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Minutes of the Commission Meeting Held on September 18, 2008 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) | - Ned Orleans (A – Tisbury) |
| - John Breckenridge (A – Oak Bluffs) | P Jim Powell (A – West Tisbury) |
| P Christina Brown (E - Edgartown) | P Doug Sederholm (E – Chilmark) |
| P Peter Cabana (A – Tisbury) | P Susan Shea (A – Aquinnah) |
| - Martin Crane (A – Governor Appointee) | P Linda Sibley (E – West Tisbury) |
| - Mimi Davisson (E – Oak Bluffs) | - Paul Strauss (County Comm. Rep.) |
| - Mark Morris (A – Edgartown) | - Richard Toole (E – Oak Bluffs) |
| P Chris Murphy (A – Chilmark) | P Andrew Woodruff (E – West Tisbury) |
| P Katherine Newman (A – Aquinnah) | |

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

The meeting was called to order at 7:40 p.m.

Doug Sederholm congratulated Jo-Ann Taylor on her appointment to the Oceans Advisory Commission.

1. SPECIAL WAYS DCPC- PUBLIC HEARING

Commissioners present: J. Athearn, C. Brown, P. Cabana, C. Murphy, K. Newman, J. Powell, D. Sederholm, S. Shea, L. Sibley, A. Woodruff

Doug Sederholm opened the public hearing and read the hearing notice on whether the Commission should vote to expand the boundaries of the Island Road District in the Town of West Tisbury by adding the following Special Ways:

- Within twenty feet on either side of the center line of Stoney Hill Path: Begins (WT Assessors' map #10) as a turn to the east from Old Holmes Hole Rd. (aka the Old Mail Rd.), crosses Old County Rd., and continues east until it merges with Stoney Hill Rd. or Head of the Pond Rd.
- Within twenty feet on either side of the center line of Checamo Path (aka Chicama Path & Little Pond Rd.): Begins at Stoney Hill Path (WT Assessors' map # 10)) and continues southeast (WT Assessors' Map #9 and Map #18) to the Tisbury town line.

Jo-Ann Taylor explained the proposal and the procedure.

- The proposal is for an amendment to the Island Road District and is treated as a new nomination.
- The amendment has been nominated and accepted for consideration and the building moratorium within the proposed amendment is in place.
- In order to make a designation, the Commissioners need to consider the Critical Planning District qualifications, particularly with respect to the size and shape of the district
 - *The district shall consist of the land and water which reasonably belong in the district for the three following reasons: it is the critical area or critical resource which is in need of protection; it is the logical planning area which should be considered in adopting a coordinated system of regulations to protect the critical resource or critical area; and the dimensions or landmarks which form the boundary of the district are convenient and recognizable.*
- In making its decision, the Commission may want to consider the existing special ways in West Tisbury which include Tiah's Cove, Watcha Path, Old Holmes Hole Road a.k.a. Old Mail Road, Old Courthouse Road, Scrubby Neck Road and Watcha Path, Roger's Path and Burying Ground Road, and Redcoat Hill/Mott's Hill Road.
- She showed a map and pointed out the networking of the paths and their relation to the State Forest and open space.
- Part of the nomination stresses the connectivity of all of the ways.
- The Special Ways Zone already has regulations. The Town will still have the option of sticking to the existing regulations or developing regulations that the Town may feel are more appropriate for these ways within the guidelines of the Island Roads District.
- The moratorium continues until West Tisbury residents vote this in or out at town meeting, which has to be done within a year.
- If the town proposes new regulations, it will require a hearing by the Commission on conformance.
- Letters have been received from Elaine Shabazian and Bob and Wendy Gray, both in support of the project.

1.2 Nominator's Presentation

Ann Bassett, chair of the By-Ways Committee in West Tisbury, presented information about the proposal.

- West Tisbury is looking to protect more trails.
- Stoney Hill Path and Checama Path are trails that pre-date colonial times. The trails are definitions of boundary. The landowners own to the middle of the path.
- These trails connect to trails in all the towns.
- The project is important for passive recreation reasons. The island is facing more and more development. It will be an asset for landowners by identifying where the trail users should and should not be passing.
- The Committee is hoping to preserve these for foot and hoof passage.
- Checama Path is used by some residents.
- The intent of the designation is not to keep landowners from doing anything. Some fences are closer than in the restrictions. They're not asking anybody to change anything. They're hoping to keep the status quo.

Bill Veno presented a slide show of the paths from ground and aerial views. He explained the specific locations of the paths.

J.C. Murphy asked for a definition of an Ancient Way versus Special Way and asked about the rights an abutting property owner might give up in a designation. He asked about liability if an accident were to occur on a homeowner's property.

Commissioners explained ancient ways and the Commission process.

- There is an obscure land court definition for an ancient way. Simply, it's a way that has become public through many many years of prescriptive use.
- This meeting's discussion is about Special Ways. It's a zoning-type designation that the town would make within the context of the DCPC. The Island Road District is a DCPC that covers the whole Island.
- These Special Ways are off-road trails. The town has developed certain regulations, approved by the Commission, which are zoning bylaws that govern development within 20 feet of the centerline of the trail. The abutters still own to the centerline of the trail. What an owner can do within the boundary of the Special Ways will be governed by DCPC regulations.

J.C. Murphy said that it's not so much the zoning; he's worried about his liability if there is activity on the property by people and somebody is injured. **Bill Veno** explained that the Commonwealth of Massachusetts has a public access for open space policy; it has a very high threshold for suit; also, West Tisbury has entered into management agreements with the Land Bank which hold the landowner harmless.

Linda Sibley clarified that designation doesn't in itself allow public access; it prevents certain kinds of development on the land.

Doug Sederholm clarified that the issue of access is not within the scope of the designation. If a way has been open since ancient times, it would difficult to legally prevent access.

J.C. Murphy said the question is obscure. **Doug Sederholm** agreed it is a legitimate concern of any abutting property owner.

Mike Shabazian said that at the last meeting he attended, Mr. Murphy brought up the issue of liability. Mr. Shabazian and his wife are very much in support of the proposal. He and his wife are going to leave their land open and they're in support of the ancient way in West Tisbury.

Harris Krinsky, abutter on Checama Path, and his family have pre-existing non-conforming lots which are irregular in shape; long and slender, one with a maximum width of 45 feet.

- They think that the designation is a great idea.
- They're concerned that the boundary will extend so far into their lots that it will make the lots unbuildable. They encourage the Commission to make an exemption for lots that are under an acre or oddly shaped.
- They are in favor as long it doesn't make their lots unbuildable.
- The lots have been surveyed but he's unsure whether to measure from the path or from the surveyor's map.

Ann Bassett said these are all issues within the purview of the Planning Board.

- West Tisbury doesn't want building on trails, but it doesn't want to make building impossible. West Tisbury will be looking to propose less restrictive regulations, as Edgartown did.
- The regulations can say that that the designations shall not make an otherwise buildable lot unbuildable.

Jo-Ann Taylor reminded the Commission that it did amend the guidelines regarding fences, walls, and structures, allowing lesser setbacks for fences or stone walls for lots of less than one acre.

Doug Sederholm closed the public hearing.

2. SPECIAL WAYS DCPC – DELIBERATION & DECISION

Commissioners present: J. Athearn, C. Brown, P. Cabana, C. Murphy, K. Newman, J. Powell, D. Sederholm, S. Shea, L. Sibley, A. Woodruff

Linda Sibley moved that the Commission accept the designation and clarify the guidelines for the Island-wide Island Road DCPC to state that regulations shall not cause an otherwise buildable lot to become unbuildable.

There was a discussion of the possible change to the guideline specifying that this could not make buildable lots unbuildable.

- **Linda Sibley** said, based on testimony and common sense, she wouldn't want to designate the District if it didn't have the change in the guidelines.
- **Mark London** asked if there are places where a Special Ways designation presently does limit the possibility of development, where changing this guideline and associated regulations allow development where it is currently impossible.
- **Linda Sibley** said creating unbuildable lots through DCPC regulations is not consistent with the intent of the Special Ways. The intent has only been to protect these historical ways to the extent that it can be done without interfering with people's legitimate rights to the land.
- **Andrew Woodruff** said that in certain cases, the designation prevents a landowner from using the way as access for further development.
- **Jo-Ann Taylor** said the issue may already be covered in the West Tisbury Regulations. She also noted that amending the guidelines was not part of the hearing notice and it would probably be better to consider amending the guidelines at a future hearing.

Linda Sibley amended her motion, and it was duly seconded, to approve the designation but, at its earliest opportunity, it will hold a hearing to consider a modification of the guidelines.

Jim Athearn said he's ready to vote for the designation of the District, but he's not comfortable having the rider attached. It's cleaner to do the one action.

Linda Sibley said she feels strongly about the issue.

- It has absolutely never been the intent of the Special Ways DCPC to make a property unbuildable.

- This may be the first time that the Commission has had an abutting property owner that has raised this issue.
- She would be uncomfortable not making it part of the motion lest somehow the issue escape being addressed.
- She doesn't want to inadvertently designate something that might have the effect of making a lot unbuildable, although she honestly doesn't think that the Commission can render a taking through this process.

Bill Veno said he thinks the prohibition already exists in the guidelines.

Christina Brown said she heard Jim Athearn's concern about changing the guidelines tonight, but Linda's motion is to have a public hearing and address the issue.

Linda Sibley said she is not willing to vote for the designation without the commitment to address the issue.

Doug Sederholm read the regulation and amendment and said he believed the amendment addressed fences and stone walls.

Andrew Woodruff said he respects what Linda Sibley's saying, but he thinks the Commission should vote on it.

A roll call vote was taken on the proposed motion: In favor: J. Athearn, P. Cabana, C. Brown, C. Murphy, K. Newman, J. Powell, D. Sederholm, S. Shea, L. Sibley. Opposed: J. Athearn, A. Woodruff. Abstentions: None. The motion passed.

Linda Sibley clarified that people who voted against the motion objected to the amendment, not the designation.

Ann Bassett received clarification that the amendment the Commission made to the guidelines applies to the Island wide DCPC, but it doesn't address the issue of the creation of non-buildable lots.

Mark London explained that JoAnn Taylor's original suggestion was that there would have to be a hearing on the West Tisbury's regulations, and that could be an appropriate time for a hearing on the guidelines. **Linda Sibley** said it would be preferable to revise the guidelines sooner than that, so the Town could develop regulations under the new guidelines.

3. AQUINNAH ENERGY DCPC – PUBLIC HEARING

Commissioners present: J. Athearn, C. Brown, P. Cabana, C. Murphy, K. Newman, J. Powell, D. Sederholm, S. Shea, L. Sibley, A. Woodruff

For the applicant: Camille Rose (Selectmen)

Doug Sederholm read the hearing notice relating to the proposal to rescind the Aquinnah Energy District designation.

- There has been no written testimony.

- If the Commission doesn't vote to rescind and the town doesn't approve regulations by December 17th, the designation dies anyway. The selectmen, however, are asking the Commission to rescind the designation now.

Camille Rose thanked the Commission for its consideration of the establishment of the DCPC.

- Aquinnah did what they planned to do by proposing regulations within the six month period, but the regulations didn't pass by the required 2/3 vote of the Town Meeting.
- The regulations are still viable, but they're going to be amended and changed.
- The Selectmen would like the moratorium lifted because they have some issues that need to be taken care of.
- They can take care of the regulations through the town-wide Town of Aquinnah DCPC.

Doug Sederholm commented that the exercise has been very valuable for the Island as a whole. The interaction has been good for putting together regulations. Other towns will go to Aquinnah first to build on the work that they've done.

- He noted that, if the Commission votes to rescind, the Town may not return with a nomination for one year, except by a 2/3 vote by the Commission to waive that one year period. He encouraged Aquinnah to come back to the Commission if they have regulations ready before a year passes.

Doug Sederholm closed the public hearing.

4. AQUINNAH ENERGY DCPC – DELIBERATION & DECISION

Commissioners present: J. Athearn, C. Brown, P. Cabana, C. Murphy, K. Newman, J. Powell, D. Sederholm, S. Shea, L. Sibley, A. Woodruff

Linda Sibley commented that the Commission could review any changes to regulations under the existing town-wide Town of Aquinnah DCPC.

Kathy Newman moved, and it was duly seconded, to rescind the designation of the Aquinnah Energy DCPC. A roll call vote was taken. In favor: J. Athearn, C. Brown, P. Cabana, C. Murphy, K. Newman, J. Powell, D. Sederholm, S. Shea, L. Sibley, A. Woodruff. Opposed: None. Abstentions: None. The motion passed.

5. MEDICINE SHOPPE – CONCURRENCE REVIEW

Commissioners present: J. Athearn, C. Brown, P. Cabana, C. Murphy, K. Newman, J. Powell, D. Sederholm, S. Shea, L. Sibley, A. Woodruff

Paul Foley gave the staff report.

- A few years ago, the Commission voted a non-concurrence based on a number of items including a pervious parking lot with five spaces in front and two parking spaces in back.
- The Medicine Shoppe bought the property and was approved for an additional parking space and a landscaping plan.
- This year the owner went to the Planning Board for approval to pave the parking lot. He shouldn't have paved because of Commission restrictions and the Conservation Commission's order of conditions.

- The owner is going to fix the parking in back, put in a vegetative area, put in a drain, and build a wall in back.
- The owner wants a paved parking area for customers who need more secure footing.
- LUPC voted to recommend not concurring with the referral based on the fact that he's going to improve vegetative drainage, finish the parking in back, plant two street trees, and there is a conservation commission public hearing.
- The non-concurrences were not recorded with the deed. Now the Commission does record non-concurrence conditions.
- The non-concurrence conditions were spelled out in the Feeney decision. Mr. Perzanowski wasn't aware or forgot that he wasn't supposed to pave. He'll do what it takes to keep the paving.
- The Planning Board made its decision and did not forward the issue to the Conservation Commission.
- The Concom allowed Tisbury Market Place to pave because there's a lot of traffic, the hardener made the surface impervious, and they have a lot of open space. The ConCom did not send that proposal to the Planning Board.
- The proposed plantings are not native species and don't take up water so his proposed planting plan will likely change.
- The new practice is to record the non-concurrence with conditions.

Linda Sibley reviewed the history of the non-concurrence.

- A building was built with the intention of being residential.
- The project was sent to the Commission when the owner proposed that two residential spaces become commercial. The builder made extremely detailed promises.
- The Commission did not concur with the referral because of the extremely detailed promises.
- The builder did not do the conditions and sold the building.
- This project raises questions about whether non-concurring and not having a public hearing works.
- The Commission should let the Conservation Commission review the proposal.
- Any non-concurrence should be based on the representation that there will be native and thirsty plantings and the driveway will be contoured so run off will be taken up by the vegetation.

Doug Sederholm said the Commission now has a clear policy of recording the conditions of a non-concurrence against the title.

Linda Sibley moved, and it was duly seconded, to not concur with the referral.

- **Kathy Newman** asked how the Commission will make sure the owner comply with conditions. Commissioners discussed the ways the owner is working on compliance.
- **Christina Brown** said she endorses the motion of non-concurrence with the stipulations. The Conservation Commission will make much more specific recommendations and they have an enforcing agent.
- **Jim Athearn** asked for confirmation that the parking will be fixed in the back
- **Paul Foley** confirmed that the parking in the back will be fixed.

- **Paul Foley** noted that the upstairs apartment is deed-restricted to be residential. The owner is currently using the space for his family, which meets the terms of residential use.
- **Mark London** said that the Commission could support the Conservation Commission's decision regarding pervious or properly drained impervious surface.
- **Andrew Woodruff** added that the owner has a legitimate reason for having the parking area paved.

A roll call vote was taken. In favor: J. Athearn, C. Brown, P. Cabana, C. Murphy, K. Newman, J. Powell, D. Sederholm, S. Shea, L. Sibley, A. Woodruff. Opposed: None. Abstentions: None. The motion passed.

6. MV ARENA WIND TOWER: DRI NO. 49M-2 – PUBLIC HEARING (CONT.)

Commissioners present: J. Athearn, C. Brown, P. Cabana, C. Murphy, K. Newman, J. Powell, D. Sederholm, S. Shea, R. Toole, A. Woodruff

Doug Sederholm re-opened the public hearing to receive any additions to the written record.

Paul Foley said the applicant submitted written offers.

Linda Sibley said she is abstaining from the decision. The wind turbine installers are installing a turbine for her and there could be a perception of conflict.

Doug Sederholm explained that the main reason they're not putting up a balloon is because it requires the same permit from the FAA that the applicant needs to build the tower. Sean Flynn of the airport said he wasn't trying to be obstructionist, but a tethered balloon requires an FAA permit.

Mark London commented about a recent newspaper article questioning the request to have a tethered balloon to be able to judge the height, and the avian study.

- Using a tethered balloon is standard practice for judging the height and visibility of proposed towers and tall buildings. They were used for the proposed AT&T tower in West Tisbury and for the Hospital tower. When requested to do this at the last hearing, the representative from the company installing the tower indicated that he was familiar with how to do this.
- As for the avian study, this was not a requirement of the Commission. One Commissioner had suggested this, and the applicants thought that was a good idea and made it part of their offer.

7. FIELD CLUB AFFORDABLE HOUSING: DRI NO. 551M4 – WRITTEN DECISION

Commissioners present: P. Cabana, C. Murphy, K. Newman, J. Powell, D. Sederholm, S. Shea, L. Sibley, R. Toole, A. Woodruff

Christina Brown noted that she had abstained from the decision.

Commissioners made the following changes:

- Line 30: delete reference to conditions
change to *Application for a Modification of a DRI*
- Line 36-38 delete
- Page 3 delete repeated reference to Bray/Nash letters

add letter from David Nash
add Oral Testimony from the public from Sherry Purdy, Prudy Burt, Michael Donaroma, Tom Benedict, and an unnamed gentleman
add Town Board testimony from *Arthur Smadbeck*
change to \$600,000 *per lot*.

Line 121

Linda Sibley asked why so much of the original decision is repeated in the modification. She sees no purpose in repeating the project description in a modification. It should focus on the affordable housing modification. She can't find a clear exposition of what was discussed and why it would be better to have \$1.8 million instead of three lots. Including the entire history makes it harder to focus on this modification.

Mark London said that a modification to a decision is effectively a new decision, so the decision follows the format of a regular decision; lines 166-175 outline the benefits and detriments of the affordable housing decision. **Paul Foley** noted that Section A4 outlines the benefits of the affordable housing decision.

Doug Sederholm said it's not unreasonable to include the project history, but agreed that much of this draft decision could be deleted. He proposed to make an executive decision to ask staff to revise the decision to include only the affordable housing component.

Andrew Woodruff said noted that this is not just a non-concurrence and modification with conditions, which focuses only on those new conditions. The Commission held a full public hearing and this is a decision that reflects that, similar to when the first decision was modified to approve the Field Club.

Linda Sibley said that this modification was specifically about one condition and the decision should reflect that.

Doug Sederholm said the concerns about the drafting the decision are not a criticism of staff because this follows the current format for decisions.

Paul Foley asked if the written decision could be revised tonight, given that the Edgartown Affordable Housing Committee has expressed some urgency about getting the proposal and written decision approved.

Chris Murphy said this would be the second time that the Commission has sent the Committee away without final action.

Andrew Woodruff said it should be noted in the decision that the money would be spent on acquisition of property not on administrative costs, as the Affordable Housing Committee testified at the hearing.

Doug Sederholm said the decision should include that the permit-granting authority is the Town of Edgartown Planning Board.

Christina Brown clarified that the next step is seeking Planning Board approval.

Linda Sibley said the Commission is not holding them up if they have to go before the Planning Board. The Planning Board can hold its hearing before the Commission has finalized its written decision. The decision cannot be re-written at this meeting; it has to have a complete re-write.

Linda Sibley left the meeting at 9:30 p.m.

Chris Murphy said it seems that the front page of the decision presents a pretty good picture of what happened. The Commission did agree with the Edgartown Housing Authority that it would expedite the process. The document is not incorrect, it merely has some extraneous information.

Chris Murphy moved, and it was duly seconded, to approve the written decision.

Mark London suggested that an option would be to take a short break to allow Doug Sederholm and him to identify the extraneous sections that could be deleted, and present this for consideration by the Commission.

Commissioners agreed to try this.

Commissioners took a short recess.

Doug Sederholm reviewed the proposed revisions:

- Page One: revise . . . to a donation of \$1.8 million *to the Town of Edgartown or its designee to use exclusively to purchase property for affordable housing.*
- Line 36-38: delete
- Other Exhibits: delete three unnecessary exhibits and add letter from David Nash
- Summary of Testimony: add Sherry Purdy, Arthur Smadbeck, Prudy Burt, Tom Benedict and Michael Donaroma and unnamed person
- Section 3.1: revise heading to read *Project History as Relates to Affordable Housing*
- Line 120: revise to read *On April 23rd, the Edgartown Affordable Housing Committee recommended to accept the offer of \$1.8 million payable to the Town of Edgartown and designated for affordable housing in lieu of the three lots designated for affordable housing. The proposed payment schedule is . . . or upon approval by the required permitting boards and the Planning Board.*
- Section 3.2: delete
- Section 3.4: change *Proposed Development* to *Proposed Modification*
- Section A2 and A3: delete
- Section A4: change to *Proposed Modification*
- Section A5, A6, A7: delete
- Keep A8 and delete the rest of the section.
- Under Decision: change to *deliberated about the proposed modification*
- Line 225: revise to read . . . *approve the modification of the affordable housing component of the original decision*
- Length & Validity: delete

Susan Shea moved, and it was duly seconded, to approve the written decision as read. A roll call vote was taken. In favor: P. Cabana, C. Murphy, K. Newman, J. Powell, D. Sederholm, S. Shea, R. Toole, A. Woodruff. Opposed: None. Abstentions: None. The motion passed.

Christina Brown stayed in the room but abstained from the discussion and vote.

8. PUBLIC TRANSIT HUMAN SERVICES PLAN

Commissioners present: C. Brown, P. Cabana, C. Murphy, K. Newman, J. Powell, D. Sederholm, S. Shea, L. Sibley, R. Toole, A. Woodruff

Mark London explained that service providers of special services to people of limited mobility want to apply for funding for additional services, but to be eligible, the Regional Planning Agency has to first adopt a Public Transit Human Services Plan.

- This plan was drafted in cooperation with the VTA.
- MVC staff held a public consultation meeting with representatives from the VTA and interested parties.
- The grant would be for is for service above and beyond basic VTA service, filling the gap between public transit and human service, for elderly or handicapped.

Susan Shea asked for the definition of paratransit. **Doug Sederholm** explained it's the Lift, for people who are in some way disabled and aren't able to use public transportation.

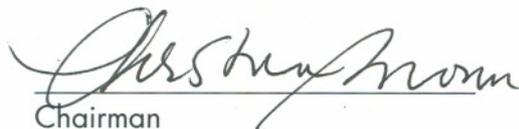
Richard Toole moved, and it was duly seconded, to adopt the Public Transit Human Services Plan. A voice vote was taken. In favor: 10. Opposed: None. Abstentions: None. The motion passed.

9. ANNOUNCEMENTS

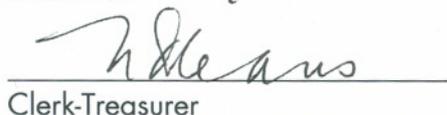
The Living Local Harvest Festival is Friday, Sept. 26th. The festival is the evolution of the annual Harvest Fest.

Christina Brown urged people to remember that on Sunday, September 21st, there will be an open house for Eric Turkington in appreciation of his twenty years of representing the Island.

The meeting adjourned at 10:00 p.m.


Chairman

2/5/09
Date


Clerk-Treasurer

2/5/09
Date