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## Martha's Vineyard Commission Land Use Planning Committee

### Notes of the Meeting of May 23, 2011

Held in the Stone Building, New York Avenue, Oak Bluffs. 5:30 p.m.

*MVC Commissioners Present: Doug Sederholm (Chairman of LUPC); Fred Hancock; Bill Bennett; John Breckenridge; Ned Orleans; Camille Rose; Christina Brown; Linda Sibley; Lenny Jason; Pete Cabana; Brian Smith; and Holly Stephenson.*

*MVC Staff Present: Paul Foley, Bill Veno, Mark London, Bill Wilcox*

#### Documents referred to during the meeting

- MVC Staff Report May 23, 2011
- Letters from 16 citizens and 1 neighborhood association.
- Referral letter from the Oak Bluffs Selectmen
- Letter from Kevin O'Flaherty of Goulston & Storrs representing the Goodale's.

#### **1. Goodale Pit Expansion (C.R.-3) Concurrence Review**

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**Applicant:** Jerry and Peter Goodale; Goodale Construction Company.

**Project Location:** 164 Edgartown-Vineyard Haven Road, Oak Bluffs, MA Map 51 Lot 2 (100.2 acres).

**Proposal:** During the course of the continued mining of the approximately 70-year old sand and gravel pit owned by the Goodale Construction Company, the most recent clearing of land (approximately 8-acres) occurred in an area identified as Priority Habitat of Rare Species by the Massachusetts Natural Heritage and Endangered Species Program (NHESP). The owners seek to continue their operations. Neighbors are asking for review of the operation of the mining as well as the concrete and asphalt processing and recycling operations with concerns for the groundwater, air emissions and habitat.

**Referral:** The Oak Bluffs Board of Selectmen referred the Applicant's operation as a discretionary DRI referral under sections 1.6 (Clearing or topographical alteration of land identified as being significant habitat) and 3.1g (Increase in Intensity of Use), both of which require concurrence of the Commission to be heard as a DRI.

#### **Presentation:**

- Doug Sederholm read the referral letter from the Oak Bluffs Board of Selectmen and explained that this is a Concurrence Review and not a public hearing per se. He then asked the lawyer representing the Applicant to present his case.
- Kevin O'Flaherty said he hoped the Commissioners had a chance to read the letter he had submitted. The Goodale Pit has been in existence for at least 50 years. What they are doing now is no different from what they have been doing over these fifty years. It predates zoning so it is a pre-existing non-conforming use. The clearing is adjunct to the operation of the business and is not an expansion beyond the Applicant's property lines as they existed before zoning. He questions the premise of the referral. He believes the project needs no local permits, therefore the local board has no basis on which to refer the project to the MVC. The MVC enabling legislation (Chapter 831) requires the

process to begin when a development permit is filed. In this case there is no development permit from the local boards.

- Doug Sederholm said he understood the argument but does not agree. He noted that a “Discretionary Referral” does not require a development permit.
- Kevin O’Flaherty said that the “Discretionary Referral” does not appear in Chapter 831. The DRI regulations do talk about it but not the enabling legislation. He questions whether the Discretionary Referral is valid under the Chapter 831 Act. He believes the Chapter 831 Act does not give the MVC the authority to go into a situation where a development permit is not required.
- [Staff note: Chapter 831 does authorize Discretionary Referrals in section 14e.]
- Doug Sederholm stated that the legal arguments can be sorted out by MVC counsel. The purpose of tonight’s meeting is to examine the factual issues, not the legal issues.
- Kevin O’Flaherty said the periodic clearing of trees has been a part of the ongoing operation of the pit for the last fifty years. He compared it to a farmer who lets a field go fallow every couple of years. The intensity of activity at the facility varies over time. Goodale’s is excavating less today than in the early 1990s. He argued that it is not an expansion.
- Bill Bennett noted that the two triggers that the Town sent the project under are already being dealt with. DRI Checklist Trigger 1.6 (Clearing or topographical alteration of land identified as being significant habitat) is being dealt with by the Massachusetts Natural Heritage and Endangered Species Program (NHESP). For Trigger 3.1g (Increase in Intensity of Use) he said it does not seem to him that there is any increase in intensity of use.
- Mike Shabazian, a neighbor to the pit, questioned Mr. O’Flaherty’s assertion that the intensity had been reduced. He said that if you measure the activity since the 1990’s there has actually been a 30% increase in intensity.

### **Water Resources:**

- Bill Wilcox said that there are not a whole lot of facts yet about the whole operation.
  - There seem to be three areas that could have an impact:
    - The mixing and processing of the mining could be a dust generator.
    - The cement plant uses certain chemicals to accelerate drying and prevent corrosion. He thinks these materials are largely benign. There could be an issue if it reached the groundwater but it seems to be contained. They include some water soluble salts.
    - The asphalt plant uses oil and fuel oil and could be a source of release of polycyclic-aromatics. Any loss of fuel could get into the groundwater.
  - One other area where there is not enough information but could be a concern is underground storage tanks: whether any exist, their type, their condition.
  - The new fuel tank is double walled. No information has been provided about the tanks for the asphalt. There appear to be some older tanks as well.
  - The asphalt tar would probably not get into the groundwater, but there is a RAP pile on site that might be a concern.
- Doug Sederholm asked where the groundwater level is.
- Bill Wilcox said that there is an area where they appear to have reached down to the groundwater level. The Town supposedly adopted a Zoning Overlay for the Zone 2 Area of Contribution (he was unable to find it on the Oak Bluffs website) that says that no excavation should occur within four feet of the groundwater level.
- Christina Brown said that in addition to the Town Board of Health there are also state and federal requirements. What type of monitoring is there?

- Kevin O’Flaherty said that at the federal level the Mining Safety and Health Administration (MSHA) have annual reporting requirements.
- Peter Goodale said that the MSHA is for safety and dust issues.
- Kevin O’Flaherty noted that the asphalt plant is a tenant’s business.

**Discussion:**

- Linda Sibley asked what the concerns are. The Oak Bluffs Selectmen asked us to look at it but did not specify what their concerns were.
- Lenny Jason said we should focus on the regional impact if there is one. He compared the operation of the pit to a restaurant in a residential district that is now serving more dinners.
- Fred Hancock said he was at the OB Selectmen meeting and that they were responding to the neighbors’ concerns. The Town has nothing in their zoning to deal with the pit and is asking for the Commission’s help in dealing with it.
- Mark London said that the question of whether or not the use is an expansion of a pre-existing non-conforming use is debatable. It could also be argued that although the use has not changed, the pit is getting bigger and is expanding into an area which is now natural vegetation. They are now mining where they previously had not mined and apparently plan to excavate the rest of the property, which could be considered an expansion of the area of the non-conforming use. He suggested that this is a legal issue and that Commissioners keep an open mind until we’ve had a chance to consult with Commission Counsel.
- Camille Rose said that the OB Selectmen in their letter said that there was a fear that the Goodale’s were contemplating expansion. She said that she didn’t think we looked at things that were just being contemplated.
- Jo Maxwell, a neighbor, said that the expansion went so quickly. Neighbors asked some questions and then suddenly there was a fence, a new road, more trees cut. They asked who is monitoring it and no one had an answer. The neighbors just want to know that someone is monitoring it. Everyone is passing the ball. The neighbors have yet to see that the operation has any permits. Anyone else would need a permit to put a shed in their yard and yet the Town is saying that the Applicant can do whatever it wants in there and they don’t need a permit.
- Doug Sederholm asked if there was any study or evidence regarding lead in the groundwater. Bill Wilcox said he did not know. Paul Foley said that someone had sent him an e-mail that outlined the dangers of lead at police firing ranges. Jo Maxwell said that lead toxicity is a major problem.
- Doug Sederholm asked how long the pit has been used for target practice.
- Peter Goodale said at least 40 years.
- Kevin O’Flaherty said the Police Chief was consulted and did not see an issue.
- Mike Shabazian said he got a response from the Police Chief to an inquiry in which a police report said the risks from the target practice would only be a “freak occurrence” and that it was an “acceptable risk”. He then said if 100 rounds a week were shot over forty years that would equal one in a million or a “freak occurrence”.
- Linda Sibley said it has not been the practice of the MVC to go back and look at projects that have been ongoing for a long time.
- Holly Stephenson said that the issue of how long they have been operating is irrelevant when it comes to issues of public health and safety. There are a lot of things we don’t do anymore because of health and safety. Just because you have been doing something dangerous for forty years does not make it okay.
- Ned Orleans said he sees three issues the LUPC has to consider:

- Whether the referral is proper;
- How can the neighbors be assured of safety?
- Who is responsible to ensure that it is safe?

He added that the referral could be interpreted as a request by the Town saying that the issue is too big for the Town and they are asking for our help in mediating. He said he is not sure we are the body that should regulate the pit.

- Linda Sibley said that the gun range is another issue the neighbors have raised and asked how often the pit is used for target practice.
- Doug Sederholm asked how shooters get access and/or permission to use the pit for target practice.
- Peter Goodale said that they authorize people they know to use the pit from 1:00 pm to 4:00 on Saturdays. They have to get permission from the Goodale's.
- Linda Sibley asked if the "freak occurrence" was a threat to the neighbors or other shooters. She thinks it is probably more dangerous to have shooters in the woods than target shooting in the pit. It's high walls making it unlikely that errant bullets would escape.
- Doug Sederholm asked for more details. How often is it used for target shooting? How many shooters at a time are there? Do they show up every Saturday?
- Doug Reece, a neighbor, said that another aspect of the "intensity of use" issue was the new asphalt tower. It now spews toxic fumes over the Alpaca farm. They start it up at 4:00 a.m. The new one gives off emissions that were never noticed before. It may be leased to another operator but it is part of the Applicant's parcel and this operation should be accounted for.
- John Breckenridge asked if there any requirements for the closing the pit when the mining operations are completed.
- Mike Shabazian said that he had looked into it and in Massachusetts there is no requirement for reclamation. He added that historically in the State most pits are left as dumps.
- Kevin O'Flaherty objected saying that he was casting aspersions on his client.
- Doug Sederholm said that there are hundreds of examples across the country of pits turning into dumps but that on Martha's Vineyard that does not appear to happen. Someone pointed out that the former Grants Pit is now an upscale club and subdivision.
- Doug Sederholm summed up that there are concerns, some of which are not regional. However, some concerns appear to be regional, such as air emissions, the potential for the groundwater to be exposed to contaminants, and habitat. There may or may not have been excavation within four feet of the water table. Bill Wilcox will look into the potential for leaching into the groundwater.
- Christina Brown said that we do not want to pass the buck. It might be helpful to ask staff to do a chart on who should be regulating the various operations at the pit.
- Fred Hancock noted that if the MVC were to take a concurrence vote now based on whether or not it has a regional impact, then the question for counsel about whether the issue was properly referred and whether the Commission has jurisdiction would be moot.
- John Breckenridge noted that sometimes we have external pressures for expediting a project but in this case there is no cease and desist order hanging over the Applicant so there is no rush.
- Lenny Jason said if you can't find a regional issue, why listen any more. The only regional issue he can see is possibly air emissions.
- Holly Stephenson asked how anyone could look at this and say it's not regional. This is certainly a regional issue.
- Jo Maxwell, a neighbor, said she keeps hearing "maybe" and "might" and "we're not sure" and "we need more information". What the neighbors are looking for are answers to these questions.

- Walter, an employee at the asphalt plant, said that the asphalt tower is just storage. He said that though it is bigger, it does not give the plant added capacity.

**Recommendation:**

- **Lenny Jason made a Motion to recommend to the full Commission that the proposal does not have a regional impact and should be sent back to the Town. Bill Bennett seconded the Motion.**
  - Linda Sibley said she agrees with Holly that there is a huge impact, but doesn't think that this was what the MVC was chartered to do. The Town should have some ability to oversee the operations. If this were a blank piece of land that they were proposing to mine for sand and gravel it would be a DRI. But this has been a pit for many years.
  - Bill Bennett said he feels that the neighbors' concerns are valid but he is confident that a dialogue will take place that will resolve the issues.
  - Holly Stephenson said she does not agree with the notion that because this is an existing use that it is not covered by the MVC. They are expanding the area of the pre-existing non-conforming use. They have cut eight acres recently and plan to cut and mine another 30 acres or so of woods. Just because they have escaped any type of study or monitoring this long is no excuse to say keep going without any oversight. She reiterated that she could not see how anyone could look at this and say it does not have a regional impact.
- **Ned Orleans made an amendment to the Motion that the MVC Staff would help the Town researching and reviewing the ongoing operation of the pit, asphalt plant, and concrete production. Lenny Jason and Bill Bennett agreed to amend the Motion.**
  - Christina Brown added that certainly there are important issues that the Commission can help the Town deal with.
  - Camille Rose added that we should tell the Oak Bluffs Board of Selectmen that they can re-refer the property to the Commission if they find there has been a change of use or other activity that triggers the DRI Checklist.
  - Doug Sederholm said that if he were in business for fifty years he might not want to talk to people about how he does his business. He added that there is no doubt that Goodale's performs some essential functions for the Vineyard economy.
- **In favor: 11. Opposed: 1. Abstentions: 0. The Motion passed.**

Adjourned 7:00 p.m.