

# THE MARTHA'S VINEYARD COMMISSION

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MINUTES OF APRIL 4, 1991

## MARTHA'S VINEYARD COMMISSION MEETING

The Martha's Vineyard Commission held a public hearing on Thursday, April 4, 1991 at 8:00 p.m. at the Whaling Church, Lower Level, Main Street, Edgartown, MA regarding the following Development of Regional Impact (DRI):

**Applicant:** Herring Creek Farm Trust  
c/o General Investment & Development Co.  
600 Atlantic Avenue, Suite 2000  
Boston, MA 02210  
Attn: C. Shortsleeve

**Location:** Slough Cove Road  
Edgartown, MA

**Proposal:** Subdivision of 207 acres into 54 lots and two private clubs qualifying as a DRI since the proposal is for the division of a related ownership of land into ten (10) or more lots.

Alan Schweikert, Chairman of the Land Use Planning Committee, (LUPC), read the Public Hearing Notice, opened the hearing for testimony, described the order of the presentations for the hearing, and stated there is a Commissioner who wishes to make a public disclosure.

Michael Donaroma, Edgartown Representative, read a public disclosure (available in the file).

Mr. Schweikert asked the applicant to make their presentation.

Catherine Shortsleeve introduced herself as Project Manager from General Development Inc., and Stuart Johnson, Dave Grissel, and Dave McIntyre.

Mr. Johnson discussed the history of the application, the design goals and objectives specifically as they relate to the open space and its preservation. The Applicant used a video display during their presentation. They discussed the lot configuration, the goals to retain the quality and original character of the land, the DCPC boundaries on this land, the proposed building envelopes, the open space, and other major aspects of the proposal. They discussed what they envision for the management of the open space.

Mr. Schweikert then called on MVC Staff to give the staff review.

Mr. Schilling discussed the proposals and the correspondence received with particular attention to the concerns stated in the staff notes (available in the DRI file). Mr. Simmons, MVC Transportation Planner, discussed the scope and study of traffic involved in this proposal.

Ms. Shortsleeve commented on the staff review. She discussed the sandplain inventory and stated that they intend to complete one but it would require 4 seasons and she doesn't feel they can do that ahead of time. She stated that as with other applicants it could be conditioned. She stated that the Mass Natural Heritage Program was the initial source of information. She then discussed the underground fuel tanks existing and stated that they have been properly registered and she sees no problem with them at this point. She discussed the fertilizer use and stated that it will be determined by the homeowners and that a list will be provided showing what is permitted to satisfy the MVC and the Conservation Commission.

Bill Smith, current manager of the Herring Creek Farm, discussed the current fertilizer used as being a Grower's Fertilizer Solution which is liquid and requires 6 gallons per acres. He discussed the solution and the method in which it is absorbed. He stated that they try to farm in a responsible way.

Mr. Schweikert then called for Commissioners' questions.

Mr. Sullivan asked if there was any documentation to show that it is impossible for the fertilizer mentioned early to go into the groundwater? There was further discussion on fertilizers.

Ms. Shortsleeve stated that in regard to affordable housing we have met with the Housing Authority before. I met with Theo Nix, Executive Director, on approximately December 7th in Boston. Mr. Schilling stated that the letter received from the Dukes County Regional Housing Authority stated that nothing has been decided.

Ms. Shortsleeve then discussed the question of whether this required a MEPA review. She stated that they had discussed this with their counsel who stated that they don't meet the thresholds and that they don't intent to file. Regarding covenants to condition or restrict the uses they haven't provided the Commission or Mr. Schilling with any documentation, it is a complex issue.

Dave McIntyre discussed the question of restrictions on the land and preservation of the open space.

Ms. Jason asked about the beach clubs. How do 250 cabanas fit in to the goal of preserving the land? Mr. McIntyre discussed the beach clubs, the cabanas, swimming pools, tennis and parking facilities. He stated that it is their view that the size is not inconsistent. He stated they feel it is consistent with their goals to retain the character stating examples of other beach clubs with cabanas.

Mr. Jason then asked about the club membership. One club will be restricted to residents and the other will be private membership? The response was yes. Mr. Jason then asked if there was a limit on the

number of members? The response was 250 members. It was stated that this number was calculated for financial reasons.

Ms. Greene asked to be shown the location of the 2 clubs. The location was shown on the plans.

Mr. Lee asked for the square footage of the club buildings? The response was approximately 2,500 square feet. He asked the size of the cabanas? The response was 5 x 5 ft. There was discussion on the height of the structures. The applicant stated that nothing will exceed 1 3/4 stories. Twenty-six (26) ft. is the maximum height.

Several Commissioners questions the facilities at the club and the distance to the beach from the clubs. It was stated that the clubs are approximately 1/2 mile from the beach. The applicant stated that there is a potential for a golf cart or jitney service. He stated that no motor vehicles would be allowed on the beach or the dunes.

Mr. Lee asked for the size of the pools? The applicant stated it is unknown since the plans haven't been developed yet. It was asked if they had hired a landscaper and architect? The response was yes. Mr. Lee asked so this is conceptual so far? Ms. Shortsleeve responded that the subdivision plan is definitive.

Ms. Bryant asked to be shown the location of the affordable housing? Ms. Shortsleeve stated that the results of the discussion with the Regional Housing Authority aren't firm. We discussed their need for money, land, leasing needs, etc. Ms. Bryant stated well let's say they need land on-site, where would it be? Ms. Shortsleeve stated she couldn't tell us now. Ms. Bryant asked so there is no agreement or offer for affordable housing? The response was no there is no agreement now. Ms. Bryant asked if the affordable housing were provided on site would they have the same privileges as other residents, i.e. clubs, cabanas, etc. The response was yes they would have resident privileges.

Ms. Sibley asked if they had discussed the impacts of pets. Many times pets are not compatible with wildlife and farm animals. Have you discussed putting restrictions on pets? Ms. Shortsleeve stated that would be part of the management plan which hasn't been put into writing but we have considered it.

Mr. Sullivan asked about the clubs again, specifically the size and the amenities? Mr. McIntyre discussed the size as being 220 ft. x 40 ft. He stated they would have small kitchen facilities but no bathrooms or showers.

Mr. Early asked about the septic systems for the individual houses. Could you install and maintain septic systems without mounding them? Mr. McIntyre responded no, some will require mounding. Mr. Early asked how many? The response was about 1/3. Mr. Early asked the location of the proposed mounded systems? The response was where the thickets are, around the pond. Mr. Early asked for the depth to groundwater? The response was close to the pond about 3 ft., near Slough Cove Road 12-13 ft.

Ms. Greene continued questioning the applicant about the beach clubs. Did I hear it stated that there would be a club facility with tennis and a swimming pool and no bathrooms? Mr. McIntyre responded that is correct. Ms. Shortsleeve stated that she thinks that will change.

Mr. Jason stated we start out with 125 acres of farm land, now we are down to 60, less than 50%. What provisions are there that this 50% will stay in active agricultural use? Ms. Shortsleeve responded that it will be up to the homeowners to determine if it will remain in active agricultural use or whether it will go to something such as sandplain grasslands. If it was chosen to maintain it in agricultural use why wouldn't it remain as it is now with the pastures smaller, the animals in the same vicinity and smaller fields. Mr. Jason stated that he has read that when the Wallace's bought this they stated they intended to protect the farm. Now we hear the property is going to be developed but while maintaining the quality and sense of place. If you really want to protect it in perpetuity, it is easy to do with covenants. It doesn't seem fair to place it in the hands of homeowners who don't exist yet. Ms. Shortsleeve stated that if the homeowners decide the conservation or preservation restriction will probably go to the Conservation Commission or someone else if the Conservation Commission wants anyone else to hold the restrictions they can determine that. Mr. Jason stated if it were me making this presentation, I would say that we are going to dedicate this land for agricultural use forever and turn it over to the appropriate organization to administer it. Ms. Shortsleeve asked you want it determined now, today? It is possible to determine that it stays in agricultural use but there are many people who feel that sandplain grasslands are a better habitat than agricultural land. So there is not uniformity that this land should stay agricultural land. There is a great difference of opinion. My point is that I think we can come up with a conservation/preservation restriction that can make people happy. I personally don't see that it is going to confine the site to one use, I think we will have to come up with a number of uses that are permissible, either from agricultural or habitat value, and allow the owners of a future time to choose among those uses.

Ms. Sibley discussed the patch work design of the open space as it relates to the sandplain grassland habitat. She asked why these locations were selected, what is the rationale? The response was that they are near the Katama Airpark lands, it seems to be an extension of habitat. Ms. Sibley stated it doesn't explain the isolated, scattered design. Ms. Shortsleeve stated there was discussion and that people have stated that patch work isn't appropriate for habitats and that there may have to be a different decision on where to locate the open space. We tried to attach one use to another, maybe it doesn't work. Ms. Sibley asked to see the soils map again. The applicant complied.

Mr. Sullivan questioned the size of the proposed houses? It was stated that they would be approximately 3,000 sq. ft. with a maximum of 4 bedrooms. There was discussion on the number of bedrooms allowable, the farm lots and building envelopes. Mr. Sullivan asked how the density is determined? Ms. Shortsleeve responded that a large parcel of open space is essentially being given as a gift to the Town.

There is no cost for this land. We need the density proposed to support that gift. Maximum density could be achieved with cluster development and we would actually get more units than we are proposing. In our view the provisions made by the Town and the DCPCs are more than adequate to protect the visual and environmental quality from a regulatory point of view.

Ms. Best asked you stated that you would be giving the open land to the Town, I assume there will be no public access? The response was negative, there will be no public access. I am saying that leaving this space open, whether private or not, there is an interest in keeping it open. We can't do it without financial support. This is a big financial commitment and we need to be able to support that with the density.

Ms. Greene raised the issue of the sluice way. Discussion on this matter followed. Ms. Shortsleeve stated it was discussed with the Chairman of the Edgartown Pond Area Advisory Committee and it is on their upcoming agenda. I have also contacted Arthur Gaines of the Woods Hole Oceanographic Institute and sent him our groundwater monitoring information and I am looking forward to receiving his interim report. There are no plans for maintenance or dredging of the sluiceway, if that is what you are asking me. It was stated that the Commission thought it was part of the deed. Ms. Shortsleeve stated not to my knowledge. There is nothing in our deed about dredging and maintaining the sluiceway. I feel that we are willing to cooperate with the Town if they are willing to present a proposal. The proposal would have to include a study of the pond, as Arthur Gaines is doing, a study of the opening of the pond and how it effects the sluice way. We are willing to cooperate but at this point the town will have to approach us to study the pond to determine what has to be done at this time. I don't think there is anything else I can do on the sluiceway, it is not part of this proposal so it is not property before this Commission. Ms. Sibley stated it is part of the property. Ms. Shortsleeve stated it is certainly part of the property but we are not proposing any work there as part of this DRI. Really it is a Town matter. Mr. Jason stated that is not true. You have to cross the bridge to get to the beach don't you and the beach is part of this proposal? Ms. Shortsleeve responded yes. Mr. Jason stated so it is part of the proposal. Ms. Shortsleeve stated but it is currently being used and it would continue to be used to access the beach. Mr. Jason asked by 5 families now, correct? Ms. Shortsleeve stated a few yes, not that many. Mr. Jason stated the current use is not by 250 members of the beach club. So it appears there might be a little increase there. Ms. Shortsleeve stated it is not a change in use, it might be an increase.

Mr. Schilling stated that the bridge is hazardous for anyone to use. It is recorded in the Registry of Deeds, Book 303, page 591, that the Trustees of Herring Creek Farm Trust and assignees will work with the Town to maintain that. I got a copy of this today from Ms. Shortsleeve. It says right there they shall maintain it. Ms. Shortsleeve stated it says they will work with the Town to maintain it, it doesn't say we will maintain it. We are willing to work with the Town but it is not part of this process. I would be happy to work

with the Advisory Committee but to tie it to this project, I think, is unwise and unwarranted.

Mr. Colaneri raised questions of covenants mentioned in the staff notes. Mr. Schilling stated that is in reference to correspondence between the Wallaces and the Cohans. It was brought up so I gave a synopsis for your benefit. The applicant has stated it isn't a concern. Ms. Shortsleeve discussed this matter as a reference to an agreement signed in 1969 among private parties, neighbors and abutters to the Herring Creek site, it has in it a right of first offer. In that if any of this property is sold at any time that it be offered to them before it is offered to the general public. This is a private agreement and it will be enforced according to its terms in due course. That again, I believe even more strongly, is not a subject for the MVC to determine. This is private contract between private parties. I think it would be unwise for the Commission to jump in and take sides or take a position. The agreement will be complied with in due course.

Mr. Jason stated that he thinks the record should show that we have not suggested what you have just mentioned that we have taken sides. Mr. Schweikert stated we just asked a question.

Mr. Lee asked when a mounded system fails because of storm tidal actions what is the current way of dealing with that and how many mounded systems did you say you are proposing? The response was the number of mounded system is estimated to be about 1/3 of the site. We have not yet designed each system. My understanding in the Town of Edgartown when a system is proven to be failed it is replaced after submittal to the Edgartown Board of Health and obtaining their approval.

Mr. Hall again asked for the locations of the mounded systems? The applicant showed the general locations but stated the exact locations are not known.

Mr. Combra asked about the membership for the non-resident club? Is the membership limit 250? The response was yes. Are these family memberships? The response was yes. Mr. Combra stated that assuming there are 4 members to each family and 250 families join, there is the potential for 1,000 members. The applicant stated this is correct but we estimate that only 1/3 of the members will be on the beach at one time. Mr. Combra continued by stating that many Island families have several cars. Assuming 1,000 family members there could be as many as 200-300 cars. It was again stated that they estimate 1/3 usage and probably about 80 cars.

Ms. Greene asked about fishermen's rights on the Beach. She stated that historically this land has provided access to the great pond and beach for fishermen. Will this continue? Ms. Shortsleeve stated that we can't stop their legal rights to cross the beach.

Mr. Jason restated the question, are you going to allow fishermen to drive up, down and across your beach to go fishing? Ms. Shortsleeve asked is it allowed by law? Mr. Jason responded I don't know. Ms.

Shortsleeve responded if it is not allowed by law, then no we will not allow access.

Mr. Best stated that he wanted to respond to the statement made by that applicant about only 1/3 of the residents or members being on the beach at any one time. My experience with rentals, mostly seasonal, in the Edgartown and particularly the Katama area is that I find most rental homes on the Vineyard are vacation or second homes. Usually there are a larger number of family members using these homes, sometimes multi-generations, often all using them simultaneously. It is like Thanksgiving in a suburban neighborhood all August. Historically on the Vineyard there are more people using the homes and they all have cars. The Applicant stated that they used the most conservative methods stated by the Institute of Traffic Engineers (ITE). There is data for suburban homes but we have not used it, or will not use it. We used the most conservative assumptions about trip generation.

Mr. Early stated that it is 10:00 p.m. and there are a lot of people out there who want to testify. I assume we will have another crack at this at the continued hearing.

Mr. Schweikert announced that this hearing will be continued so that if anybody feels it is getting late and they want to leave they are assured that they will be heard at a future date. I assure the public that they will have their opportunity to testify.

Mr. Jason questioned the price of membership to the beach club? Ms. Shortsleeve stated it would depend on the market at the time they would be available for sale. Mr. Jason said that it was stated earlier that you knew you needed 250 members based on economics, you must have a number. Ms. Shortsleeve stated that Landvest did a financial analysis but the numbers will change. Ms. Jason stated an estimate would be good enough for today. Ms. Shortsleeve stated that is not a fair or reasonable request at this time. I would estimate 55 million total as built today. Mr. Jason asked out of that 55 million how much is from the beach club? Stuart Johnson, senior Vice President, stated that the financial analysis was done as of the moment in a more buoyant time economically. I would estimate 8-9 million dollars revenue from the memberships of the club.

When there were no further questions from the Commissioners, Mr. Schweikert called upon town board testimony.

Ted Morgan, Edgartown Selectmen, stated you talk about a Development of Regional Impact (DRI), I've never seen a development that would have more of a major impact on the Town of Edgartown than this one will. I think it is ludicrous. To think that growing up as a kid and looking out over the plain and thinking how beautiful it was and now having these people, paid professionals, come here and tell you how much more beautiful it is going to be with 49 more houses there is absolutely ludicrous. There was applause from the audience. This is a fragile area. This development would have a devastating impact on that area out there. We all know that the Town of Edgartown has a tremendous investment in the Great Plains and Katama Area. We have

the Airport that the Town has purchased through the graciousness of the Nature Conservancy, we have conservation land on the right of the Airport, we forced the State to buy State Beach because they were going to make it a private beach which included a club as proposed here, 250 sections of the beach were going to be sold, which is again ridiculous. We have Katama Farms though the effort of many dedicated people the Town was able to buy Katama Farm. We have the Waller Farm We have development rights across from the storage sheds. We have tried our best to preserve it because it is a fragile area. We have problems down there. In fact in meeting with the Katama Association a few years back they wanted the Town to establish a water district to bring in Edgartown Water Company water because they had so much problem with the water such as salt water intrusion, nitrates, on and on and on. Here we are talking about 49 units with septic systems, some mounded septic systems close to the shore line. To me it is absolutely unbelievable to think that we are confronted with a project such as this at this time in our lives. These people come here, and they are paid professionals, and they are trying to convince you and everyone else sitting in this room that this is going to be a fantastic project. We don't need this project in the Town of Edgartown. We have all these houses, we are going to create more traffic, more people going back and forth to a beach which is public and we already have a difficult time accommodating people now. We have people there from all over the Island, its a public beach. You go down there on a Sunday and you can't find a parking space. This goes on and on. How much more can we take? You people are going to have to really consider this. There have been many questions asked tonight that can't be answered by the people proposing the development. One of the questions that was brought up was the sluice way. When the Wallaces first arrived here, supposedly, they were going to assume the responsibility of maintaining the sluice way. It hasn't happened since. Talk about getting a gift of land, the Wallaces have never given anything to Edgartown, nothing. Every time anything has happened down in that area and people want to do something they have ended up in court. There is an individual in Town who has lived here all his life that wants to build a house down there. He has all the permits but he can't build it because he has an injunction against him from the Wallaces. So here we are confronted with a project proposed by them thinking that it is such a beautiful thing, that it is going to be great for the Town but folks consider this. I would hate to be sitting in your shoes because no matter what decision you make you are going to be in court. Unfortunately that is the history of these people that you are dealing with. So I feel sorry in the event that you ever turn this project down, which I hope you will, you'll be in court. There was a round of applause following his testimony.

Steve Ewing, Edgartown Conservation Commission, read from a letter submitted into the record dated 4-4-91 (available in the file in its entirety) which related their comments and concerns regarding the proposal and their objection to the plan as currently proposed in the Environmental Impact Statement.

Paul Sheehan, Edgartown Planning Board, stated that he has been instructed to say that the Edgartown Planning Board has not yet taken

a position in regards to this proposal. We hope to initiate a site review process with all the Edgartown Boards, the MVC, the Police Chief, Fire Chief, etc. and study all the data available from the MVC. In addition to that we will hold public hearings and the first public hearing will be April 23rd.

Paul Bagnall, Edgartown Shellfish Constable and Marine Biologist, stated there has been quite a discussion about the opening of the ponds and I thought an explanation of how that works might be useful to you. The Town currently opens the pond 4-5 times per year. The Sluice way, under its order of conditions in the '70s, was constructed to keep the pond below 2.6 - 3.5 feet above mean sea level. The interaction of the pond with the sluice way now is that the sluice way has filled in to the point where water does not flow into it until it is about 2 3/4 feet above sea level. The sluice way then acts to drain water from the great pond. We maintain the pond level by either adding or taking away boards of the sluice way. This is done under my supervision and under the control of the Dept. of Natural Resources. The sluice way still works now. If you do want them to do any work out there as part of this process they should follow the original order of conditions because a pond height lower than that would not allow us to open it to the ocean. The result of this would be a decline in the salinity and a decline in the growth and health of the shellfish which are currently in the pond. Commercially harvested species in the pond now include soft shell clams and oysters. Another issue that I haven't heard addressed here tonight that I would be concerned with is south coastal erosion in that area which is a considerable rate. It varies but certainly nobody says the beach is building up out there. My final concern is the various mentioning of vehicular access out there. Fishermen are not allowed out there with their vehicles. At least during the summer months there is a guard from dawn to dusk. There are wildlife regulations that if you are on foot and you are fishing or fouling you have the right to access to the Great Pond. So there is a right to walk the beach for fishing or fouling but not necessarily for swimming or sunbathing. My concern is that currently to open the pond we have to drive a bulldozer across their property and I don't want to see any conflicts in that. If we were ever unable to open the Great Pond it would be devastating to the shellfish because what would happen is that the pond would rise to approximately 3 ft. above sea level and start to drain out through the sluice way into Cratucket and it would act to freshen the pond to the point where it would no longer support shellfish. This was the case from approximately 1900 - 1930. I hope what I've had to say is useful and if you would like a written statement I would be happy to provide it.

Ms. Bryant requested a written statement. She then asked how the fishermen would access the pond to shellfish? Mr. Bagnall responded via the Town landing at what is referred to as Wilson's Boulevard.

Mr. Early asked for the estimated commercial value of the shellfish that come out of that pond? Mr. Bagnall stated he could get the figures from his office. He stated a ball park figure of 1,000 bushels of oysters that came out of there last summer worth somewhere in the neighborhood of \$45,000 and that was considered, in my mind, to

be a poor year for an oyster yield in the Great Pond. Mr. Early also requested a written statement.

When there was no further Town Board testimony, Mr. Schweikert called for testimony in favor of this proposal - there was none.

Mr. Schweikert then called for testimony in opposition to this proposal.

Robert Morgan, Sr., testified that he will be brief because most of his concerns were discussed by Commissioners, and brother Ted did convey some of my feelings. I think that traffic impact is a major concern and certainly the question of the wastewater, the surrounding water bodies and the marshes nearby is a concern. I think there is a social concern as well. I would ask that when you make your decisions you must decide if you are going to air in favor of the water, the inhabitants of Martha's Vineyard or in this particular case 9 people named Wallace. This project might improve the way of life for a few people, who could live there or play in their cabanas, but it would certainly interfere terrible with the way of life for all of those people who are living on the Great Plains between Katama Bay and the western boundary of Edgartown-West Tisbury Road. I am sure you will give this a lot of thought and I am sure that you will make a wise decision. I am strongly in opposition to the project.

Edward Mendler stated he represents Marshall and Judy Cohan who are abutters to this project and are also participants in the 1969 agreement that has been referred to. When this project was first proposed that agreement came into the public eye and was discussed and put in the public press. Soon after that in order that Mr. & Mrs. Cohan's intention to assert and enforce their rights under the agreement would be made perfectly clear, I wrote a letter dated 11/12/90 to Mr. Clifford, MVC Exec. Director, setting for the terms of the agreement ending with the following paragraph: "The Wallace's spokesmen have been reported as stating on several occasions that the Wallaces intent to comply with the terms of the agreement subsequently we are puzzled by the futility of their presentation of this plan which would leave the agreement in tatters if carried out. But which cannot and will not be carried out because of our clients' right to and intention to purchase the land. In these circumstances we respectfully suggest that it behooves the MVC to consider the propriety of carrying forward a complex approval procedure and incurring attended public expense in view of our clients' ability and intention to exercise their rights under the agreement to prevent the development even if it were otherwise to be approved." They are still puzzled by the Wallaces' actions and we still believe that the 1969 agreement is a factor that should be taken into account by the Commission. We have repeatedly requested the Wallaces to discuss the matter with us but they have not seen fit to do so. On the contrary they are now before this Commission telling you that you shouldn't consider the 1969 agreement. Ms. Shortsleeve was reported in the Vineyard Gazette as saying that if the 1969 agreement were considered it would indicate that the process isn't working and that it would be a test case. If the Commission should wind up approving the Wallaces' plan they would have 52 or 54 house lots to sell. Presumably they

would want to sell them. Well the 1969 agreement says that they can't sell them without first offering them back to Mr. & Mrs. Cohan. When that offer is made Mr. & Mrs. Cohan will buy the lots and there will be no such development as the Wallaces' propose. They will have wasted a lot of their time and money and lot of our time and money and the Commission's time and money. To my way of thinking that is trying to use the Commission, you might even say have used. Well yes the 1969 agreement is a private agreement and it gives the parties private rights. We agree it is not the role of this Commission to adjudicate those rights or determine how and when they are to be enforced. But what is the role of the Commission. Well you well know that it is to test every DRI against certain criteria set forth in the statute. One of those is that the probable benefit must exceed the probable detriments. In making that evaluation it says that the Commission is to consider factors "if they are indirect, intangible, or not readily quantifiable" and also whether "the proposed development will favorably effect other persons and property", taking into account "circumstances peculiar to the location". Those are points which I think are precisely pertinent to the fact that there is a private agreement effecting this property. It is not at all unusual for private property rights and interests to be taken into account in relation to zoning and subdivision matters. In a decision of 1973 the Supreme Judicial Court said that a Board of Appeals was not prevented from requiring an applicant to fully disclosure property interests held in the site by others and the applicant's plans to acquiring such interests so as to impose conditions to the approval based on those outstanding rights. In many cases, the court has emphasized that the scope of a Board's discretion is not to be woodenly applied or limited and is particularly broad when the agency is carrying out the purposes of a regulatory act or is fashioning remedies. In case called SMI Investors against the Planning Board of Tisbury the court said in 1984 that that board was within its rights in denying a plan endorsement because it felt its actions might mislead prospective buyers of lots. Furthermore, in quite a number of cases, probably every case that involved this Commission, the court has emphasized that the Commission's purposes and its powers are greater than those of individual local boards. Your powers are more encompassing. It is a general principal of law that a regulatory agency, especially one having the scope of authority which is vested in the MVC, can and should take into account all factors which it deems relevant to its jurisdiction and that its decisions will be sustained unless they are clearly arbitrary and unreasonable. We agree that the Wallaces' proposal should be evaluated on planning and environmental impact criteria but even if the Commission should conclude that it meets the tests and is to be approved it would still be lawful and appropriate for the Commission to impose a condition that no work on any road or any lots could be done until the applicant, the Herring Creek Farm Trust, provide the Commission satisfactory evidence that the rights of the Cohan's and others under the 1969 have either been released or otherwise duly disposed of. When you consider the merits of the proposal from a planning and environmental basis you should also be aware that in the private agreement, besides the rights of the Cohan's to buy back this land, which they do intend to exercise, there are some express restrictions. There are clear, undeniable, express restrictions which mean that the beach club closest to the beach would

violate outright. There are other restrictions, which I grant are subject to some interpretation, in relation to the roads and use of the roads and to the construction and development of more residences on this land which in our considered opinion the Wallaces' proposal is quite contrary to the spirit if not the letter of those restrictions. There are a lot of people here who are going to have a lot of information for you and presumably at your continued hearing which do go to the issues of the planning and environmental impact appropriateness of this proposal and I would be glad myself to hear more from them.

Mr. Hall asked Mr. Mendler if those restrictions in the agreement are covenants that run with the land? Mr. Mendler responded yes until 2010. Mr. Hall asked is it a right of first refusal? Mr. Mendler responded yes. The term right of first refusal is used in a variety of ways, it means any right to purchase when the land is offered for sale. Mr. Hall asked if any of these covenants, in your opinion, be wiped out by a bankruptcy filing on the part of the Wallaces? Mr. Mendler responded I doubt it but I am not a bankruptcy specialist. It is in a sense an executory contract and it is an interest in the land which does exist and is vested in the Cohans so it would not be wiped out.

Gray Bryan, Edgartown resident, stated he represents the Edgartown Harbor Association and the Great Plains Conservancy with a membership of 976 very concerned citizens. You should be aware that between the Town of Edgartown and private donations from the 976 members there is a commitment of \$584,000 to clean up the surrounding waters, increase the production of our shellfish resources, and restore the herring run to Edgartown Great Pond a vital part of our food chain. Nowhere in this proposed development do we see any regard for our efforts. To the contrary we see total disregard. Last October we contracted with Horsely, Whitten, and Hegemann, Environmental Consultants, to represent our members and protect our investment in the future. He introduced John Whitten who is representing our group.

Mr. Whitten stated they have a small graphic which will take a minute to set up with your permission.

Mr. Schweikert called for other testimony in opposition while they are setting that up.

Sheriff Look, abutter, stated he abuts with 3 acres on Crackutet Cove. I would like to go on record as being wholeheartedly opposed to this development for many, many reasons which I will put into writing and submit to your Commission.

Mr. Whitten then introduced himself again and stated that they are water resource planners. We have been retained by the Great Plains Conservancy to review the application that you heard this evening, to review it objectively in coordination with your regulations, the regulations of the Town of Edgartown and what standard environmental science and planning principals. We have done that and we would like to report our findings to you this evening. The first general comments I would like to make is that as we have heard tonight, and I

think very clearly, the application is incomplete and we would like to object to the continuation of the process with such an incomplete application. It seems that the applicant is responsible and required under your and the Town of Edgartown's regulations to file a complete application that addresses many of the concerns, if not all of the concerns, that are talked about here tonight. How could we file an application for 54 house lots if we don't know the depth of ground water for septic system placement? We are going to negotiate that lot by lot, piece by piece, clearly the answer is no. We strongly object to the filing and continuation of an application that is so incomplete. There are an awful lot of people here who are unable to watch dog the process week in and week out. The requirements of the filing of a complete application are, in part, so that the abutters and citizens, residents of the Town and the Island have a right to know what to review and what to comment on. If we piecemeal file new information every week, every month or every six months then many people here are excluded from that process, so we object to that. So the plans as it stands now is inaccurate, its incomplete, its inconsistent with your regulations and it clearly exceeds the carrying capacity of the site, the carrying capacity of the ponds, the carrying capacity of the groundwater system, the carrying capacity of the wetlands system, the carrying capacity to support the current use of the site both for agriculture and for rare and endangered species. I think you will find that to be true once we complete our presentation. In November we submitted a letter to the Commission and met with Mr. Clifford and Mr. Schilling of the MVC and we appreciate the time that they took to meet with us. We sat before the Land Use Planning Committee meeting review of the application itself and we raised several conditions, over 14 concerns, that we had months ago. Tonight we are before you with the exact same concerns, a copy of that letter was forwarded to Ms. Shortsleeve. The same concerns are before you tonight. In our opinion based on review of your files, correspondences, etc. nothing has changed. We have the same letter with a few modifications that we will submit to you tonight Mr. Chairman. We again want to restate our objections to the incompleteness of the application. What we have done is used Sasaki's EIS application to the Commission and reviewed it from our perspective, from the perspective of the carrying capacities, from our perspective of our interpretation of the Town of Edgartown's regulations and the powers of the MVC given the fact that there are 4 designated areas of critical environmental planning concern (DCPCs). He introduced Sue Trell, who is an ecologist with our firm with expertise in ground, surface water and wetlands habitat to go through very briefly since I realize it is late and there are many other people here who want to speak, but interpret for you the information that was presented in a slightly different format, objectively and again not our own information the information that was submitted as part of the package.

Ms. Trell used a display utilizing overlay maps to point out some of the concerns with the proposal as presented by Sasaki. The first map shows the outlines of the property. The next overlays shows setbacks based on existing requirements in the Town. The green is the setback around road areas, the blue is the buffer zones around wetland resources within the Edgartown Great Pond DCPC it is a 300 ft. buffer

in the EIS Sasaki has proposed using only a 200 ft. buffer there is no justification given for that decrease. They would have to apply to the Conservation Commission for alterations within the blue area. The red circles represent setbacks around existing private wells that are in the area, these are drinking water supplies and the red areas should not have any septic systems in them to protect these people's drinking water. The proposal calls for water mains to be brought into the site and that anyone within the area who wanted to would be able to hook into those mains. People who have existing wells may not wish to do so. There are apparently other areas on the Island where dead end water systems have stagnation problems such as odors and tastes and people who have existing wells with good quality may wish to continue that. Their rights have to be respected and these setbacks at a minimum should be protected. Also in this light the applicant has not calculated transport time for groundwater on this site. The soils as we have seen on the soils map are mostly fairly porous materials through which groundwater can move quickly. Viruses, bacteria and other contaminants can move in that groundwater to any of these wells if there is a septic system upgradient. The applicant has not shown septic systems in relationship to existing wells or the direction of groundwater flows accurately. He did provide a groundwater table map for the site but we believe it is inaccurate. She stated that in one area it shows water flowing between ponds but not to the ocean and that seems contrary to any hydrogeological principals. They also have not shown maps with the different conditions of ponds open and ponds closed. The next overlay adds the wetlands areas onto the base map as delineated in the EIS by Sasaki. I would like to point out that there is not documentation given for their methods. As someone mentioned tonight they should be field verified. She showed additional wetland resource areas shown on State Maps and the discrepancy is unexplained by the applicant regarding missing wetland areas. These hatched areas are flood plains. All these areas are subject to high water tables and septic systems are proposed in this area and all this area should be protected from development. The next overlay shows the soils maps. The main thing I would point out here is that the dark green area is prime agricultural soil, Katama Sandy Loam, and there is only 600 some odd acres on the Island and it is very good for agriculture. If you remember what the development scenario showed we are going to lose a good portion of this for development. This is a soil that is best kept in agriculture or for conversion to sand plain if farming should ever stop on the site since it is close to the Katama Airport sand plain area. It is not the best soil to be used for development if you wish to retain agriculture which is supposedly a goal of this program. Although we might argue with that because they said they would maintain active farming to the point where children could continue to visit the farm to see its operations. If however, as Ms. Shortsleeve said tonight, the homeowners association decides what's to happen to agriculture and they choose to go to get a hay field, row crops or nothing at all then that is not going to be an active farm where children can visit and learn from. The next overlay has small red and blue dots with numbers written on them. These indicate the location of test pits prepared by Sasaki. The numbers show the depth to groundwater. But the dividing line between blue and red is where the separation between groundwater and surface is sufficient to place a Title V septic system without

mounding. All the red dots have insufficient depths to groundwater. You can see that many of those fall within the wetland area and the flood plain area. Now the Commission already asked what would happen to a septic system that has failed by storm damage, the answer is it doesn't work. Replacing that system might help temporarily but the next time it floods again it is not going to work. Septic systems, subsurface like this, rely on unsaturated soils for sufficient functioning. The applicant proposed tonight that some of these systems would be mounded. If you need to mound this much of the site we would suggest that you are exceeding the carrying capacity of the site. Another question is, if you are going to bring in enough soils to mound out these systems you are going to be changing local grading which means bringing in more equipment which means changing drainage patterns, none of that has been addressed. These test elevations came from the time of the year when groundwater is typically at a low level. The Board of Health in Edgartown requires that test pits should be put in in the spring or else you should have a 7 foot separation between groundwater. I don't know whether Sasaki plans to redo these in the Spring when they get around to actual locations or not but that should be taken into account. The last overlay represents positions for proposed new dwellings and clubs. Yellow is existing dwellings and orange is proposed. You can see how many of them line up with red dots where the septic systems will not work. If you look at this picture at a whole, the areas that should be setback for private wells, for wetlands, for insufficient separation to groundwater, prime agriculture soils and retention of farming, you can see that there is very little on this site left. We recommend that there is insufficient land to develop a proposal of this size and we ask that you deny it.

Mr. Whitten offered to answer any questions from the Commission. He also added that we have tremendous respect for Sasaki and by no means do we intend to show any disrespect by our analysis but I would say to the Commission that in laying out subdivision plans one would think that one would first look at the development constraints to determine what portions of the piece of land are undevelopable or should not be developed. That is the position that we take. We look at the site as if we were the developer and Ms. Shortsleeve came to us and said what portions of this parcel could we obtain house lots, what portions of this parcel are subdividable. That is what Sue has just showed you. Half of the proposed development, in our opinion, is undevelopable, the carrying capacity has been and will be exceeded. Clearly in our opinion, this proposal is in violation of MVC regulations, the intent, spirit and tone of the purpose of the MVC act and many very specific Town health and planning regulations. We do have a letter which will restate what we have said.

Mr. Hall asked what is the last overlay? The DCPC areas.

Mr. Jason asked what was the capacity you came up with? Mr. Whitten stated that based on Sasaki's information yields half of the number of lots proposed but there is a caveat. We disagree with their water table mapping, we disagree with proposing a development without understanding groundwater flow and direction, we strongly disagree in an area with that many private wells to install septic systems without

understanding transport time for viruses and bacteria, so I can't answer that question. If we were retained to do that analysis by the developer we would give them that answer. Our best guess is that this is an undevelopable site given the information before you. The burden of proof is not on the Great Plain Conservancy nor on this Commission, the burden of proof is on the applicant. We strongly and respectfully restate that that certainly has not been proven.

Mr. Hall asked what scale was used for the proposed houses, they look a quite bit larger than this other display? Ms. Trell replied that all of the figures used here were taken from the report prepared by Sasaki. That is a larger map but the size is similar even if the scale is different. I believe this shows the development envelope not the actual house size since they haven't figured that out yet.

Mr. Jason asked what is the setback around the private wells? The response was a 200 ft. setback.

Mr. Hall asked if the existing houses are to scale? Ms. Trell responded they are estimated. Mr. Hall asked if they could submit this display for our records. They agreed.

John Marquand stated he is an abutter on the beach. My land on South Beach actually accommodates the cut to the Edgartown Great Pond. I have a recollection about what it was like when the Wallaces owned that part of the beach. My mind reels when I hear the proponents of this proposal say that the whole purpose of the proposal is to preserve that area in the nature of which it was. Under the Wallaces' ownership people were not allowed to walk there. This was enforced by college students with summer jobs to enforce this in order to keep myself, my children, my family and many others off this beach which use to be open in the days when the Cohan's owned it. I could go on at great length about the Wallace brothers racing across the dunes, pulling out from the back of their bathing suits copies of the Supreme Court decision requiring everybody to walk along the low water mark not the high water mark. Now they have changed, everything is going to change, but certainly not the privacy of that beach.

Robert Hughes stated that his mother was a Cohan. He showed the location of his home and stated that he feels he will be impacted by this development. I would like to say for the record that you will receive correspondence from my counsel stating the specifics of our opposition. I just want to take a moment and speak about Ben Cohan and why he entered into such an agreement with the purchasers of this property. That was to, as he believed, entrust this property in such a way that it would be maintained for an extended period of time as the lovely setting it is today. I don't envy the burden that is upon this Commission. My grandfather felt that at some point there would be substantial environmental protections and ability to protect this land at the time he made this agreement he did so because he believed he was aligning himself with people who would keep this property undeveloped for the term of that agreement. I think he would be horrified if he realized what he had done. I wish the Commission God speed and assistance in making your best judgement as you decide on this issue.

Joan Worth submitted a letter from the M.V. Garden club which she read into the record which related 2 points in connection with this development. The letter urged that a good deal more information be gathered on plants in the area specifically in relation to rare and endangered species. The letter urges that access be made available to their group so they can inventory the area no later than May 1st. She stated the land should be visited several times during the year. The letter discussed the sand plain habitat and repopulation of the species that make this their habitat. (The letter is available in its entirety in the file.)

Joe Yawol testified as an abutter. He stated that he has 21 years of experience with the Wallaces and many years pleasant years before that with the Cohans. I wrote a letter to the Herring Creek Trust and in essence what it says is that they don't pay attention to the covenants or agreement with the Cohans. It said there shall be no piggeries or heneries, right now I have a piggery right next to my property and a henery that has been there for some time. Further they say we will use the low point to do some type of catchment to drain things out of the area. There is a low point between the barns and underneath it are several pits. The whole thing fills up and they pump the water out onto the garden which is right next to my well and I have saminella in the well from them pumping the barn.

Due to the late hour Mr. Schweikert called for a show of hand of how many opponents still wanted to testify. Some 20-30 people raised their hands. Mr. Schweikert then asked if for a show of hands if it would be inconvenient for them to come back to testify. No one raised their hand. Mr. Schweikert then called for proponents that still want to speak, no hands were raised.

Mr. Schweikert stated we are open for written testimony. He continued the hearing at 11:11 p.m. and stated that the hearing will be continued in about a month.

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Ms. Greene, MVC Chairman, suggested that they continue their special meeting agenda items until next week when there is less on the agenda. This was agreed.

Ms. Greene reminded Commissioners that the meeting would begin at 7:30 p.m. at the Commission offices next week.

The meeting adjourned at 11:13 p.m.

ATTEST

Jane A. Greene                      4-18-91  
Jane A. Greene, Chairman      Date

Thomas Sullivan                      4-18-91  
Thomas Sullivan,                      Date  
Clerk/Treasurer

Attendance

Present: Best, Briggs, Bryant, Colaneri, Combra, Donaroma, Early, Greene, Hall, Hebert, Jason, Lee, Schweikert, Sibley, Sullivan, Harney.

Absent: Wey, Benoit, Clarke.