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**Minutes of the Commission Meeting  
Held on March 10, 2011  
In the Stone Building  
33 New York Avenue, Oak Bluffs, MA**

**IN ATTENDANCE**

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Commissioners: (P = Present; A = Appointed; E = Elected)

P Bill Bennett (A – Chilmark)	P Lenny Jason (A – County)
P John Breckenridge (E – Oak Bluffs)	P Katherine Newman (E – Aquinnah)
P Christina Brown (E – Edgartown)	P Ned Orleans (A – Tisbury)
P Peter Cabana (A – Tisbury)	- Camille Rose (A – Aquinnah)
- Martin Crane (A – Governor)	P Doug Sederholm (E – Chilmark)
P Erik Hammarlund (E - West Tisbury)	P Linda Sibley (E – West Tisbury)
P Fred Hancock (A – Oak Bluffs)	P Brian Smith (A – West Tisbury)
P Chris Murphy (E – Chilmark)	- Holly Stephenson (E – Tisbury)
P Jim Joyce (A – Edgartown)	

Staff: Mark London (Executive Director), Paul Foley (DRI Coordinator), Jo-Ann Taylor (DCPC Coordinator), William Veno (Senior Planner)

**Chris Murphy** called the meeting to order at 7:00 p.m.

**1. MINUTES**

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***Linda Sibley moved, and it was duly seconded, to accept the July, 15, 2010; September 2, 2010; February 3, 2011; and February 10, 2011 with corrections.***

Corrections:

- February 10, 2011 Minutes: References to catch basins will all be called leaching pits.

***A voice vote was taken. In Favor: 9. Opposed: 0. Abstentions: 5. The motion passed.***

**2. MUCKERHEIDE HOUSING OAK BLUFFS DRI 615 MODIFICATION REVIEW**

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Commissioners Present: B. Bennett, J. Breckenridge, C. Brown, P. Cabana, F. Hancock, J. Joyce, L. Jason, C. Murphy, K. Newman, N. Orleans, D. Sederholm, L. Sibley, B. Smith

For the Applicant: Donald Muckerheide

**Erik Hammarlund** recused himself from the review and left the room.

**2.1 LUPC Report**

**Doug Sederholm** provided the LUPC Report.

- The applicant has an approved DRI on Dukes County Avenue in Oak Bluffs.

- The original plan was to build 12 living units in a single building.
- The project was approved in 2009 with approved offers.
- The request is to modify the offers of Section 1.1 through 1.9.
  - Reduce the affordable housing mitigation to \$50,000 or one unit to be rented as affordable, i.e: 80% AMI.
  - Eliminate the maximum sale price of \$350,000 for a two-bedroom unit.
  - Eliminate the prohibition of weekly rentals.
  - Eliminate the rental period minimum of 30 days per rental.
  - Eliminate the number of rentals of two per year.
  - Eliminate the notification of local affordable housing groups when units were for sale.
  - Eliminate the requirement of advertising the units in local newspapers before marketing them off-island.
  - Eliminate the restriction of short-term rentals to owner occupants.
- The purpose of the project was to provide reasonably priced year round housing and was allowed to be at a higher density rate than the neighborhood.
- Does the removal of the affordability piece create a big enough change to the project to require a public hearing?
- The LUPC voted unanimously that the removal of the affordability piece is a significant change and recommended a public hearing.

## **2.2 Applicant's Presentation**

**Donald Muckerheide** explained the reasons for the modification.

- The economic downturn has impacted the condo market.
- The conditions are no longer relevant.
  - A two-bedroom condo unit would not sell for more than \$350,000. The units are being marketed at \$250,000.
  - Affordable housing groups have been notified.
  - The remaining offers would be addressed by the condominium association.

***Linda Sibley moved, and it was duly seconded, that the requested modifications were a substantial change and would require a public hearing.***

- **Christina Brown** explained that the original benefit was community housing, if the conditions are removed and the economy gets better the benefit of community housing will not be present. She thinks a public hearing is needed.

***A voice vote was taken. In favor: 14. Opposed: 0. Abstaining: 0. The motion passed.***

## **3. VINEYARD GOLF MEMBERS ROOM DRI 484-M6 MODIFICATION REVIEW**

***Commissioners Present:*** B. Bennett, J. Breckenridge, C. Brown, P. Cabana, E. Hammarlund, F. Hancock, J. Joyce, L. Jason, C. Murphy, K. Newman, N. Orleans, D. Sederholm, L. Sibley, B. Smith

***For the Applicant:*** Martha's Vineyard Golf Partners, LLC, Peter Vincent (Attorney), James Hickman (Club President), Jeff Carlson (Grounds Manager)

### **3.1 Staff Report**

**Paul Foley** provided the Staff Report.

- The applicant is Martha's Vineyard Golf Partners, LLC, and Peter Vincent (Lawyer).
- The project location is Map 22 Lot 57.2 consisting of 12.1 acres.
- Vineyard Golf (DRI 484) would like to modify their DRI Decision "to allow six rooms in the clubhouse to be used by members and their guests, as well as by staff", whereas currently Condition 1a from the 1999 DRI 484 Decision reads: "That should there be any housing to be provided upon the golf course parcel, then said housing should be for the purposes of providing housing for the golf course employees/staff/help".
- The LUPC voted unanimously that the request is a significant change to the original approval and recommended a public hearing.

**Doug Sederholm** explained that discussion at LUPC.

- At the time the golf club was approved, there was the issue that the golf club was taken the potential 140 properties for year round residents out of the potential housing stock.
- There was a concern that people who would be using the golf course would not be connected to the community and would be flying in and flying out.
- The first condition was that any housing provided would be for staff of the golf course.
- The six rooms were categorized as housing for employees and were actually used by the developer and members of the development team (owners).
- LUPC felt that the request to eliminate the condition regarding housing was significant enough for a public hearing.

**Katherine Newman** asked if the golf course had 40 beds for staff. **Paul Foley** explained that they do have 40 beds in other buildings.

**Linda Sibley** explained that the condition was not offered by the applicant and was imposed by the Commission because they felt it was essential to the benefits and detriments.

**Bill Bennett** asked if the rooms in question were furnished and in use. **Peter Vincent** explained that they were not in use and had been in use over the last 10 years routinely and were furnished.

### **3.2 Applicant's Presentation**

**Peter Vincent** gave the applicant's presentation.

- The club currently has 160 island memberships, 247 proprietary memberships, and 7 memberships left for sale.
- The six rooms would primarily be allowed for guests of the proprietary members.
- One benefit of a proprietary membership is that they are able to invite guests to play golf with them. The rooms would allow the members a place to offer their guests to stay rather than having them stay in their homes.
- The club has been taken over by the membership and they would like to use the rooms.
- There is no significant impact to the community.
- The zoning board of appeals felt it was a minimum change and voted to allow it.

**James Hickman** said that he was under the impression that the concern was more in regards to the 11 acre parcel and not the use of the club house rooms. He asked for more information from Lenny Jason, Linda Sibley, and Christina Brown.

**Christina Brown** explained that the point James Hickman made is the exact thing that needs to be discussed at a public hearing so that people who were involved have a chance to be heard.

**James Joyce** said that the traffic generated would be the same regardless if it was employees or guests using the rooms. He does not see how it would be a regional impact to the Island.

**Ned Orleans** explained that the importance of having people who had a direct relationship to the golf club.

- There are examples such as on Nantucket where it is not the case. It is a different kind of club.
- The Island-wide impact is if it is allowed at one country club, it becomes precedent for other clubs.
- The change from employees to guests and their guests is a significant change.

**Fred Hancock moved and it was duly seconded, that the proposed change rises to the level of a public hearing. A voice vote was taken. In favor: 12. Opposed: 2. Abstentions: 0. The motion passed.**

#### **4. DCPC PUBLIC HEARING RECONSIDERATION OF 2007 EDGARTOWN SPECIAL WAYS NOMINATION**

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*Commissioners Present: B. Bennett, J. Breckenridge, C. Brown, P. Cabana, E. Hammarlund, F. Hancock, J. Joyce, L. Jason, C. Murphy, K. Newman, N. Orleans, D. Sederholm, L. Sibley, B. Smith*

**Doug Sederholm** said that he represents individuals who are co-owners of a 40-acre parcel directly north of a parcel owned by Starbuck Hill Trust. The Halls are co-owners of the 40-acre parcel. The parcel does not abut Watcha Path. He is involved in litigations with the Coffins Field Trust seeking access to the West Tisbury Road over Coffins Field. The Hall's are involved as well and also on behalf of Starbuck's they are seeking access to West Tisbury Road over Coffins Field. He is raising it because there might appear to be a conflict. He has thought about it and made the same statement when the issue came up when the DCPC was reviewed in 2007. He does not think there is a conflict of interest, but wanted to make sure everyone was aware of it.

There were no objections to Doug Sederholm sitting as a Commissioner for this topic.

**Chris Murphy** read the public hearing notice and opened the public hearing.

##### **4.1 Staff Report**

**Jo-Ann Taylor** provided the staff report.

- The original Island Road District came from a number of nominations in 1975 when the Commission first started and was one of three island-wide districts.
  - The Island Road District is comprised of the Major Road Zone and the Special Ways Zone.

- It was the intent of the original Commissioners that the Major Road Zone and Special Ways Zone fit across the island.
- The Special Ways Zone has tried to accommodate what special ways are for a particular town.
- The Special Ways Zone has been reviewed over the years to keep current with development.
- The Commissioners are being asked to review and amend the Critical Planning District Qualifications.
  - The Qualifications were adopted in 1975 and approved by the Secretary of Communities and Development, in accordance with the original Commission legislation.
  - This is the first time the Commissioners are looking at amending the Qualifications.
  - Once the Commissioners vote on amendments, the Qualifications will have to be approved by the Secretary of Executive Office of Energy and Environmental Affairs.
- The Commissioners are being asked to amend the Island Road District as a District of Critical Concern.
  - The Commissioners are being asked to amend the findings of the original designation to clarify that public access had no bearing on protecting the special way.
  - The special ways have value in their own right and still need to be protected under the qualifications.
  - The regulations are not to change the access rights, but to protect the value of the special ways from inappropriate development.
- The Commissioners are being asked to amend the boundaries designations.
  - The boundaries were amended in 2007.
  - The boundaries affected five ways in Edgartown; Ben Tom's Road, Middle Line Path, Penny Wise Path, Tar Kiln Path, and Watcha Path.
- If the Commissioners amend the Critical Planning District Qualifications and it is approved by the Secretary of Energy and Environment, the Commission will use those criteria to determine the designation of the special ways in the future.
- One difference between a special way and a major road zone is that the purpose of protecting the special way is not that no one should ever build there.
  - It is that the way and characteristics should be protected.
  - Development in close proximity to the way should not negatively impact the quality of the special way.

**Bill Bennett** asked what came up that the Commission is being asked to make amendments and change boundaries. **Jo-Ann Taylor** said that was a question for Counsel, but from a planning perspective the Island Road District was created in 1975 and as times change, there is a need to keep up.

**Fred Hancock** asked what the changes were to the boundaries section. **Jo-Ann Taylor** said that the change is to reconsider adding the five ways exactly as voted upon in 2007. Nothing has changed since the vote.

**Arthur Kreiger**, attorney representing the Halls, said that the court had struck down the designation of the five ways, which is why they are being reconsidered and the other amendments are there.

**Eric Wodlinger**, attorney representing the MVC, provided information regarding the DCPC.

- The reason why the DCPC was being reviewed was explained.
  - The Halls appealed the designation of the five special ways and the judge found an error in the MVC's designation.
  - The specific error was that the judge read the qualifications as requiring public access to the ways. He does not think the qualifications actually say that.
- The reason why public access should be addressed from a planning perspective was explained.
  - The MVC regulates how private property is developed, such as in the historic district and coastal district.
  - There is no reason why there should be a public access requirement in designating a way as a special way. If a way is worth preserving because of its historic value or origins, it is worth preserving, whether public or private.
  - The MVC does not establish the public or private character of ways. It is done by the towns at a town meeting with a vote.
- The Commissioners are being asked to address the qualifications to remove any reference to public access as a prerequisite of a special way. From a planning point of view there is no good reason for it to be there, particularly in the case of ways.
  - Eric Wodlinger, Edgartown town counsel, and a title examiner researched the history of the five ways to find out if there was public access. It is not clear if there is public access.
    - The ways were laid out between 1733 and 1798 by the proprietors.
    - When the land was originally divided up, it was done in large tracts in common ownership. Eventually the proprietors laid out lots and conveyed them to individuals by vote. There were no deeds. The votes of the proprietors were sufficient to convey the land.
    - The individual lots were laid out by metes and bounds and references to side lines bounding on a way, which is where the five ways are found.
    - Prior to 1846 a public way could be established by dedication, which is when a land owner offers the way and the town accepts it with a vote. After 1846 it has to be laid out by the Selectmen and voted on at town meeting.
    - The five ways are laid out by the proprietors and the records in the Edgartown Town Clerk's office of the meetings of the Freeholders and Inhabitants of the Town of Edgartown have not disclosed any acceptance of any of the five ways.
    - Absent acceptance by Town meeting, there are two possibilities for their character; they are purely private ways or common scheme ways. Common scheme ways are accessible to anyone who owned land that fronted on them.

- One planning reason for preserving the ways is that they are the original historic means by which people divided off the land and traveled on to get to their lots and is the reason why planners have said public access is irrelevant and should be removed.
- The Commission does not have any involvement with the designation of a way being public or private. It is the determination of the individual towns or the county.
- It is important that the Commission is not burdened by having to find out if a way is public or private; it is irrelevant and very costly.
- The Commissioners are being asked to designate the five individual ways.
  - The designation would address what happens to the road surface and 20 ft. from the center line of the road, which is designed to preserve the historic viewshed.
  - If any of the ways were not public ways, the Town of Edgartown has the right to lay out footpaths and other kinds of ways that are not necessarily vehicular.
- The Commissioners are being asked to consider two findings of the judge that were considered implicitly and not explicitly;
  - That existing private or public regulations cannot ensure protection of these ways
  - Damage to the district or impediments to proper development would be a substantial loss to the region.
- The litigation is on-going.
  - The judge has given 30 days to make findings addressing the question of public access.
  - The judge indicated that from what he read, public access was important.
  - The Commissioners should consider removing the public access off the table because if the ways are worth preserving, that is so regardless if they are in private hands, easements, or statutory private way (layout by town, but abutters are responsible for maintenance and libel), or a public way with lost records.
  - No one knows the exact classification of the ways until determined by the courts.
- The Commissioners are being asked if they wish to preserve the ways as special ways.

#### **4.2 Commissioner's Questions**

**Christina Brown** said that the classification of the ways is not a concern of the Commission. The Commission is concerned with the physical nature of the ways and their historic value. **Eric Wodlinger** said she was correct. The Commission does not lay out ways or make them public or private. The Commission does not change rights of access.

There was a discussion regarding the Commission being able to put conditions on private property.

- **Bill Bennett** said he had concern because the ways are on private property. Part of the discussion that took place was predicated upon they were public ways. He feels the Commission has impeded on private ownership.
- **Eric Wodlinger** said whatever rights someone has today will be unaffected by what is done tonight.
- **Bill Bennett** said the Commission has put conditions on use of the land on and around the way that belongs to private people.
- **Eric Wodlinger** said that happens every day with zoning bylaws, the Coastal District, the Island Road District, and historic districts.

- **Doug Sederholm** said that every District of Critical Planning Concern involves in some way conditions put on the use of private property. Virtually every DRI involves some condition put on the applicant's use of their private property. It is what the MVC does and is part of what they are supposed to do as set forth in Section 1 of the enabling legislation. They are to protect the unique values of Martha's Vineyard from inappropriate development.

**Doug Sederholm** said the Commission is to clarify the intention of the DCPC qualifications. The judge said that it is required that a way be public in order to qualify. **Eric Wodlinger** said that he would suggest the Judge misread the qualifications. He does not read them to require public access as a qualification. By raising the issue, it brought up the planning issue of should public access be required as a qualification, after consideration there is no reason why it should be a requirement. In an historic district both public and privately owned properties are regulated.

**Linda Sibley** said that in her experience with the Commission, whenever a way is considered they were instructed that access could not be conveyed and it was not considered.

**William Veno** said that when the determination of the five special ways was made, the judge was not satisfied with the elaboration of the findings as required. The purpose of the review is to make the designation of the five ways acceptable to the judge.

- A map and pictures of the ways was presented.
- Areas A, B1, and B2 on the maps represent the properties owned by the Halls, which the judge required the MVC to show how they would access their properties with the impact of the ways.
- B1 was a 1980's subdivision, but has been vacated by the Town. There are not officially 30+ lots. They are assessed at a discount, not as individual buildable lots.
- The special ways designation allows for vehicular access if it is the only access. It may require a service road to minimize the impact on the way.

**James Joyce** asked if the ways were being maintained or if it was from usage. **William Veno** said he was not aware of people maintaining them. Some ways have problems with ATVs using them.

**Peter Cabana** asked whether the intent was to have a road access from Vineyard Haven / Edgartown Road to each of the lots.

#### **4.3 Testimony from Public – Town Boards**

**Dudley Levick**, Edgartown Byways Committee, said that they have not discussed it at their committee because they thought it was between the judge and the Martha's Vineyard Commission. Their bylaw says their special ways neither create nor extinguish public rights. It is purely an historical and cultural resource.

**Doug Sederholm** asked if the Town is still requesting the MVC to designate the ways. **Dudley Levick** said yes they have not changed their feeling at all.

**Robert Green**, Edgartown Byways Committee, said that the designation was overwhelmingly supported by the town residents at town meeting. **Dudley Levick** said the vote was about 230 to 10.

#### **4.3.1 Testimony from the General Public**

**Linda DeWitt**, an Edgartown Byways Warden living off Watcha Path, said that the activities change on the path. There used to be horseback riding and walking and now there is bicycle riding as well. The paths are being used. The paths are cleaned of garbage. There had been trees cut down on the path and the destruction was never cleaned up.

**J.C. Murphy**, abutter of an ancient way, said an ancient way, defined by the glossary of Massachusetts Planning Board Acronyms and Terms, is a way in existence before Subdivision Control Act was approved by a municipality.

- An ancient way has no legal standing.
- After reading the judge's finding the MVC has overstepped their bounds and did not determine and can't make an ancient way a special way without first making it a public way.
- In order to make a way a public way, each abutter must be compensated.

**Arthur Kreiger**, attorney for the Hall family involved with litigation with the MVC, said the court decision is the reason for the hearing. He expressed the problems with the Commission's actions and proposals:

- Without any planning or planning that was disclosed through the public records request, a solution was found embodied in the public hearing notice which is just a way to get around the judge's decision. There were no studies of the implications or Island wide ramifications.
- The process under the Act seems to be short-cut. Standards and criteria are being changed which would have to be approved by the Secretary of Executive Office of Energy and Environmental Affairs, but at the same time, roads are being designated in the DCPC under those new standards. It can't be done in one shot or at all.
- He will submit a packet of information for the record containing the court's decision, notices of decisions, and judgment that was entered; the public records request and response for certain documents; and request for privilege log for anything that was withheld or redacted on the basis of attorney client privilege; a letter from Arthur Kreiger; a letter from Ben Hall with maps and descriptions of ownership; and if there are any documents produced from the privilege log, it was requested that those documents be submitted as part of the record.
- There was litigation between the Halls and the MVC for four years and on the basic issue, the MVC lost because it failed to make the basic finding of public access that the court held is required under the statute as well under the MVC criteria and guidelines.
- Five of the six counts against the Commission were dismissed because there were alternate forms of relief. The judge decided that relief should be sought under count 3.
- The court invalidated the designation of the five ways, the amended DCPC guidelines, the MVC's two conformance determinations; the Town's zoning amendments, and the Town's general bylaw amendments. Everything done by the Commission and the Town in 2007 and 2008 was invalidated and vacated by the court.
- The court found the MVC failed to find public access in the ways as required by the Act resulting in manifest injustice to the Halls. It criticized the MVC for brushing aside the

argument the Halls made in the designation process. The court vacated the designation of the five ways.

- The Commission argued in court for four years about public access, that it could be presumed because they were proprietor's ways, that the burden of proof was on the Halls to show that there was no public access, that there was sufficient evidence that there was public access, and that the court could find sufficient evidence that there was public access. It never argued that public access was not an issue. Because of the court decision the Commission wants to take a different approach at lightning speed.
- The court remanded for the Commission to make the required findings if it chose and rectify the other defects in its actions. The court maintained the development moratorium for those 30 days.
- The order defined the Commission's obligations if they wanted to reconsider the designation of the five ways.
  - Make all of the findings and determinations required by the Act.
  - Address whether the public access is met. While, as least on the surface, you are not changing the public access, you are required to find that there is, in fact, public access.
  - Address whether or how the Halls would be able to access their property by motorized vehicle, to be able to use and develop their property as any other land owner not on a special way would have.
- The Commission is not trying to comply with the instructions, but is taking a different direction. The direction may not be valid. It does not salvage the designation of the five ways. The designation has been vacated, unless the gap is filled within 30 days, which is Monday [four days away].

There was a discussion regarding the public hearing notice.

- **Arthur Kreiger** asked if the proposed amendments were published in the public hearing notice or if they had been changed again.
- **Mark London** said the subject matter was the same since the publication.
- **Arthur Kreiger** asked if the language changes that were published in the newspaper are the same changes being considered.
- **Mark London** said that there are adjustments to the language that was published.
- **Arthur Kreiger** said he has not seen any of the new proposed changes. He asked what the changes were.
- **Eric Wodlinger** said he did not think the changes were substantively different from what was advertised. Some of the language was changed with respect to vehicular rights. It was to preserve vehicular rights where ever they currently exist. The change primarily concerned Watcha Path.
- **Arthur Kreiger** said that he was looking at a bunch of red-lined changes to what he thought were the proposed amendments. The letter he is submitting address the changes contained in the public hearing notice. He asked the hearing be continued because he has had no opportunity to review the proposed changes.
- **Chris Murphy** said that they only had a 30 day time limit and is required to advertise for 21 days. There was not a lot of time.

- **Arthur Kreiger** explained that the 30 day time limit does not apply because what the Commission is doing is not what the judge gave them 30 days to do. The judge gave 30 days to make findings regarding access and other things in order to support the designations made. They were explicitly and unequivocally not proposing to find public access or make the other findings, but to make public access irrelevant. It is not needed to do it in the 30 days and it does not help to do it in the 30 days. It has no bearing on the judge's decision because the Commission is not doing what the judge gave them the 30 days for.
- **Mark London** said he sent an email to Ben Hall at lunch time regarding the changes and suggested that they arrive early to make themselves aware of the new materials.
- **Ben Hall** said he did not receive the email as of 2:00 p.m. and had not seen the new material.
- **Doug Sederholm** pointed out a change to the proposed changes in the special qualifications that were posted in the notice. The change does not appear to be significant, but are different words. He was making sure Arthur Kreiger was aware.
- **Chris Murphy** offered to allow for a break to allow Arthur Kreiger to review the changes.
- **Arthur Kreiger** said that he would take whatever time he could, but would not want to be rushed in ten minutes.
- **Doug Sederholm** said that it is not known if the language changes are significant enough to violate the public hearing law.
- **Arthur Kreiger** said that what he has to say would be applicable to the language, but would like to be able to amend his comments once he has had a chance to review the new language. He did not think the time offered by Chris Murphy was sufficient time.

**Arthur Kreiger** addressed the proposed language as presented in the public hearing notice.

- The Commission is proposing to amend the standards of criteria for the DCPC to state that an area... "has the history or potential for symbolic or recreational linkage with other such areas..." meaning areas of exceptional symbolic or recreational importance. The new language has similar phrasing "exceptional symbolic, historic, or recreational value or has the history or potential to become a historic, symbolic, or recreational asset or amenity..."
- The Commission is proposing to change the findings: that "special ways may provide public rights of way..." rather than "provide rights of way", as stated in the old language; ""They may link origins and destinations . . ." would replace "They do tend to link origins and destinations..." and "therefore they may offer a resource" would replace ""therefore they offer a resource..."
- The Commission is proposing to re-designate the five ways and add them back into the Island Road District.
- The actions the Commission is about to take are both procedurally and substantially invalid, which is supported by the court's decision and other case law cited in his letter.
  - The actions being carried out are not in relation to the previous designation. The Commission is re-designating under new standards. The 30 days is irrelevant because the old designation is gone. The developmental moratorium will end on Monday.

- The judge did not authorize the MVC to amend its findings and standards in a way that would short-circuit the Act. To re-designate the five ways without a new process for the designation, starting with a new nomination by the Town or the Commission is inconsistent with the Act.
- The Commission has to start over to designate the ways under different standards that were designated before. All of the procedures are implicated.
- The Commission is adopting new standards and criteria at the same time they are designating under them. The standards have to be approved by the Secretary of Executive Office of Energy and Environmental Affairs. Once approved the Commission can designate under those standards. The Commission cannot designate ways at the same time as they are proposing standards.
- The new standard would violate the Act. It was not just the court thought the MVC's standards required public access, but the court thought the Act required public access. "Nothing in the MVC Act supports an inference that the legislature intended to authorize the MVC to designate and regulate special ways for cultural, historical, recreational category of DCPCs without making a reasonable effort to determine rather merely assuming the public right's to access the ways. This is particularly true where the designation accounts for DCPC regulations imposing strict limitations on the Hall's ability to access and use their property and the Plaintiff challenged the MVC in assumptions of public access." The need to prove public access is derived from the statute in the court's view not merely the standards and criteria that is now being tried to change. Changing the standard and criteria does not solve the problem.
- The Act limits the designation of a DCPC to an area that possesses, present tense, declarative unique historical or cultural resources of state-wide significance. The proposed language: "...has the potential to become a symbolic recreational asset or amenity..." He does not know what a symbolic recreation is. There is no such thing. It does not require it possesses it now, not in the future.
- The new standards would be unconstitutionally vague. There are limits to the deference that the courts give to towns and commissions. The courts have struck down town or land use enactments as being unconstitutionally vague. People have to know what is permitted and what is not. Boards have to have reasonable standards so that it is not relying upon discretion, it applies the same criteria, and people know what the criteria are.
- The proposed language that addresses vehicular access is vague. The Commission is exempting ways that "...unless providing the only access to a property with access and development rights prior to nomination of the Special Way," What access and development rights qualify and when is the finding made? There are no standards. It gives the Commission unbridled discretion.
- The court stated "that it was not clear for a way to meet the test for having exceptional symbolic or recreational importance." The proceeding language was less vague. The court would not approve of the actions based on the decision that has been rendered.
- Eric Wodlinger had said that the designation would preserve the viewsheds if one had a right to walk there. Nobody has the right to walk there. The Commission does protect attributes of other properties such as for ecological reasons, but this requires public access.

- There are problems with the lack of planning, speed, simultaneity of amending standards and designations, language, and it has significant and manifest injustice to the Halls, who own 68% of the private undeveloped and developable land along the ways.
- He requested time to absorb and respond to the newly changed proposed language.

**Benjamin Hall Jr.**, trustee of a number of trusts along the five ways, spoke to the DCPC and presentation that was made.

- The map is missing a piece of land that is owned by the Halls along Watcha Path in Edgartown.
- The lots that are appeared on the map in a uniform blue color are broken up into several parcels.
- The B2, B1, and the westerly area of B1 are under different ownerships. There are many differently ownership entities.
- What is the resource that is being protected and for whom? It is clear that the ways are trying to be preserved for enjoyment. If they are private with no public right of access, for whom are they being protected?
- Other people than the property owners are trespassers. In the oath of office it is stated they are to uphold the laws. Trespassing is a civil and criminal violation of the law. The requirement of keeping the ways open prevents the property owners from keeping trespassers off their property.
- There is no current nomination before the Commission. The nomination that was made was done in August 2007. Unless the Commission meets the judge's criteria, the nomination is gone.
- Within the setbacks discussed; the guidelines and bylaws would allow someone to conduct any use in the district within the special way zone that is currently allowed. Agriculture would not be permitted within the special ways zones. No cutting or alterations can be made to vegetation. Animals cannot block the way while grazing.
- There is no evidence in the record that any of the ways were laid out by the proprietors, except maybe on Watcha Path. Lots were set off by a boundary, which was the centerline of the road. The property owners owned to the centerline of the road. None of the ways have a defined width. The courts have repeatedly said that in regards to a road with no defined width; a person is allowed to enjoy the rights of that way for as wide as one would reasonably utilize the way for vehicular access. They were cart paths which make them vehicular paths. If there are vehicular rights, public safety vehicles should be able to access those ways.

**Robert Green** said the goal was to keep the ways public; they are playing around to prolong things.

**Bill Bennett** said he was not clear what needed to be accomplished within 30 days. **Eric Wodlinger** said that the Commission must decide if it wishes to re-designate the five ways within 30 days under the existing qualifications. The change to the qualifications needs to be approved by the Secretary of Executive Office of Energy and Environmental Affairs before any designations can be made under them. The two are unrelated, but could both be addressed tonight.

**Bill Bennett** said that the town's designation of the ways was vacated. **Eric Wodlinger** said the Town's bylaw dealing with the special ways is based on the MVC designation. If the MVC designation falls, the town's bylaw falls as well. The designation was vacated because the judge said the MVC made an error in adopting the designation. The MVC was given 30 days to cure the error. If the error is cured, the bylaw will be retro-actively reinstated.

**Peter Cabana** asked how re-designating cure the error. **Eric Wodlinger** said that the judge said the MVC made three errors in the designation. Two of the errors were not fatal. The findings that present public and private regulations will not assure protection and that damage to the district or impediments to proper development would be a substantial loss to the region should have been made explicitly. The judge found material in the record that the inferences could have been made to support these findings. The failure to not make the findings was an error of law. The Plaintiffs have not established however that the failure amounts to a substantial error of law which results in a manifest injustice to warrant relief.

There was discussion regarding if re-designating the ways would be sufficient for the judge.

- **Peter Cabana** asked if the MVC re-designates based on the provided language if the judge would be satisfied.
- **Eric Wodlinger** The third and fatal error pertained to public access. The title research does not prove public access.
- **Peter Cabana** asked how the re-designation gives information to the judge that says everything is okay if public access was the crux of the issue with the ways.
- **Eric Wodlinger** said that public access was not the crux of the issue. Chapter 831 does not require public access when a DCPC is designated. "A district of critical planning concern can only be designated when: A) an area which possesses unique, natural, historical, ecological, scientific, cultural resources of a regional or state wide significance."
- **Peter Cabana** said that possesses is the presence tense and part of the language that is considered is future.
- **Eric Wodlinger** said that part of it is future to accommodate the possibility that the Town of Edgartown may lay out the ways as public foot paths, public ways, or something else.
- **Peter Cabana** asked if it would have to go before the State because it changes to address if something has an impact on the future.
- **Eric Wodlinger** said that the Findings 2A state that special ways are typically historical, by definition including roads that have been abandoned or left to infrequent use. Some of the roads are foot paths. In some cases they have been laid out by the early proprietors. The language was added because the title research was completed. The language changes are more editorial rather than substantive.
- **Peter Cabana** said one of the lines states potential and potential is the future, which seems like a substantive change.
- **Eric Wodlinger** said it was intended to be recognition of the fact that the town has the capacity to change the character of the roads in the future. The Commission does not.

**Chris Murphy** said it was the intention to bring the public hearing to deliberation and a decision that evening. The hearing would need to be closed. The reason to keep the hearing

open would be to receive information from the public. Deliberation among the Commissioners is not impacted by closing the hearing.

**Bill Bennett** asked what would happen if the Commission did nothing to re-designate that evening and what it would take for the town to nominate the ways again. **Eric Wodlinger** said that it would take a period of time in which there is the potential of development.

**Doug Sederholm moved and it was duly seconded, that the Commission incorporate by reference into this hearing the entire file, minutes and documents from the last [2007-2008] set of hearings regarding this matter, including the information for the hearing on the original [1975] establishment of the DCPC Guidelines and designation of the special ways; and all minutes and documents of the prior hearings to be incorporated.**

- **Erik Hammarlund** asked if it was being offered for the record or consideration, because he was not familiar with the 1975 material.
- **Doug Sederholm** said it was for the record and once part of the record it was considerable.
- **Chris Murphy** said it does not imply that people are familiar with the record, but simply adds it to the record to provide a history.

**A voice vote was taken on the motion. In favor: 14. Opposed: 0. Abstentions: 0. The motion passed.**

There was a discussion regarding the time deadline of 30 days.

- **Linda Sibley** said there seemed to be two timing issues; one is that the Commissioners must do something within the 30 days and the other is that activities could occur.
- **Eric Wodlinger** said that it was the same issue.
- **Linda Sibley** asked if there was no nomination before the Commission.
- **Eric Wodlinger** said that the Commission was remanded by the court. The judge specifically said that he would keep the moratorium in effect.
- **Linda Sibley** asked if instead of re-designating the Commission used their abilities under Chapter 831 to nominate.
- **Eric Wodlinger** said it would result in a new moratorium.
- **Lenny Jason** asked if the Commission would be in violation of the court order.
- **Eric Wodlinger** said they would not be in violation.
- **Chris Murphy** said the Commission could not do it during the hearing.

**Mark London** questioned that the Commission is required to determine public access.

- The judgment was that the Commission had to find that there was public access according to the special qualifications for a cultural or historical resource district.
- The special qualifications for a cultural resource district require that there be public access or there be a very unique or contribution to the island character or that it is irreplaceable or replaceable only with extraordinary effort or expense.
- It appears that the qualifications do not require a finding of public access on the part of the Commission, but would require a finding of one of the three special qualifications.

There was discussion regarding closing the public hearing.

- **Chris Murphy** said he would like to close the public hearing.

- **Christina Brown** said that Arthur Kreiger had requested he be allowed to enter into the record his comments on the proposed changes that different from the public hearing notice.
- **Chris Murphy** said it was his intent to invite Arthur Kreiger to give the Commission his comments at any time he wants on any of it. In terms of getting through the hearing he must close the hearing in order to move forward.
- **Christina Brown** said that Arthur Kreiger wanted his comments to be part of the record which would be looked at when the decision is reviewed.
- **Eric Wodlinger** said that it would be opportune for Mr. Kreiger to make his comments on the editorial changes and proposed findings before the close of the hearing. If they are not made now, it seems unlikely they will be included in the record.
- **Arthur Kreiger** said that he does not think the Commission is under the 30 day time limit. If the Commission is taking a break, he will use the opportunity to review the documents.

**Chris Murphy** recessed the public hearing for 15 minutes and recessed the meeting for 5 minutes.

## **5. MARTHA'S VINEYARD HOSPITAL PARKING – OAK BLUFFS DRI 324-M3 DELIBERATION AND DECISION**

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*Commissioners Present: B. Bennett, J. Breckenridge, C. Brown, P. Cabana, E. Hammarlund, F. Hancock, J. Joyce, L. Jason, C. Murphy, K. Newman, N. Orleans, D. Sederholm, L. Sibley, B. Smith*

**Doug Sederholm** gave the LUPC Report.

- The applicant was willing to make all of the conditions as offers as signed by Mr. Walsh as of February 15, 2011.
- The LUPC voted unanimously to recommend that the Commission accept the offers and approve the application incorporating the offers as conditions.
- There was discussion regarding the fence and its height, which has been worked out and is noted on the plans.
- The operation and maintenance plan was updated to address when the filters are to be cleaned out.

**John Breckenridge** said that the offer to install oil absorbent filters should be deleted. It had been agreed that it was unnecessary based on the bio-retention swells. **Doug Sederholm** agreed that Bill Wilcox had said they were not necessary.

**Erik Hammarlund** said that he is raising the following question because the Hospital is one of the few applicants that have outstanding conditions. He proposed that no work can begin on the project until they have either entirely satisfied all other previous conditions or entered into a contractual obligation to have all previous conditions satisfied. There is no point in placing conditions on a project which the MVC is willing to issue new permits when things remain unsatisfied without a timeline. It is fine to have a timeline and a contract.