetts.

Present were Mark Marinaccio, Sandwich; Peter Lomenzo, Dennis; Deborah Gray, Yarmouth; Roy W. Robinson, Jr., Brewster; Paul Leach, Orleans; James R. Wilson and Leslie Ann Morse, Commission Attorneys; Christopher W. Kanaga, Jeffrey S. Robbins and Joseph D. Lipchitz, Appellant/Applicant's Attorneys; and Douglas Johnston, Appellant/Applicant's Architect.

Absent was Patricia Anderson, Barnstable.

The Town Committee's decision was filed with the Town Clerk on September 7, 2007. The appeal was entered with the Commission on September 14, 2007, within the 10-day appeal period.

**Procedural Stipulation:**

At the commencement of the public hearing, it was stipulated that while the appeal petition contained five (5) issues for review; that the "constructive grant issue" set forth as the first reason for the appeal should be heard first. The Commission adopted this procedure because if the issue presented by the Appellant/Applicant were determined to be in it's favor, it would render further review of the other four (4) issues unnecessary.

**The Appellant/Applicant's Presentation:**

Jeffrey S. Robbins, Attorney for the Appellant/Applicant, addressed the Commission on behalf of his client's appeal. He stated that as a matter of law and the clear factual record in the case, the Certificate of Appropriateness has effectively been constructively granted. He cited Section 9 of the Historic District Act, which requires a Town Committee to make a determination within 45 days of the filing of an application or within such further

time as allowed in writing by the applicant, or "the committee shall be deemed to have approved the application."

He presented a copy of the original application stamped received on June 22, 2007 and a complete copy of the town public records indicating that a written extension of time had not been given by the Applicant. He stated that his client did not sign or submit a written extension of time. He asserted that the application was constructively granted on August 6, 2007. He suggested that any action taken by the Town Committee after that date is effectively a nullity and cited a range of cases to support his position on the legal issue.

He submitted as Exhibits copies of two Public Records Requests (Town Clerk & Town Committee); Complete copy of Old King's Highway File as certified per requests; Letter to Town Clerk confirming completeness of file; Copy of *Craig v. Planning Board of Haverhill* (Cited as 64 Mass.App.Ct. 677, 835 N.E.2d 270) and *Bernstein v. Town of Stockbridge Planning Board* (Cited as 2006 WL 1148147 (Mass. Land Ct.)); and Town of Brewster Waiver of Time Form.

Mr. Lomenzo asked to see a copy of the July 23 Town Committee Minutes which had been submitted with Exhibits. He read from the Minutes the following:

"After brief discussion, it was decided to continue the review to the September 6 meeting; the fourth committee member should be present; and all parties agreed to allow that a member review the information and vote."

He asked Mr. Robbins what "all parties" meant?

Mr. Robbins responded to the inquiry by suggesting that the Courts do not permit minutes to serve as a substitute for a written extension signed by the applicant. He indicated that minutes are prepared by the Town Committee and reflect the Committee's record of the events.

He pointed to possible ambiguities in the wording of the minutes and suggested that in similar situations, the Courts have ruled that the clarity of a signed written extension is required under the law.

Mr. Lomenzo inquired as to whether or not a written waiver form had been offered to the Applicant at the July 23<sup>rd</sup> Hearing. Mr. Kanaga, who had represented the applicant at the July 23<sup>rd</sup> hearing, indicated that a waiver form was not presented to the Applicant.

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

Paul Leach addressed the Commission on behalf of the Orleans Town Committee. He stated that he was new to the job of being chairman of the Town Committee and that the Minutes tell the whole story. He confirmed that a written extension of time had not been filed with the Town Committee.

**Public Comment:**

Mr. Robinson asked for public comment and none was offered.

**Discussion:**

The members of the Commission reviewed the material submitted for review.

Mr. Lomenzo stated that it appears that the Town Committee did not adhere to the rules. It appears that a vote was not taken within the required time period and that Committee cannot put up much of a defense for what happened. They were not being malicious. They were not trying to mess up, but they were not following proper procedure. I do not see any way around upholding the appeal and nullifying the decision and granting the Certificate of Appropriateness just in this area of the technicality. I support the Appellant/Applicant and would vote to nullify the denial and issue them the Certificate.

Mr. Robinson stated that he agreed. Every committee has got the responsibility to get the extension in writing.

Mr. Marinaccio stated that he had nothing more to add to what had been stated.

Deborah Gray began by stating that the Town Committee did not act within the time allowed by Section 9 of the Historic District Act. Mr. Robbins has clearly presented the case for the Appellant/Applicant. I will offer a motion to nullify the decision of the Town Committee and issue the Certificate of Appropriateness.

**The Commission findings:**

The Commission found as follows:

The Applicant submitted its application to the Town Committee on June 22, 2007.

The Town Committee held a public hearing on the application on July 23, 2007.

The Town Committee continued the hearing until September 6, 2007.

The Applicant did not sign a written extension allowing the Town Committee to exceed the 45 - day time period.

The failure of the Town Committee to timely act on the application caused it to be constructively approved on August 6, 2007.

The denial of the application on September 6, 2007 was an error.

The Commission should issue a Certificate of Appropriateness for the proposed 100 foot Bell Tower.

**Determination:**

As to Appeal #2007-8, the decision of the Orleans Town Committee denying the application is annulled and a Certificate of Appropriateness is issued approving the proposed 100 - foot Bell Tower as requested in the application submitted to the Orleans Town Committee on June 22, 2007. (4-0-1)

Said Certificate of Appropriateness is restricted to the plans and specifications submitted with the application and placed on file with the Orleans Town Committee.

Said project shall continue to be subject to all the provisions of the Historic District Act and this Certificate of Appropriateness shall expire one year from the date of filing this decision with the Orleans Town Clerk unless a building permit has been issued or the Certificate has been renewed by the Orleans Town Committee under the provisions of Section 6 of the Act.

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 Orleans Town Clerk.

October 18, 2007

  
Roy W. Robinson, Jr., Chairperson