THE MARTHA'S VINEYARD COMMISSION

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Minutes of the Regular Meeting of September 18, 2003

Held in the Olde Stone Building,

33 New York Avenue, Oak Bluffs, MA

IN ATTENDANCE

Commissioners: James A. Athearn, Chairman (Elected – Edgartown), John Best (Elected – Tisbury), Christina Brown (Elected – Edgartown), Linda DeWitt (Appointed – Edgartown), Jane A. Greene (Appointed – Chilmark), Tristan Israel (Appointed – Tisbury), Katherine Newman (Appointed – Aquinnah), Megan Ottens-Sargent (Elected – Aquinnah), Bob Schwartz (Appointed – West Tisbury), Doug Sederholm (Elected – Chilmark); Linda Sibley, (Elected – West Tisbury), Paul Strauss (Appointed – County), Richard Toole (Elected – Oak Bluffs), Andrew Woodruff (Elected – West Tisbury)

Staff: Mark London (Executive Director), Jennifer Rand (DRI Coordinator), David Wessling (Transportation Planner), Christine Flynn, (Affordable Housing; Economic Development), Bill Veno, (Comprehensive Planner; Trails & Byways)

1. CK ASSOCIATES (DRI No 555) – ALLEGATIONS

Commissioners present: J. Athearn, J. Best, C. Brown, L. DeWitt, J. Greene, T. Israel, K. Newman, M. Ottens-Sargent, R. Schwartz, D. Sederholm, L. Sibley, P. Strauss, R. Toole, A. Woodruff.

There being a quorum present, Jim Athearn, Chair, opened the Meeting at 7:40 p.m.

Jim Athearn noted that there would be no discussion of the merits of the proposal, only a discussion of the various allegations against commissioners. He passed the gavel to commission counsel Eric Wodlinger to run this part of the meeting.

Eric Wodlinger introduced himself; he is from Choate, Hall & Stewart in Boston, and has been commission counsel for twenty years or so. Allegations have been made which could affect the integrity of the commission's processes, and the commission takes those allegations seriously.

For conflict of interest, there is a statutory mechanism to deal with such allegations; any commissioner who has a question about conflict of interest is entitled to an opinion from commission counsel, in confidence. The statute, Chapter 268A, is designed to prevent someone with a financial interest from voting on the matter.

- The issue has come up about commissioners who are members but not board members of the Vineyard Conservation Society. The State Ethics Commission has ruled on this question before; members who pay annual dues to the Vineyard Conservation Society, but do not serve on the board of directors, do not have a conflict of interest. He has cleared those commissioners to participate in this matter.
- An allegation has been made about a commissioner whose wife is a board member of the Vineyard Conservation Society. He has reviewed the provisions of Chapter 268A Section 19, and has spoken with the chief counsel of the state Ethics Commission, who confirmed that the person himself or herself must be a member of the board; it does not apply to members of the immediate family.

Another allegation comes under the heading of bias and prejudice. An applicant is entitled to a fair and impartial hearing. This does not come up often but there was a recent case in Winchester that a member of the ZBA had been so vitally interested in a project as a Selectmen, that he could not sit impartially as a member of the zoning board; the decision was overturned by the Court.

In this case, commissioner Linda Sibley is alleged to be biased or prejudiced against potential residents of the proposed affordable housing project. The right to a fair and impartial hearing are guaranteed by due process. The integrity of the commission's processes is of interest to the commission. There is no statutory provision to deal with this but he proposed dealing with the allegations within the framework of dealing with the analogous situation of judges accused of bias and prejudice. It is a two-step process. First, there is a subjective process: the judge or commissioner must examine his or her conscience and determine whether or not he or she harbors any bias or prejudice against a party or applicant. Then there is an objective process wherein the other commissioners will examine the allegations and the response made by Ms. Sibley. Then the commissioners decide whether they believe that Ms. Sibley is biased or whether she can give the applicant a fair and impartial hearing.

This is not the thin edge of the wedge; that anyone can cry "bias" with respect to any commissioner. Case law is clear that "shopping" for a judge is to be discouraged. A judge can resist a challenge to his impartiality if it is tenuous, baseless, or frivolous. It should not be allowed to let an applicant to choose among the commissioners, to eliminate those who he thinks would not be favorable to his project.

Mr. Lafferty has alleged that Ms. Sibley may be biased or prejudiced against potential residents of the proposed housing project. Mark London has made several requests to Brian Lafferty to supply information. Mr. Lafferty has provided two video clips, apparently one from a commission hearing and one from an LUPC meeting, from the Commission's consideration of the Down Island Golf Club project, in which Ms. Sibley was apparently discussing the potential for fly-in, fly-out golfing, in the context of the proposed golf club. Eric Wodlinger proceeded to quote Ms. Sibley from one of the video clips, "…according to testimony, you could have corporate memberships; you could have my mythical golf fanatic from Tokyo…" and from the other clip, "…the Island and not my mythical golf player from Japan…"

He has examined the minutes and transcripts from the commission meeting on May 11, 2000. He read Ms. Sibley's statements from the transcript: "*Yeah, thank you, first of all I have to say I could only understand about three out of every five words that you said so, um, you may [inaudible]. In terms of your equity members, regular full paid members, do you actually have a requirement that they have some sort of um, um existing, preexisting tie to the island or could*

a 'golf nut' from Tokyo um, join if there was space?" At an LUPC meeting on June 12, 2000, the transcript quoted Ms. Sibley as follows *"well, it was proposed, fine, I go back to what I said about when you're weighing benefits and detriments presumably we want the benefits to accrue, um, to the island and not to my, my mythical golf player from Japan, so it would certainly affect, in my mind it affects the benefits and detriments of the project."* That is the documentary evidence with respect to the statements about Japan and golf fanatics. We have not located minutes or transcript or videotape with respect to Ms. Sibley's reference to Michael Jordan flying in and out of Nantucket on a couple of occasions in the same day to play golf. Although the exact text of the statements is not available, Ms. Sibley agrees that she did make a comment about Mr. Jordan in the context of flying in and out of Nantucket twice on the same day to play golf. Mr. Lafferty has been allowed to review all the materials, as has Ms. Sibley.

Eric Wodlinger then asked Linda Sibley whether she was able to give the applicant a fair and impartial hearing or whether she would entertain some bias or prejudice that would prevent her from doing so. He said that she had provided a written response to the allegations, dated September 18, 2003. This statement was distributed to the Commissioners and the public, and the meeting paused to allow time to read it. The statement read:

> *"I have been asked to make a formal reply to the accusations of bigotry and bias made against me. These accusations are based on misquotes and quotes taken out of context, so it will be necessary to explain the context. During the first round of hearings on the proposed Down Island Golf Club (DIGC), the applicant's representative testified that the club would not require preexisting ties to Martha's Vineyard as a qualification for membership. This raised two serious concerns in my mind, based on a Boston Globe article that I had read concerning the Nantucket Golf Club. This article stated, "About 40 percent of the club's 303 members don't even have a home on the island where they can hang their hat. They just fly in on their private jets, play golf, and fly out again. It's causing quite a bit of additional traffic,' said Fred Jaeger, manager of the Nantucket airport..." I felt strongly that in weighing the benefits and detriments of the project, as required by chapter 831, the commission should credit only benefits that accrued to the community of Martha's Vineyard. The Nantucket situation strongly suggested that, absent a requirement of Island seasonal or year-round residency, many members of the new club could come from off-Island and spend no time here contributing to the community at large. It also suggested that this off-Island membership could result in a substantial increase in private jet traffic and its associated noise and air pollution. I felt that the MVC should consider this possible negative consequence of the new golf course. In discussing these concerns I used two examples: Japanese golfers and Michael Jordan. My use of Japanese golfers as a symbol of potential off-Island membership resulted from a television feature that I had seen on the popularity of golf in Japan and its importance in the Japanese business community. It described significant Japanese participation global golf tourism. It seemed to me that my hypothetical Japanese golfer, coming as he did from the other side of the world, was an appropriate symbol of potential off-Island membership. My use of the words "hypothetical" and "mythical" was intended to emphasize the symbolic nature of the example. The Michael Jordan example was not symbolic, but real. The enclosed article from the Boston Globe written during the Ryder Cup reports: "Jordan spent most of his day on a golf course, but he wasn't on the Massachusetts mainland. For the second straight day, he teed it up with friends at the toney Nantucket Golf Club.. ..Jordan was accompanied on the course*

yesterday by ...(others)... and the group returned to Balsbaugh's home in Brookline last night.. .Jordan and Balsbaugh commuted back and forth between Boston and Nantucket on Jordan's jet." This represented a specific example of the private jet, fly-by golf reported in the previously mentioned article. My choice of these examples was in no way based on race. If I had seen a television feature on Swiss golfers or read about Bobby Orr flying to Nantucket twice in 48 hours, I would have used those examples. Nor did I make derogatory remarks about my chosen examples. What I objected to was the fly-by golf activity not the people actually or potentially engaging in it. As for my specific language, I referred to "businessmen" from Tokyo not "little" men from Tokyo. Furthermore, Mr. Lafferty's accusations, delivered at a recent LUPC, that I used the word "little" coupled with a racial slur is ridiculous. Having lived in Japan for over a year, I am particularly offended by anti-Japanese bias, and I have never in my life used a racial or ethnic slur against the Japanese or any other group of people. I am also attaching examples of the phrases "golf nut" and "golf fanatic" to illustrate the widespread use of these sports colloquialisms. As you can see from the examples, these phrases are affectionate synonyms for "golf enthusiast" and in no way derogatory. I do not harbor prejudices with regard to Japanese people as a group, Michael Jordan as an individual, or any other group or individual. My parents were deeply committed to racial equality and racial justice. They taught me that there is only one race, the human race. Anyone who knows me knows that I have lived according to that core belief for over half a century. As for Mr. Lafferty's allegation that I have made derogatory remarks about people of lower socio-economic status than myself, he has provided so little detail that it is difficult to make an effective rebuttal. He stated that these remarks were made in connection to Coney Island. I have, on several occasions, discussed the environmental and economic collapse of Coney Island as a cautionary tale about over-development of a resort community. I did not make derogatory remarks about any group of people. Nor do I have biased views of possible candidates for the affordable housing component of this project as Mr. Lafferty has alleged. On the contrary, I am a committed supporter of affordable housing for all members of our community. It is impossible to prove that one is not a bigot. I have explained my remarks from the first DIGC hearings previously in a letter to the editor, and I do not believe that there is any benefit in explaining myself repeatedly. At some point, people will have to believe in me or not. But I recognize the importance of the Martha's Vineyard Commission addressing these serious allegations. I am therefore, submitting this statement for consideration by my fellow commissioners."

Eric Wodlinger asked Ms. Sibley whether, in examining her own conscience, she believes that she can review the DRI project proposed by C.K. Associates fairly and impartially, free from any bias or prejudice against any potential residents of the proposed affordable housing project, or whether she wished to recuse herself.

Linda Sibley responded, *"I feel totally confident that I have no bias or prejudice with regard to the potential residents of the proposed C.K. Associates housing development, which would interfere with my ability to hear and judge the proposal in a fair and unbiased manner. Therefore, I do not choose to recuse myself."*

Eric Wodlinger said that it now falls to the Commission to exercise the objective task. Clearly, Ms. Sibley cannot be the sole judge. The commissioners must safeguard the integrity and the

fairness of the commission's processes, and assure the applicant, and any applicant for a DRI permit who appears before the commission, that they will receive a fair and impartial hearing.

He asked the Commissioners, other than Ms Sibley, whether, on the basis of the evidence brought forward, based on Ms. Sibley's response, and based on any recollections by those present at the time of the statements, whether or not they believe that she should be recused. The commissioners are the sole judges. Commissioners are not expected to be a blank slate without opinions of their own. They are entitled to believe that there should be more or less development on Martha's Vineyard, that the traffic situation is wonderful or needs improvement. The question is whether Ms. Sibley can fairly and impartially consider the project based on the evidence presented during the course of the hearing, or whether she is disabled by bias and prejudice from giving the application a fair hearing.

He asked for a motion as to whether the commission should require Ms. Sibley's recusal.

Christina Brown moved and it was duly seconded, that, based on review of the allegations and material provided by Mr. Lafferty, based on review of the commission transcripts, based on Ms. Sibley's response statement, based on her own recollections of the meetings and the context of the statements, that the MVC find that member Linda Sibley has no bias or prejudice which would affect her sitting on the C.K. A. application, and that we find that she can act fairly and impartially."

- **Jim Athearn** said that he was not present at the meetings, but that the statements seem entirely appropriate in the context of fly-in golfers; she has always been fair and impartial, and ready to listen to other opinions.
- **Richard Toole** said that he was at those meetings and believes that this was taken out of context and used to discredit Linda. The comments were made in the context of fly-in traffic. No one does her homework, and takes her job more seriously than Linda. For her to be accused of being a bigot is laughable. She can act in a fair and impartial manner.
- **Paul Strauss** said that he has been a member of the Oak Bluffs Conservation Commission for the last twelve years and there have been similar strained situations. What that commission has to do is address the issues related to a project. That is what Linda has done. She was not talking about the individuals; she was talking about fly-ins and the need for a residency requirement for membership in the proposed golf club. She is as objective as anyone can be.
- **Doug Sederholm** said he was not on the commission during the Down Island proposal. But he has spent his whole adult life as a trial attorney; which requires him to evaluate evidence on a daily basis. He has reviewed all the material and found that Mr. Lafferty's allegations are utterly without merit; this is not even a close call; the comments were taken out of context to support the allegations of bigotry, which are merit-less.
- **John Best** said that he was at the hearings, often sitting close to Linda. Nothing she had said caught him off-guard as being indiscreet. Everyone on a board brings personal feelings to an issue but we use intellect and judgment rather than those feelings about an individual or project in making a decision. She has the intellect and judgment to overcome any bias about a project, and to make a fair decision.
- **Megan Ottens-Sargent** said that what Linda did in this case was a lot of outside research. She is frustrated that someone who has devoted the time and energy that Linda has should have to go through what she has gone through.

Mr. Wodlinger asked to move the question. He called for a vote by show of hands. ***The motion was carried unanimously. In favor: 13 Opposed: 0 Abstentions: 0*** *(Ms. Sibley had not been asked to vote.)*

Eric Wodlinger next turned to Mr. Lafferty's allegation that a brief had been prepared on behalf of the commission as an amicus brief to a suit against the Town of Dennis, at a cost of $10,000. He explained that his firm did prepare a draft brief; the bill was about $2,200. The reason it was not finalized or filed is because they determined that the situation in Dennis bore no real resemblance to the position of the commission; whatever decision was reached in the Dennis case would have no affect on the commission.

Jim Athearn addressed a statement made at a previous public hearing by Mr. Lafferty that suggested he might have a conflict of interest because Mr. Lafferty had heard a rumor that Mr. Athearn might have done some work for Vineyard Acres II. He stated for the record: *"I have not done any work, paid or unpaid, for an entity called Vineyard Acres II, nor for the golf course that took over the land on the West Tisbury Rd. in Edgartown that once went by that name. I will disclose, however, that in May of 2000, being aware of a large fiberglass tank damaged by bullet holes, which had been sitting in the unbuilt subdivision which was to become the new Edgartown golf course, I asked Tom Wallace if they had any use for the tank and, if not, may I have it. After checking with others, Mr. Wallace said I could take the tank. My son and I loaded it onto a trailer, took it home, and cut it in half with a chainsaw, making a slick little Quonset hut type of house for my six pigs. We call it the Pigloo. No money changed hands and I figure that our labor in removing the tank was a fair exchange for its salvage value. At the time of this transaction I was not yet a member of the MV Commission nor was I yet a candidate for the position."*

Eric Wodlinger said that he was satisfied that the issue with Mr. Athearn did not involve any financial interest; in addition, any possible relevance would have been to the Down Island Golf Club, not to the present proposal. On both grounds, he found that there is no violation of the conflict of interest law.

Eric Wodlinger next addressed Mr. Lafferty's allegation that commissioner **Tristan Israel** had some financial interest in this project due to his son being a Wamponoag Tribe member. Mr. Lafferty had been asked to provide a contract, or letter of intent, or any other document to show that the Wampanoag tribe had a financial interest in this housing project. He has not provided any documentation, so Mr. Wodlinger has ruled that Mr. Israel has nothing to answer for, and there is no conflict of interest.

Eric Wodlinger addressed the final allegation by Mr. Lafferty, which pertained to the Public Records Law. In addition to the litigation and associated discovery, Mr. Lafferty had filed a Freedom of Information Act request for all documents exchanged between the commission and its attorneys. The Commission has declined to produce those documents, citing attorney-client privilege. The Secretary of State, Supervisor of Public Records, takes the position that public entities do not enjoy attorney-client privilege. The Attorney General takes the position that they do. The Secretary of State cannot appear in Court except through the Attorney General. Consequently, no Court has ordered that any public body produce its attorney-client communications. MVC counsel has informed Mr. Lafferty that they will preserve attorney-client privilege. They have also declined to produce communication to or from the state ethics commission dealing with a specific commissioner. The statute preserves the confidentiality of

those communications, only allowing the individual to waive confidentiality. They have, therefore, declined to produce those documents, regarding the Down Island Golf Club proposal.

Eric Wodlinger returned the proceedings to the chairman.

Tristan Israel suggested that Eric Wodlinger be invited to come back and make a more general review of protocols, as he had done in previous years.

Andrew Woodruff commented that after a year or more of nasty allegations, it is long overdue that the Commission deal with these allegations and he is glad that this has finally taken place.

The time was 8:16 p.m.

2. MEMBERSHIP ON SUB-COMMITTEES

It was agreed that the following will be members of various sub-committees:

- For the Cape and Islands Commissions coordination, the committee will be Megan Ottens-Sargent and Mark London, with Tristan Israel as an alternate.
- For the Personnel Committee, to deal with updating the personnel policy, the committee will be Jane A. Greene, John Best, and Christina Brown. Alan Schweikert and Deborah Moore will also be contacted.
- For the LUPC landscaping sub-committee, to deal with preparing guidelines, specific details on proposals and post-approvals: Linda Sibley, Jim Athearn, and Andrew Woodruff.

There was a discussion of possible Commission and/or public meetings to discuss various planning issues.

- **Jim Athearn** said that, as we proceed with planning, there would be committees made up of Commissioners and non-Commissioners to deal with various planning issues.
- **Katherine Newman** asked whether there could be forums on different topics that we could discuss as groups, as a precursor to setting up a committee. She would be willing to organize it.
- **Christina Brown** said that the committees could start to talk informally about these topics. **Mark London** said this would be very useful and complementary to the work on the Community Development Planning process now underway.
- **Tristan Israel** said that he was at a GIS meeting where it was discussed that the Commission could play a role in regional GIS. We should identify priority topics.
- **Linda Sibley** noted that at a PED meeting, we had representatives of affordable housing groups and she thought the commission could play a role in bringing these groups together.
- **Christina Brown** said that, at a meeting a year ago with various affordable housing groups, it was seen as useful to see what each group is doing and what the MVC could do for them. She suggested a full commission meeting at which this could take place.
- **Tristan Israel** said this would be good but there also should be more general meetings on topics; we need to identify priorities.
- **Jim Athearn** suggested that PED should be asked to come up with a proposal.
- **Katherine Newman** suggested that a brainstorming meeting be held. She invited interested commissioners to contact her.
- **Mark London** said that it would be good to have public meetings on specific topics, perhaps with public speakers.

- **Christina Brown** said that every commissioner should read the Island Plan, not just the first volume, but all six volumes. It is a wealth of information about ideas, actions and groups that are actively working.
- **Paul Strauss** said that this is what PED is trying to do and we should address it an upcoming PED meeting rather than start all over tonight.
- **Richard Toole** invited everyone to come to the next PED meeting.
- **Linda Sibley** said that for PED to develop forward momentum, we need people interested in particular topics. We need planning subcommittees so instead of five people once a month, we need people to meet more regularly for a period of time.

Paul Strauss left the meeting at 8:46

3. TOMS NECK FARM (DRI No 483-M)

Commissioners present: J. Athearn, J. Best, C. Brown, L. DeWitt, J. Greene, T. Israel, K. Newman, M. Ottens-Sargent, R. Schwartz, D. Sederholm, L. Sibley, R. Toole, A. Woodruff.

Christina Brown reported from the previous LUPC meeting. The MVC approved a subdivision for Farm Neck Farm in 1999 with a provision that there be an historic structures report on the farmhouse and a requirement that any alterations to it be approved by the Edgartown Historic District Commission. The owner requests the condition involving the historic commission be removed because there will now be a covenant that says that there cannot be any change to the house without approval by the homeowners' association and that these changes must preserve and be consistent with the character of the house. The Edgartown Historic District Commission has written to the Commission its agreement with the proposed change. LUPC recommended that the proposed change is minor, does not require a public hearing and should be made; that it accept the proposed covenants as a means to protect the structure.

Doug Sederholm asked how to ensure that the covenant is in fact adopted and recorded. **Christina Brown** replied that the Edgartown Planning Board would not endorse the plan until it receives a number of documents and, at that time, it will ensure that it is immediately recorded.

Tristan Israel is concerned about leaving this to a homeowners association.

Jim Athearn read the letter from the Historic District Commission (see file).

Linda Sibley said the reason for being comfortable about letting this go is that, although it is a wonderful house, she thinks that if there are covenants to protect this house, she doesn't think there is a need for the MVC to intervene.

Megan Ottens-Sargent said that there should be an opportunity to discuss this with the Historic District Commission

Tristan Israel wanted it clarified as to whether there is long-term protection of the building.

Ann Floyd said that the Commission has a copy of the covenant that protects the views of the property from Dyke Road. She would like to rebuild the barns that were demolished. There cannot be any changes to the public views, including details such as the height and pitch of the roof. It is not an historic building, but it is a traditional building.

Jane A. Greene moved and it was duly seconded that the proposed removal of condition A.1.d was not significant and therefore does not require holding a Public Hearing. Voice vote: in favor 13. Opposed: 0. Abstentions: 0.

Jane A. Greene moved and it was duly seconded that condition A.1.d be removed, with the understanding that a covenant protecting the house would be written into the homeowners association's covenants. Roll call vote. In favor: J. Athearn, J. Best, C. Brown, L. DeWitt, J. Greene, T. Israel, K. Newman, M. Ottens-Sargent, R. Schwartz, D. Sederholm, L. Sibley, R. Toole, A. Woodruff. Opposed: none. Abstentions: none.

The time was 9:03 p.m.

4. LUPC Report

Upcoming LUPC meetings:

- Monday, September 29 – LUPC MV Electrical and CK Associates.
- (if needed) Wednesday, October 5 at 5:30 p.m. – CK Associates

Christina Brown asked members to review their notes on CK Associates and fill in the grid sheets in order to structure the discussion.

Christina Brown noted that LUPC had approved a minor change to the proposed landscaping around the Fialkow house on Plum Bush Point that slightly changed the location of a stone wall, resulting in less paved surface area.

Christina Brown noted that Mr. Houlihan has asked for modification to a landscaping condition of DRI # 450M-3. It will be discussed at a LUPC meeting in November.

John Best left the meeting at 9:11 p.m.

5. MINUTES OF PREVIOUS MEETING

Tristan Israel moved and it was duly seconded to approve the minutes of July 24.

- Page 7 line 3 should read "there is no reason for the MVC to take a position"

Voice vote: In favor: 12. Opposed: 0. Abstentions: 0. The motion carried.

Tristan Israel moved and it was duly seconded to approve the minutes of August 14.

- Page 10 line 20 should read "Bob Schwartz said …."

Voice vote: In favor: 10. Opposed: 0. Abstentions: 2. The motion carried.

Tristan Israel moved and it was duly seconded to approve the minutes of September 4.

- Page 7 line 13 should read "The resident population shall be maintained at a level that will yield a sewage flow that produces a nitrogen concentration within the groundwater that meets the Southern woodlands DCPC requirement of less than 3.0 milligrams per liter"

Voice vote: In favor: 11. Opposed: 0. Abstentions: 1. The motion carried.

The Meeting was adjourned at 9:25 p.m.

_____ _____

Chairman Date

_____ _____

Clerk-Treasurer Date