

THE MARTHA'S VINEYARD COMMISSION

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MINUTES OF MAY 18, 1989

MARTHA'S VINEYARD COMMISSION MEETING

The Martha's Vineyard Commission held a regular meeting on Thursday, May 18, 1989 at 8:00 p.m. at the Commission offices, Olde Stone Building, New York Avenue, Oak Bluffs, MA.

Mr. Filley, Vice-Chairman, opened the special meeting at 8:12 p.m. and proceeded with agenda items.

ITEM #1 - Chairman's Report

Mr. Filley welcomed Ms. Iris Davis, new Governor Designee to the Commission.

ITEM #2 - Old Business - There was none.

ITEM #3 - Minutes of May 11, 1989

Mr. Filley explained that due to a computer malfunction the minutes are in a very rough draft and should be reviewed for content, not grammatical or syntactical presentation.

It was motioned and seconded to approve the draft minutes. There was no discussion. The motion passed with no opposition, 1 abstention, Eber. (Harney was in favor, Davis abstained.)

ITEM #4 - Committee and Legislative Liaison Reports

Mr. Young, Chairman of the Land Use Planning Committee (LUPC), reported that they had met last Monday on the Aquinnah Shop DRI and come up with a pretty good recommendation. The solution was not as complex as we had thought. Concerning the M.V. Regional Refuse District's Transfer Station DRI, due to public comments regarding the proposed truck routes during the hearing and the fact that there was no news coverage of the public hearing we have decided to hold the record open for written testimony for an additional week, until May 25, 1989, to allow any members of the public who wish to comment sufficient time to do so. Mr. Young continued by stating that the Refuse District would be back to meet with LUPC on May 22nd in preparation for an additional LUPC meeting on June 5th, and that they would ask town boards Island wide to address their concerns. Also on the 22nd we will meet with the applicants for the Playhouse Theatre and Edgartown National Bank DRIs.

Mr. Filley, Co-Chairperson of the Comprehensive Planning and Advisory Committee (CPAC), reported that they had met earlier tonight and began

a preliminary review of the Task Forces' presentations. We hope to meet with the full Commission at the beginning of June and hold public forums by the 3rd week in June.

Mr. Ewing, Chairman of the Edgartown Ponds DCPC Committee, reported that they had met this evening to review an exemption, and as they hope to do with all exceptions they will make a site visit before voting on this exemption. He stated there was also discussion on the zones and appropriate uses within them.

Mr. Morgan, Legislative Liaison, reported that there was really no encouraging news, the budget situation appears to indicate there will be more cuts and more taxes. He reminded Commissioners of the upcoming public forum on June 2nd at 9:15 a.m. with Senator Rauschenbach, Representative Turkington and representatives from health and human service agencies.

Ms. Skiver, MVC Staff, reported on the All Island Space Needs Study Committee's progress, handed out a fact sheet that is being published in local newspapers, and requested input from all Commissioners and CPAC.

Discussion followed among the Commissioners about the various alternatives to alleviate the current and future space needs of the Island schools including the following: regional middle school, regional junior high, portable classrooms, additions to existing elementary schools, and future needs of the existing regional high school based on current kindergarten enrollment and projected population increases.

ITEM #5 - Possible Vote - Written Decision, Swan Neck DRI, Town of Edgartown

There was discussion regarding the following issues: Page 26, Condition 2.b., the clarity of this condition was questions with regards to the number of building envelopes and the number of structures actually allowed; the applicant's offer of the development rights, there was discussion with the applicant who stated the offer would stand regardless of whether it was conditioned or not; and the lack of conditions for deep observation well and no underground fuel tanks.

On consensus votes it was decided to make the following changes: Condition 2.b. delete the number six 6 before building envelopes and add "reflecting no more than 5 dwellings and 2 guesthouses" after; add Condition 2.d. regarding installation of a deep observation well, the wording to be written as in past decisions; and add Condition 2.e. stating no underground fuel tanks shall be allowed within the subdivision.

It was motioned and seconded to approve the written decision with the changes listed above. This motion passed on a vote of 8 in favor, 0 opposed, 5 abstentions, Eber, Evans, Filley, Scott, Young. (Davis abstained).

ITEM #6 - New Business and Correspondence

Mr. Filley reported that the Commission had received a nomination for the Oak Bluffs Harbor and two thousand feet adjacent to it as an Area of Critical Planning Concern. This nomination was made by taxpayers petition. Mr. Filley appointed the Oak Bluffs Harbor Area DCPC Committee as follows: Ms. Sibley, Mr. Evans, Ms. Eber, Ms. Scott, Mr. Early, and Mr. Ewing. Mr. Morgan also volunteered for this Committee. Ms. Borer, Executive Director, added that Tom Bales is the staff member for this DCPC and he will be speaking to you tonight about your first meeting.

There was no correspondence.

After a short recess Mr. Early, Chairman, reconvened the regular meeting at 9:10 p.m. and proceeded with agenda items.

ITEM #7 - Working Session with Donald Connors and Eric Wodlinger of Choate, Hall & Stewart.

Mr. Early introduced and welcomed Mr. Connors and Mr. Wodlinger and turned the meeting over to them.

Mr. Connors began by stating that they had held this type of working session with the Commissioners for 14-15 years and that it was always a pleasure to be involved in such a worth while process. He stated that there has been more litigation this year than he could recall since the late 1970s. Mr. Connors and Mr. Wodlinger than gave an update of the ongoing litigation, and stated that they had a written summary available for the Commissioners (this is available in its entirety in the meeting file). Mr. Wodlinger continued by stating that if any Commissioners have questions or wish to explore the cases beyond a general way that they might prefer to entertain them in executive session but Mr. Connors felt, and I concur, that the public should know that the Commission's litigation is fairly active at this time and that there is a burden on the Commission to sustain this level of litigation and that the importance of the land use decisions that we are making is leading to an increasing burden of litigation on the Commission. Fortunately our record of litigation is good to this point.

Mr. Connors recommended that they do a periodic review of the decision writing process and apply the latest learning from court cases about what ought to be in a decision and how it ought to be framed. Mr. Connors stated that we should put them in a form that is most likely to be defensible. There was discussion about the fact that the judges like to see concise statements and that perhaps the inclusion of all public hearing minutes is not the best way to achieve a concise, defensible decision.

Mr. Connors recommended there should also be a review of the statute to see if it accomplishes what it needs to accomplish on the Island.

There was discussion about the Cape Cod Commission Bill and innovations contained in that statute that this Commission might look

at such as regional policy plan provisions, development extraction or impact fees systems, and additional revenue sources. Also part of such a periodic review ought to include looking at the kinds of fringe benefits/employment benefits that your staff has and whether it is appropriate for the needs of the Commission and the needs of the staff. We would be happy to assist you and refer you to other important resources.

There was also discussion on how the Commission can help the towns in formulating development extractions within the existing legal framework. There are some traditionally accepted exaction programs that have been accepted by the courts which the Commission with its staff could help the towns institute. For instance, water and sewer hook up or connection fees developed in terms of the capital development program and growth projections. You may want to look at offering the towns some expert services or act as a catalyst to provide services which their own budgets may not be able to provide.

Mr. Connors stated that 2 years ago, when the people of Cape Cod were trying to formulate a plan for the future of the Cape, they had before them the choice of coming up with something new or looking around at other existing agencies, which we did. They said won't it be smart to pattern what we are thinking about and what we think we need for the Cape after the Martha's Vineyard Commission. Look they have been successful, they are still in operation. It was such an interesting and important decision these people made to pattern the Cape Cod Commission after the Martha's Vineyard Commission because of your success. I think it is fair for me, being deeply involved in it, to say that if it wasn't for the experience of the Vineyard Commission it is unlikely that the Cape Cod Commission Act would have gone as far as it has gone. Mr. Wodlinger related an incident where Mr. Bill Snowden, Stoney Hill Farms DRI, stated to Cape officials that he has developed on the Vineyard, I know the Commission and it's not bad. To have Mr. Snowden say that after having made fairly substantial concession from his original proposal says we must be doing something right.

Ms. Harney asked if the Cape funding is set up similar to ours? Mr. Connors explained their fee structure, a County Charter funding mechanism by land transfer tax, and stated that they will need some additional funding from the legislature. There is no assessment like we have on the Vineyard. However there is a larger, more stable source of funding than this Commission has.

Ms. Eber asked if the Commission makes a decision with a condition that is in conflict with the rules and regulations of the planning board of that town does that lead to litigation or is there a way out? Mr. Connors stated that the MVC action and decision is independent of the town action. The MVY Realty Trust case is the perfect example. There is a condition that the MVC put on there that the town didn't do therefore they can't go forward because they need approval of both levels of government. There is a possibility for conflict. Ms. Eber asked if the planning board could waive the regulation if it were in the public interest? Mr. Connors responded if it is in the public interest to waive it yes, under the Subdivision Control Law. Ms. Eber

gave the example of the Vineyard Crossing DRI and the condition for affordable housing. There was further discussion on this issue among the Commissioners and counsel.

Mr. Connors stated that the Commission does have the power to bring lawsuits to enforce your decisions or enforce the statute. I only recall one or two cases where we have brought such cases. Mr. Connors related a recent incident.

Mr. Wodlinger addressed the State Conflict of Interest Law and stated that to make this easier for everyone to deal with we have prepared a memo and checklist which he distributed and reviewed. Before you begin consideration of any DRI or DCPC you should either physically or mentally look over this checklist and see if there is any reason why you ought not to participate. Mr. Connors added that all Commissioners have the right to seek legal council's opinion and you ought to take advantage of that so you can feel comfortable and you should channel these through Ms. Borer, even without giving her the details. There was discussion about the hybrid status of the Commission and the fact that the by-laws adopt the State's standards voluntarily. There was discussion about who this law applies to, specifically in terms of voluntary workers.

Mr. Filley discussed the Cape Pogue DCPC and the possibility of having just specially permitted using and no permitted uses, he asked if that was a legal possibility? Mr. Wodlinger stated that it is a bad idea. The courts have been very unreceptive to the idea that there is nothing you can do as a right with your land. I don't think this should be encouraged, you should look at alternatives. You should have some minimum level of use. He related specific cases. Mr. Filley then asked about the West Tisbury method of excluding wetlands when calculating buildable area, is there also a possibility of creating other resource categories besides wetlands that may fall under a similar elimination or percentage reduction from a buildable area? Mr. Connors responded that because of Supreme Court decisions in 1987 we have to be very careful. Mr. Connors and Mr. Wodlinger related a specific case and stated that it's not that it can't be done but it has to be done carefully with consideration of people's property rights.

There was discussion about a recent DRI where the developer offered a contribution to the wildlife management of the area. Mr. Connors stated that there was recently a case where a voluntary offer was determined to be unconstitutional based on the rational of the proffer system. There was also discussion on how to come up with the figures to determine development exactions.

Ms. Sibley questioned if there were any mechanisms for services other than sewer and water, such as schools, fire and police departments, etc.? Mr. Connors stated yes there is. There is a terrific body of case law for what you can do with development exactions. He described the process as follows: you have to have a reasonable definite plan, if you are going to charge an impact fee the development has to cause the harm for which you charge the fee, there has to be a reasonable relationship between the amount of impact and the amount of fee, the

money must be collected and put in a separate fund, it has got to be spent for that improvement and that improvement has to benefit the development, and if the money isn't spent in a reasonable time, 5 years, the money has to be refunded. In Massachusetts we have one trial court decision that says local government cannot charge impact fees. We are working on writing an impact fee for the City of Watertown and we think that they can probably do it. This question should be looked at when reviewing Chapter 831. If you are going to charge impact fees you must have a reasonable definitive plan, we don't have many of these plans in Massachusetts but you are working on one which is a terrifically important thing for the legal underpinning of the Commission's work. You would need statutory power to exact for schools or police, etc. and we should really look at statutory amendments to get that type of authority.

There was discussion about the fact that sewer and water exactions would be easier to do specifically because the Island has a sole source aquifer and that is a strong case for unified planning and control in that area. There was also discussion about the regional landfill and the fact that user fees would be appropriate in this case. There was further discussion about assisting the towns to exact development fees under the existing legal authority and the West Tisbury Flexible Zoning By-laws in relation to this.

Mr. Adams, MVC Staff, asked how the Commission can officially adopt the Comprehensive Plan and why when the initial legislation was enacted a comprehensive plan was not specified? Mr. Connors stated that the legislation was taken from Article 7 and the comprehensive planning section was not in there. Also in Massachusetts we have had a history of doing a lot of zoning and very little planning. People just didn't think about comprehensive plans in Massachusetts. You could think through the process you want to use to adopt it when reviewing your legislature. We could write a mechanism for adoption. Mr. Wodlinger added that adoption is new ground in Massachusetts. Obviously the more input you can get from various town boards the better from the standpoint of home rule authority. The adoption of the Comprehensive Plan by the Commission is the last step not the first. Mr. Connors stated that he feels it is especially useful for the Comprehensive Plan to help to inform you about your DRI/DCPC process. In thinking about defensive strategies, a comprehensive plan is going to help you with the legal validity for the support of the Commission's work.

Ms. Waterman, MVC Staff, asked about the recent Edgartown Ponds DCPC enlarging the Coastal Zone and asked if allowing certain uses in the shore zone would conflict with the purposes of the DCPC, namely the hazardous area within 10' contour? Also in the same light would the enlargement of the shore zone constitute a taking? Mr. Connors stated that a taking occurs, in its simplest form, when you deprive the property owner of all economic uses of the property. Even when you deprive the person of almost all use but you do it to protect the public health and safety you can go an extra distance in prohibiting development. Mr. Wodlinger stated the one thing you cannot do at all is invade a persons property, i.e. say that people can walk in the shore zone. Mr. Wodlinger stated he sees no conflict with protection

of the area based on the FEMA maps and the hazardous nature of the area and allowing certain uses. FEMA regulations don't prohibit human habitation, it sets requirements for these uses. Mr. Connors stated that it is usually best to leave a couple of honest to God uses, it makes it easier for your lawyers to defend.

Ms. Scott asked how far can you go when protecting endangered species? Mr. Wodlinger stated that the easy answer is to find a Conservation Commission and some wetlands. Once you are into animal habitat and have a species of special concern the power is pretty great but if there is no wetland involved..... Mr. Connors stated that you could, as part of your DCPC or DRI power, add into the consideration for adopting your regulatory decision a wildlife protection plan. Mr. Connors stated that no one knows the exact answer so we should be careful. He related a specific case he had examined where there was a particular endangered bird and the use of computer simulation and the fact that this simulation would be very useful to the Commission.

Mr. Morgan stated that in a recent DCPC there was a conflict because we want to preserve the wildlife habitat and we have also found that the bird population may be killing the pond and therefore we must do something to control their populations.

There was discussion about the protection of the surrounding water and the possible loss of economic development that would be caused by pollution of the water.

There was also discussion about the benefits and detriments of closing or continuing public hearings with the main detriment being Commissioner's attendance and therefore voting quorum. Council advised continuing the public hearing when any major controversies exist. There was discussion about changes to the legislation in this regard.

Ms. White, MVC Staff, asked in regard to public input if the staff could be allowed to give verbal testimony instead of just written testimony? Mr. Connors responded that it is up to the Commission to decide who could speak at a public hearing. Mr. Wodlinger stated that they ought to be able to speak the only real difficulty is whether it gives the public the perception that certain members of the Commission staff have a bias that may affect their reports. There is some reason why the Commission may want the staff not to present personal opinions but confine their remarks to their professional planning analysis. There was discussion that Ms. White in her role does not participate in any planning, analysis, voting or other presentations of materials. It was stated that this concern has come up previously. The Commission should maintain the public perception that the Commissioners act fairly and reasonably on the information presented. To the extent possible there should be no personal attitudes, to give a heightened sense of fairness. It was stated that public perception might be that since you are a Commission employee, that the Commissioner might give greater weight to your personal or aesthetic opinions than they would to a member of the public.

There were questions about Commissioners and employees engaging in activities under the jurisdiction of the Commission. Mr. Connors stated that it is perfectly permissible for any member of the Commission or employee to engage in any activity that is in the jurisdiction of the Commission. There was discussion that no Commission staff or employees should get up from the table to address the Commission and the fact that a Commissioner had recently done so in a personal DRI presentation.

Mr. Filley asked if it makes a difference if they accept a proposal with conditions rather than turning it down if we are clear on what we want for conditions? Mr. Connors stated that he is in favor of saving money and I would prefer to see you condition an approval rather than denying and possibly going to court. Mr. Filley asked if there is any benefit on conditional approval even if we know that the applicant won't accept the conditions? Mr. Connors stated yes there is, because it lets the courts know what you have found as facts, what you think is wrong and how you think it can be rectified. As we were discussing perhaps the decisions should not incorporate all of the minutes and just have a clearer statement of what you found as facts. Not necessarily incorporating all the details but making a clear statement and indicating why you attached the conditions that you did. There should be a practical sense on what is going to be the strongest way to draft these decisions so they speak for themselves.

Ms. Harney asked if there were any governors appointees on the Cape Cod Commission and if there is any chance of changing the non-voting status of the governors appointees on the M.V. Commission? It was stated that this is possible and there was discussion about this and the fact that statutory amendments would be needed to do this. There was also discussion about the composition of members for the Commission and possible changes to the composition, quorum requirements, and voting status of the Commission.

There was discussion about the input of town boards in relation to DRIs and the fact that they usually don't hold public hearings prior to the MVC hearing and therefore don't have sufficient information to give us their input and possible ways to rectify this such as town boards holding a public hearing, continue it, and referring it to the Commission. There is the possibility that if boards testify at our hearing it may give the perception of preconceived opinions when it comes time for their decision.

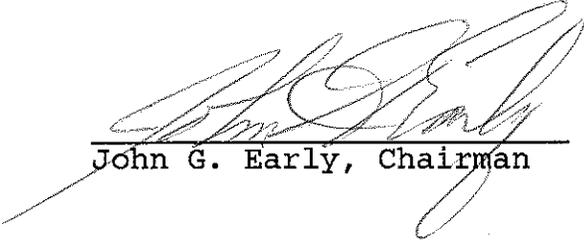
ITEM #8 - Possible Vote to Enter into Executive Session regarding Litigation.

It was decided that there was no need to enter into Executive Session.

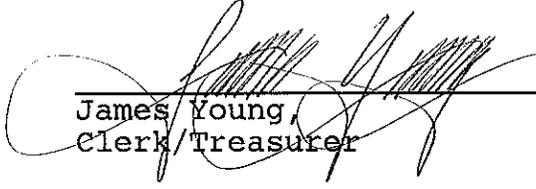
Mr. Early thanked Mr. Connors and Mr. Wodlinger. Mr. Wodlinger stated that he would be at the Commission offices until about 12:00 tomorrow if anyone wished to discuss anything further.

The meeting was adjourned at 11:20 p.m.

ATTEST



John G. Early, Chairman Date 5/25/89



James Young
Clerk/Treasurer Date 5/25/89

Attendance

Present: Bryant*, Colebrook**, Early*, Eber, Evans***, Ewing, Filley, Fischer, Jason, Lee, Morgan, Scott, Sibley, Young, Harney*, Davis.

Absent: Araujo, Wey, Delaney, McCavitt, Allen, Geller.

- * Ms. Bryant, Mr. Early and Ms. Harney arrived at 9:00 p.m.
- ** Ms. Colebrook left at 10:10 p.m.
- *** Mr. Evans left at 9:00 p.m.