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**Minutes of the Commission Meeting  
Held on May 25, 2006  
In the Stone Building  
33 New York Avenue, Oak Bluffs, MA**

**IN ATTENDANCE**

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

- |   |                                       |
|---|---------------------------------------|
| P James Athearn (E – Edgartown)         | P Ned Orleans (A – Tisbury)           |
| - John Best (E – Tisbury)               | - Megan Ottens-Sargent (E – Aquinnah) |
| P John Breckenridge (A – Oak Bluffs)    | P Deborah Pigeon (E – Oak Bluffs)     |
| P Christina Brown (E – Edgartown)       | - Jim Powell (A – West Tisbury)       |
| P Carlene Condon (A – Edgartown)        | P Doug Sederholm (E – Chilmark)       |
| - Martin Crane (A – Governor Appointee) | P Linda Sibley (E – West Tisbury)     |
| P Mimi Davisson (E – Oak Bluffs)        | P Paul Strauss (County Comm. Rep.)    |
| P Chris Murphy (A – Chilmark)           | - Andrew Woodruff (E – West Tisbury)  |
| - Katherine Newman (A – Aquinnah)       |                                       |

Staff: Mark London (Executive Director), Christine Flynn (Affordable Housing & Economic Planner), Paul Foley (DRI Coordinator)

**1. MEETING WITH ERIC WODLINGER, COMMISSION COUNSEL**

Commissioners met with Eric Wodlinger, Commission's attorney, to discuss general legal matters.

**1.1 Procedures and Conflicts of Interest**

**Eric Wodlinger** outlined issues related to conflict of interest.

- When Commissioners take office, they should receive 268A and booklet about conflict of interest laws.
- If a Commissioner messes up, he/she can be personally liable for a fine from State Ethics Commission. People can allege a conflict that might quickly be on the front page of the newspaper.
- The point is to avoid financial conflicts of interest and the appearance of conflict of interest. It is important to recuse oneself when it appears one has a conflict of interest.
- The law is intended to deal with municipal situations.
- Issues Commissioners face are:
  - You own property near the project.
  - An applicant is proposing a commercial project that you are intertwined with.
  - You are a board member of a voluntary association and a project comes up that your organization wishes to take a stand on.

- The good news is that Commissioners are entitled to get a ruling from the State Ethics Commission counsel. Eric said he often passes questions to the Ethics Commission.
- **John Breckenridge** said the State Ethics Commission has cut back, so it takes two or three weeks to get a ruling. **Eric Wodlinger** said the time frame for a response waxes and wanes with their finances.

**Christine Brown** said her experience has been that she's received very quick responses on the phone. Written responses can be slow.

**Chris Murphy** asked what if an applicant were to come before him as a member of a town board and then come before him as a Commissioner. **Eric Wodlinger** said that instance is not a conflict; he has to evaluate the project against the standards of each particular board.

**Eric Wodlinger** described an instance in Winchester in which a selectman was a proponent of using town land for a continuing care retirement community. By the time the project went through, the selectman was on the Zoning Board of Appeals. He was so involved as a proponent of the project that he should have recused himself when it came to the ZBA. This wasn't a case of a conflict of interest, since he had no financial interest, but an issue of pre-judgment, where he couldn't be an impartial ZBA member.

**Linda Sibley** noted that John Early had recused himself from the recent West Tisbury School debate because he is a selectman and the town was the applicant.

Concern was expressed about getting an opinion over the phone because of temptation not to give all the facts; **Eric Wodlinger** said it's important to give the details.

**Eric Wodlinger** clarified that appointees to the Commission don't need to file a statement of financial interest; elected members need to file the statement.

**Jim Athearn** asked, as a seller of donuts and coffee, if he needed to recuse himself from the discussion of Dunkin Donuts based on the perception of conflict of interest. **Eric Wodlinger** said he didn't believe so because of the distance between the businesses and Island traffic increases the distance.

**Jim Athearn** asked whether he has the right to testify if he recuses himself. **Eric Wodlinger** said the rule is that if you recuse yourself, you are supposed to step out of the room and not participate as a board member. However, a Commissioner has a constitutional right to testify as a private citizen. According to a Supreme Judicial Court opinion, the best practice is to leave the room when one has recused oneself.

**Mimi Davisson** asked whether she has to state that she has given a donation to the Hospital. **Eric Wodlinger** said the test is whether you would benefit one way or another. It's better to make the statement but it's not necessarily a prejudgment or conflict.

## **1.2 DRI Review**

**Linda Sibley** said the Commission is in the process of revising the DRI Regulations. **Eric Wodlinger** outlined a procedure for establishing standing to appeal a decision. When Bridge Housing was approved by the Commission, the neighbor appealed the decision, but he didn't have standing.

**Eric Wodlinger** explained that there is a distinction between zoning law appeals and Chapter 831 with respect to the issue of standing or party status.

- Chapter 831 says that "any party aggrieved" by the decision may appeal as opposed to "any person aggrieved". The courts have noted that distinction. We have won cases by pointing out that a person who brought an appeal was not a party; a party is defined to be a person who was specifically granted party status during a hearing.
- The Commission could grant anyone party status, but a request for party status doesn't mean the Commission has to give it. He suggested that the Commission require that to be granted party status, some be required to fulfill two criteria:
  - To be substantially and directly affected by the outcome of the matter.
  - To be obligated to participate actively in the procedure and to provide substantive evidence. It's not enough to say they don't like a project; they are obligated to bring facts to the table. If you want party status and the right to appeal, you have to add something to the conversation.
- No one has yet asked the Commission for party status. Although only a 'party' can appeal, anyone can testify.
- The applicant automatically has party status. Usually the municipality would have party status, but there haven't been many decisions appealed by towns.
- Most attorneys don't know about the party status issue. Granting party status is serious. The Commission could charge a fee to parties.
- **Linda Sibley** said there is a democratic part of her that objects to preventing a poor person from getting party status because they can't hire an expert.

There was a discussion of enforcement of referrals.

- **Doug Sederholm** asked what the Commission could do to exercise its authority over a project that should have been referred to the Commission but was not, and a building permit has been granted.
- **Eric Wodlinger** said the first thing is to take advantage of the financing system. The borrower has to show the bank that there are no restrictions on the property. The Executive Director could send a letter to the developer and building inspector. He could also talk to the Selectmen in the town to ask the building inspector to issue a cease and desist order. Chapter 831 allows the Commission to go to court to enforce its position.
- **Linda Sibley** asked whether the invalidity of the permit also puts the developer at greater risk of being sued by aggrieved neighbors.
- **Eric Wodlinger** said if a project should have been referred to the Commission but it was not, it puts any permit at dubious validity. If Mark sends a letter to the developer and building inspector, it should send red flags. The permits aren't valid. On the Cape when you're dealing with a project that has financing, the letter is very effective; here, sometimes developer finance projects by themselves. It has happened that the courts have required that buildings be torn down.

There was a discussion of enforcement of DRI Conditions.

- **Paul Foley** asked how the Commission should deal with projects which are in violation of DRI conditions.
- **Eric Wodlinger** said sometimes the easy, cheap way is to record a notice in the Registry of Deeds that the project is no longer in compliance and send a letter to the owner and

town officials. If the owner sells or refinances without telling about the deed notice, he's in trouble. If that doesn't work, we have the power to go to court.

- **Christina Brown** said they've been told that the building inspectors are the Commission's enforcers.

There was a discussion having a streamlined version of the DRI process.

- **Mark London** asked what could be done to simplify some aspects of the DRI process for simple projects. The Commission has discussed having a two-tiered system, effectively delegating most of the work on smaller projects to LUPC and keeping the review by the full Commission to a bare minimum. The Cape Cod Commission has a mechanism whereby a subcommittee of five people carries out most of the review, and the full Commission relatively quickly reviews and generally endorses the subcommittee work. On a related subject, he asked whether we could conceive of a system whereby the Commission could review an application for a project's concept, and approve the concept in principle, with carefully worded expectations outlining expectations for how the detailed design should be carried out, with full plans to be submitted for a second approval by the Commission. This would save an applicant from spending a lot of money doing a detailed design, only to find that the Commission does not approve the basic concept.
- **Eric Wodlinger** said that Chapter 831 is barren in reference to procedure. A different approval process would have to be constructed out of regulations. If the Commission had a rational, coherent set of regulations that set up a system, a court would support them as within the Commission's authority. Chapter 831 doesn't limit the Commission. The key would be to communicate with building inspectors and town boards that a concept plan is sufficient for referral to Commission. If the Commission can work out with building inspectors and boards and Commissions the level of detail the Commission wants, that would be great.
- **Ned Orleans** said the Commission would need to have a good definition of concept plan.
- **Eric Wodlinger** said that as long as the decision can be carefully crafted and defended, a concept plan process could be set up.
- **Mimi Davisson** said she would be inclined to condition projects specifically without seeing a detailed plan and be explicit on the details.
- **Eric Wodlinger** pointed out that the Cape Cod Commission has very specific quantified, performance standards.
- **Mark London** said the Commission is developing DRI policies by putting down on paper what is being done in practice. Unlike the Cape Cod Commission with specific numerical standards, the Martha's Vineyard Commission DRI Policies do give some flexibility. The Open Space Policy has been adopted and the Water Quality Policy is being worked on.

There was a discussion of the possibility of creating enterprise funds.

- **Mark London** asked about creating a fund, which would allow applicants to make a mitigation payment related to water quality impacts for a project. The fund could then be used for offset mitigation within the same watershed.
- **Eric Wodlinger** outlined the legal context.
  - There is an extensive list of statutes that govern municipal finance.

- A home rule amendment allows municipalities to do anything that isn't governed by municipal law. Financial aspects didn't get a home rule amendment, so statutes on municipal finance guide financial matters.
  - Certain enterprise funds have been authorized; none have been authorized for regional agencies.
  - There is a whole list of very specific purposes for enterprise funds.
  - Enterprise money goes to the public entity that is authorized to spend and receive money. If a town has an enterprise fund for a purpose, the funds can only be spent for this purpose.
  - Money could be collected to offset the impact of a particular development. Money has to be set aside for a specific purpose and can't go into the general fund.
  - With respect to the possibility of getting all six towns set up enterprise funds for mitigation of DRIs, he explained that the Commission could consult town counsel for all of the towns. They could provide a list of enterprise funds.
  - The County government could hold an enterprise fund if they have the ability to issue contracts and administer them.
- **John Breckenridge** asked if a fee were to go to a conservation commission fund, would it have to specify what it was paying for. **Eric Wodlinger** explained that when money is exacted from a developer to mitigate an impact of a development, the developer is entitled to know that the money is going to that purpose. It has to specifically go to offset the impact of the development.

**Christine Flynn** asked whether the Commission should hold a public hearing before adopting a policy. **Eric Wodlinger** said he is in favor of holding a public hearing, but it's not required:

- Policies are not regulations, they are more of a general statement of what the Commission expects.
- DRI permits are quasi-judicial. DCPC decisions and standards and criteria are quasi-legislative. The standard of review by a court on a Commission decision is very deferential. A court will not second guess the Commission. Commissioners are elected and generally a judge is not going to challenge a vote.
- A public hearing on policy makes sense. A policy tell people how the Commission is going to measure benefits and detriments and creates a framework for people to follow when they are going to submit a project. A public hearing is an opportunity for people to submit what they think.

**Megan Ottens-Sargent** asked about a project in Aquinnah that was proposed during the building moratorium. **Eric Wodlinger** said that on the Cape, they have carved out exceptions to the moratorium. Exceptions to moratoriums can be specified if they do not violate a DCPC and meet local planning board rules.

**Christina Brown moved, and it was duly seconded, to enter into executive session for the purposes of discussing pending and imminent legal matters with Commission counsel, with members of Commission staff in attendance, and to not return to open session. A roll call vote was taken. In favor: J. Athearn, C. Brown, J. Breckenridge, C. Condon, M. Davisson, C. Murphy, M. Ottens-Sargent,**

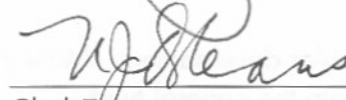


**D. Pigeon, D. Sederholm, L. Sibley. Opposed: None. Abstentions: None. The motion passed.**

The meeting adjourned at 8:15 p.m.

  
Chairman

4-12-07  
Date

  
Clerk-Treasurer

4-12-07  
Date