

PO BOX 1447, OAK BLUFFS, MASSACHUSETTS, 02557, 508-693-3453  
FAX 508-693-7894 INFO@MVCOMMISSION.ORG WWW.MVCOMMISSION.ORG

## **Minutes of the Commission Meeting Held on January 31, 2008 In the Stone Building 33 New York Avenue, Oak Bluffs, MA**

### **IN ATTENDANCE**

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

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|---|--------------------------------------|
| P James Athearn (E – Edgartown)         | - Ned Orleans (A – Tisbury)          |
| P 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)            | - Susan Shea (A – Aquinnah)          |
| - Martin Crane (A – Governor Appointee) | - Linda Sibley (E – West Tisbury)    |
| - Mimi Davisson (E – Oak Bluffs)        | - Paul Strauss (County Comm. Rep.)   |
| - Mark Morris (A – Edgartown)           | P 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 Planner), Jo-Ann Taylor (Coastal Planner/DCPC Coordinator)

The meeting was called to order at 7:45 p.m.

### **1. ISLAND ROADS DISTRICT PROPOSED GUIDELINE AMENDMENTS AND EDGARTOWN SPECIAL WAYS REGULATIONS PROPOSED AMENDMENTS – PUBLIC HEARING**

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**Doug Sederholm** read the notice of the public hearing.

- He explained that hearing was on Island Road DCPC guideline amendments and conformance of proposed Edgartown regulations.
- The Commission would be hearing testimony and receiving evidence as to whether it should amend the Island-wide guidelines for the development of the District in Section 5 of the Commission's decision designating the Island Roads District as a DCPC and to determine whether the proposed amendments to the regulations governing the Island Roads District in Edgartown conform to the guidelines to the development of the District specified in the Commission's designation of the District.

**Doug Sederholm** disclosed that he represents Richard and Judy Olsen. They own a property that abuts one of the roads that is designated a Special Way. He does not represent them in this matter and has no financial interest, as far as he knows, in the outcome of the hearing.

## **1.1 Staff Report**

**Jo-Ann Taylor** gave some background on the Island Roads District.

- The Special Ways District was designated in 1975.
- The early Commission felt the Island Roads District, with the Coastal District and Special Places District, should be Island-wide. They designated major roads in all the towns and Special Ways in Aquinnah, West Tisbury, and Chilmark.
- Since then, Special Ways have been designated in Oak Bluffs and one in Edgartown.
- In October 2007, the Commission designated five additional Special Ways in Edgartown.
- The Edgartown Planning Board felt it was important to protect the roads and it would be necessary to amend the regulations governing Special Ways in Edgartown to accommodate the ways that are, in part, routinely traveled.
- It was also noted that it may also be necessary to reopen the original Island Roads District guidelines from 1975 to accommodate Special Ways that are routinely traveled.
- She read the Special Ways description from 1975 when the designation was made to protect the ways from development. The five newly designated ways weren't protected and have been developed. The question is what to do about including and protecting the ways now.
- It seems possible to update the early Island Roads District to accommodate what's happened in the last 30 years and still honor the original intention.
- The first consideration is the amendment of the Island Roads District goals and guidelines on which the regulations are based.
- The second consideration is to find conformance of the proposed Edgartown amended regulations for Special Ways with the amended guidelines for the District.

**Jo-Ann Taylor** outlined possible amendments to the Island Roads District goals and guidelines, prepared by MVC staff. These are intended to update the Island Roads District while keeping the original goals to protect historic places, to retain these ways open primarily for uses such as walking and horseback riding but not developed as a primary vehicular route except for access to properties where no other vehicular access exists.

- Section 5.V.A.1 (Width) – add . . . *unless the town elects to allow greater width by special permit after approval by the Martha's Vineyard Commission as a Development of Regional Impact.*
- Section 5.V.A.2 (Fencing/Walls) – add . . . *unless the town elects to permit fencing or walls on a small lot in which case the town shall determine what acreage constitutes a small lot and the town is encouraged to define setbacks commensurate with the height, transparency, and materials of the fence or wall.*
- Section 5.V.B.1 (Permitted Uses) – add . . . *However, maintenance and continued vehicular use may be permitted where specifically identified by the town as routinely traveled by motor vehicles prior to nomination.*
- Part B (Applicable to Both Zones) – add . . . *However, Part B shall not apply to routinely traveled Special Ways.*

These amendments update the Island Roads District guidelines to account for 30 years that have gone by. If the Commission accepts the amendments to the goals and guidelines, then it would appear likely that the Commission might find that the proposed regulations are in conformance.

## **1.2 Town's Presentation**

**Roger Becker**, chairman of the Edgartown Planning Board, explained the proposed changes to the regulations.

- The problem is what to do with the Special Ways that have vehicular use. The goal is to keep the development to what it is so far and make the Island Road District continuous with what is there already.
- Section 14.2.2.a (Special Ways Purpose) – Add . . . *While some segments of a Special Way may be routinely used by automobiles, they nevertheless provide continuity to the entire Special Way and the community maintains an interest in how these segments are further utilized.*
- The Planning Board identified Special Ways segments routinely used by automobiles on a map. The sections are Pennywise Path, a short section of Ben Tom's Road, and a northern section of Watcha Path, all identified in orange on the map. The map is referred to in section 2B of the bylaw.
- Section 14.2.2.b (Special Ways Designated Special Ways) – Add . . . *Segments of Special Ways that are routinely traveled by automobiles may not have any physical characteristics to distinguish them from contemporary dirt roads. Such segments and their widths are noted as Special Vehicular Ways on a map entitled "Map of Special Ways, January 1, 2008."*
- Clarification is proposed that the existing surfaces of the Special Vehicular Ways could be maintained and repaired with the existing surface material.
- Under Special Permits, the amendment proposes accommodating automobiles on the ways that are already used by automobiles.
- The Planning Board is addressing any new access by a special permit process, which is outlined on page 7 of the proposed amendment regulations.
- The Planning Board addressed the issue of 12-foot width by requiring an applicant to go before the Commission as a Development of Regional Impact, as outlined on page 7, Section 14.2.2.g: Criteria for Special Permits.
- The Planning Board addressed the existing fence issue on Pennywise Path by allowing those that weren't encroaching on the feeling of walking in the woods. Section 14.2.2.d.6 addresses the fence issue. This is addressing the half-acre lots abutting some ways.
- Another issue is that some subdivisions have been created that included the Special Ways as part of a 40-foot layout of the subdivision. If the Town or a developer decided that it wanted to develop one of these roads, the Planning Board would have a method of retaining the cartways and the new way would be built separately alongside.
- The excavation and filling issue is addressed so that people aren't adding fill to the roads and the historic nature of the trails for non-motorized use is maintained.
- Pre-existing fences will remain. The Planning Board inventoried the fences. Two or three existing fences don't meet the new criteria but they would be allowed to continue.

There was a discussion of which roads were designated and what category they are.

- **Jim Athearn** asked about the portion of Ben Tom's Road coming from Pennywise Path South, which is allowed for vehicles but it doesn't feed any houses. He wondered why it would be a Special Vehicular Way.
- **Roger Becker** said the designation is because the way is routinely used by automobiles.
- **Jim Athearn** noted that the rest of the way must be vehicular, as well. The designation seems to be recognizing the historical event of it being improved.
- **Roger Becker** said the issue is the condition of the roads as they surveyed them. Further south you would need a four-wheel drive, high-clearance vehicle, not a regular car.
- **Chris Murphy** asked if the Commission and Planning Board would be carving in stone a handy way to get to the road, and not a right of use.
- **Doug Sederholm** said that's the Town's issue, addressed in its regulations. The Commission responsibility is only to determine whether the proposed regulations conform the Commission's guidelines. If the Town has determined that it wants to designate different sections in different ways, that's probably beyond the scope of the Commission's review.
- **John Breckenridge** said Eric Wodlinger has said the Commission is making a determination of boundaries, not access. That's up to the Town.

**Doug Sederholm** suggested some clarifications.

- Section 14.2.2.2 (Special Ways District Ben Tom's Road) – Add . . . Lot 96 *and running . . .*
- Section 14.2.2.4 (Special Ways District Pennywise Path) – Add . . . Three Cornered Rock Road *and running . . .*

**Roger Becker** agreed with the amendments.

**Doug Sederholm** asked about Section 14.2.2.d (Development Regulations); he understood that a person could put up a five-foot high stockade fence within one foot of the edge of the Special Way and asked how the Planning Board addresses the requirement for turnouts and whether it is worth addressing the need for turnouts. **Roger Becker** said he would argue that the traveled width by definition would include the turnout, so it wouldn't be an issue; people wouldn't be able to put a fence across a turnout; it would have to be one foot set back.

There was a discussion of Subsection 7.

- **Doug Sederholm** said he has concern about whether there is a difference between Special Vehicular Ways and areas where vehicular rights-of-way pre-exist the designation of the Special Way.
- **Roger Becker** said there could be, but they wouldn't know that until somebody wants to establish pre-existing rights there. This has nothing to do with determining rights. People would have to use some other method to determine their rights. Until a vehicular right-of-way was established, only the Special Vehicular Ways are for motorized vehicles.
- **Christina Brown** said it would be clearer to say *Special Vehicular Ways or where vehicular . . .*

**Doug Sederholm** asked about Section 14.2.2.f.1 (Uses Requiring a Special Permit in the Special Way Zone) and the meaning of *shall seek to evaluate and determine*. **Roger Becker**

said it is setting up the criteria for what the Planning Board will be looking at in considering whether a special permit should be issued. **Doug Sederholm** suggested saying . . . *shall evaluate and determine*.

**Doug Sederholm** asked about Section 14.2.2.f.4 and applying for a subdivision of 100 acres; would the Planning Board have the power to grant a special permit for vehicular access for a subdivision with no other access? **Roger Becker** said the issue is all economically viable use.

**John Breckenridge** asked about the fencing issue and whether it should correspond to the 12-foot threshold versus the current 10-foot setback. **Roger Becker** said one of the problems is that these ways are lined up with half-acre lots, some of which are green lawns, fenced in storage areas, or dog pens. The Planning Board tried to look at present conditions and what would be a burden on abutters.

**Jim Athearn** asked for clarification on whether anyone who has a ½ acre lot could put up a fence without permission. **Roger Becker** said that fences can be put back one foot from the embankment no matter how wide the way is.

**Doug Sederholm** clarified that the Town is proposing the amendments with the clarifications adding the words *and running*, changing *and* to *or*, and deleting *seek to*.

### **1.3 Town Boards**

**Dudley Levic**, By-Ways Committee, said that the By-Ways Committee is in agreement with the proposed amendments to the regulations.

### **1.4 Members of the Public**

**Ben Hall** thanked Commissioners for the opportunity to speak and commented on the proposed amendments.

- The issues of guideline amendments and regulations amendments are distinct and separate.
- It's important for the Commission to be cognizant of the guideline changes, far and above the changes that are being looked at to decide whether the Town proposal is in conformity with the guidelines.
- Furthermore, since the Town would not have the by-law but for the power of the Commission, it is incumbent on the Commission to ensure that the Town has drafted a by-law that is clear, unequivocal, workable and doesn't leave open the opportunity for the Town or its boards to use the by-law in an arbitrary or capricious manner to achieve goals that are not consistent with the goals the Commission has set for the by-law.
- He expressed concern that there is an additional amendment to the guideline amendments that he and the public were not made aware of until this public hearing.

**Doug Sederholm** asked for clarification on when the amendment to Section 5.V.a.1 came about.

**Jo-Ann Taylor** said the amendment wasn't in the notice, which is a courtesy notice prepared by staff which also states that members of the public should contact the Commission for the most up-

to-date proposal. Through the process of people coming in to review the guidelines and amendments, there was a question of whether the 1,000-foot curb-cut separation applied to the Special Ways. The Planning Board feels that the 1,000-foot curb cut separation isn't the best thing for the Special Ways. It doesn't make sense to push for the 1,000-foot curb cut separation on a Special Way where the road might then have to be cut 900 feet more than they would otherwise need to. Staff suggested that the guideline could be amended to say that *Part B shall not apply to routinely traveled Special Way*.

**Doug Sederholm** re-stated that the public hearing notice does say. . . *written testimony may be submitted prior to or during the hearing*.

**Doug Sederholm** clarified the proposed amendments to the guidelines. There are four amendments.

- Section 5.v.a.1 (Width): Proposed as written.
- Section 5.v.a.2 (Fences): Proposed as written.
- Section 5.v.b.1. (Permitted Uses) Proposed as written.
- Section 5.B (Applicable to Both Zones): Proposed as follows . . . *However Part B shall not apply to Special Ways routinely traveled by motor vehicles*.

**Mark London** clarified two points.

- When the Commission is acting on a DCPC, it is acting as a legislative body, not as a quasi-judicial body. It may consider new aspects of the topic as they come up.
- The role of the Commission with respect to regulations is limited to ensuring conformance between them and the guidelines. The Commission is not judging the merits of the regulations, how well they might be worded, or any other aspects. That's the Town's role. If the regulations don't conform to the guidelines, the Commission may amend the guidelines, find that regulations don't conform, or find that regulations conform provided certain changes are made.

**Ben Hall** said that the public should be alarmed that the Commission is considering making changes without notifying the members of the public.

- The amendment to Section 5.V.B. was not on the website so the public had no way of knowing that this would be discussed at the hearing and hundreds of people that live in Edgartown might have been affected.
- The public should be made aware of what's going on. The Commission rules with an iron fist. People who want to build a house have to go through tons of regulations to look at see what they can build.

**Doug Sederholm** clarified that people who build houses don't usually have to come before the Commission and he asked Ben Hall to focus on the specific issue addressing the guidelines.

**Ben Hall** said he wanted to point out a procedural problem that people should be aware of. When he was on the Commission, they would often postpone a decision in order to make people aware of what's going on.

**Ben Hall** reviewed the guideline changes.

- The overall theme is that Commissioners have to look at the beginning and end of the Town's proposed regulations before Commissioners look at the guidelines.

- A poorly drafted by-law is the Commission's problem if it is putting its imprimatur on the by-law. The Commission shouldn't be approving a by-law when it has so many problems. He doesn't think the Commission wants to impose a permanent gridlock on the courthouse.
- Other forums will determine whether a road has been used routinely. That summarizes the problem with the bylaw.
- The Commission is basically saying that every time somebody who is not an agreeable person who doesn't fit nicely on the road . . . They are trying to except hundreds of small lots from the real impact of the regulations.; they are okay; they can do whatever they want. And it just so happens that a member of the ByWays Committee happens to live on one of these stretches of road and all of a sudden they're exempt from most of the regulations. But now you're going to impose those very regulations on everybody else.
- The point is that by imposing the regulations by the way they're being drafted, the Commission is going to put a gridlock on all the other larger landowners, particularly his family which owns the vast majority of the lands that are being impacted with the full strength of the regulations. And the Commission is forcing a permanent gridlock in the courthouses and every time they don't agree with something, people are going to end up at the courthouse trying to determine whether or not they drove their car up and down that road in the '70s. These are questions that shouldn't have to come up. The burden is being put on the landowner.
- The guidelines arise out of the cultural and historic Special Ways. The Commission wrote in 1975 the very purpose as to why there was a Special Ways District. The Special Ways are not committed to major vehicular travel.
- Tonight Commissioners are being asked that there be a special type of Special Way. These are used every day for people to come and go to their houses. They are not special ways.
- When this was first nominated, he tried to bring to the Commission's attention the problem with lumping all these ways into one district, into one particular set of regulations. The result is that it is not a coherent district anymore. There's so much variety within the districts that it's not a workable by-law anymore.
- In the Commission proposal, in Section 5.V.A.1, it says that the Town can elect to allow a greater width by special permit, after approval by the Commission as a DRI. This is some provision for relief from saying that a Special Way zone can't exceed the width of 12 feet. It is important that the Commission is recognizing that fire safety vehicles are now getting wider . . . two fire safety vehicles in the middle of the woods having to pass each other on a road that is only 12 feet wide.
- Something to that effect should be in there but the Commission is now creating a new DRI. It's not on your DRI Standards and Criteria Checklist. It's not even, as he reads it, within the by-law itself. If it's approved, "the Commission has to kick the by-law out and say this not in conformity because it doesn't say in the bylaw itself that this is -- now a special permit -- you want to widen the road beyond 12 feet is now a DRI".
- The by-law doesn't say you're referred automatically as a DRI; it's not on the MVC checklist.

**Roger Becker** referred to Section G on page 7. **Ben Hall** said the Commission is making a discretionary DRI a mandatory DRI, and it's not on your checklist. This is another situation where things were drafted so quickly without coordination and without a lot of thought.

**Ben Hall** explained another problem.

- The Town owns and controls part of these ways. Then the Town would now need to come to the Commission for improving its own roads. He thinks the selectmen have exclusive jurisdiction over what happens on a public way.
- There are stretches of these roads that are now being argued in court whether they are public ways and there is a stretch that is not being argued in court that it's a public way. But the fact remains that the guideline implies that you have automatic permission to improve the way up to 12 feet. The implication is that you can construct it but you can't go beyond it.

**Mark London** said he understood that clarified that ways are taken to be 8 feet wide, if the width is not visible. They can go to 12 feet with a Special Permit from the Planning Board. And they can go beyond 12 feet by going before the Commission and then the Planning Board.

**Ben Hall** said they cannot go to 12 feet because you can't touch the surface of the Special Way with or without a special permit because it's one of those prohibited things. You can't allow by special permit that which you've already prohibited. There is the sentence that says it's not intended to prohibit maintenance of the way but you can't touch the surface of the road so you can't widen it. It can't be improved. There's no way for these ways to be widened for public safety. Your guideline implies that you can go up to 12 feet. That's a necessary thing for the purposes of fire safety. That's what people had in mind in the '70s when cars were a little bit narrower. Twelve feet might have allowed two fire trucks to squeeze by if they had to.

**Doug Sederholm** said that he can't imagine that two fire trucks could have ever squeezed by each other in a 12-foot way.

**Ben Hall** reviewed the fencing issue.

- He welcomes the idea that fencing would be allowed in a Special Way Zone to a point. It's important because one of the tenets when you own land is that you get to keep people off it. How do you do that without a shotgun? You do it with a fence. If you're not allowed to have a fence on the edge of your property that means that people will be wandering onto your property and the only way to do it is to have a fence. A reasonable fence is all that anybody really needs. And the Town has at least looked at having some reasonable fences allowed.
- But the problem is that you're now saying they're only allowed on smaller lots so his question to the Commission is why are they only allowed on small lots? Why can't people who have a little more land than the next guy keep people off their property to the same extent that people have smaller lots? What makes small lots so unique that they get to have a fence but the bigger guy doesn't? That doesn't make sense.
- He thinks that should be struck out and it should say instead "unless the town elects to permit fencing or walls, in which case the town is encouraged to define – to use materials that have a certain height and transparency".

- This guideline is designed to take heed of what Edgartown is trying to do in one little stretch of road and he doesn't think it should even be before this body. It happened to be included later on.
- Why is the Commission penalizing people who didn't break up their land? It's totally unfair and he urges the Commission to adjust that and tweak that.

There was a discussion of Maintenance and Vehicular Use.

- **Doug Sederholm** clarified that the proposed change is: *However, maintenance and continued vehicular use may be permitted where specifically identified by the Town as routinely traveled by motor vehicles prior to the nomination.*
- **Ben Hall** said there are several problems with the way the sentence is written. One is *may be permitted*. The Commission is saying that anytime anyone wants to fill a chuckhole in a road, they need a permit. He suggested using the word *allowed*. It's more of an 'allowed' use, rather than a 'permitted' use. Whether it's by right or by special permit, we're talking about allowed uses and he urged the Commission to change the term *permitted uses* to *allowed uses*. *Permitted uses* has the implication that you need a permit issued by somebody. From time immemorial up until today, you do not need permission to fix a hole in your damn road, which on these roads we're talking about people's very own driveways within the Special Way zones. If their driveway is in the Special Way zone, they can't even fix the hole in their driveway, the way this whole thing is being drafted. He expressed concern with the phrase *specifically identified by the Town as routinely traveled by motor vehicles prior to the nomination*. He doesn't know where the language came from, what the sentiment is behind the language, but it smacks of special interest. It's putting the burden on the landowner to have to prove that they have the right to go up and down these roads. These roads would not have been created, but for the fact that landowners went up and down these roads with carts, which are vehicles. So the history of all of these roads – they wouldn't even be here today to be discussed if they weren't vehicular ways. So to say that it has to be specifically identified by the Town as routinely traveled by motor vehicles prior to nomination is putting an undue burden, an unfair burden, on the landowner to have to prove that they need to get up and down the road to get to their own property.
- **Doug Sederholm** said that the existing guideline says you can only have uses that don't result in direct vehicular access. Unless the Commission amends this, vehicles won't be allowed. By including this, the Commission is giving a landowner the opportunity to argue that it was routinely traveled by motor vehicles prior to nomination.
- A member of the audience said that it says in the by-law that you can maintain the roads that are vehicle traveled.
- **Doug Sederholm** clarified that, in regard to the guidelines, what's been proposed is a modification that will permit some use of Special Ways by vehicles. If you look at the guidelines and the goals, the whole idea of a Special Way is to preserve it for foot use, horseback use, and perhaps bicycle use, and not vehicular use.
- **Ben Hall** agreed and added except for those people who have the right to use it for vehicles. Nothing in the existing guideline says you can't use the road. It says you can't

develop within the Special Ways District in a manner that would allow for direct vehicular access.

- **Doug Sederholm** said the amended guidelines would allow that.
- **Ben Hall** said that it doesn't. It now says that you have to prove that. The regulations did not prohibit maintenance of the road. No town prohibits, up until now, has prohibited maintenance on a used road. No town. It's allowed. Now you're saying that if you want to maintain it, you have to go to the Town and get permission to maintain your own road and that you have to prove that you routinely, whatever that means, and he doesn't know what routinely means anymore – is that once a year, twice a year, every day? So you're using a term that has no definition to it, that's vague and ambiguous, instructing the Town that they have to develop a bylaw based on something that's very vague. When the history of these ways is patently clear that they wouldn't even be there but for the fact that they were used by cars over the years – over the centuries. He believes the Commission needs to re-write that in entire fashion and suggested striking out *specifically identified by the Town as routinely traveled by motor vehicles prior to nomination*. He suggested: *Maintenance and continued vehicular use may be allowed*. The Commission achieves its goal, it doesn't limit the town, the regulation isn't unfair and it doesn't put an undue burden on the landowner to have to prove that they drive to their property. It's unfair and absurd. We have to go to court to prove that I drive my car to my property? Would you want to have your property imposed with some regulation that says anytime you want to go to your property or fix the road, you have to go to the Town for permission and you have to prove to them that you drive to your property. That makes no sense.

**Ben Hall** spoke about the change to the 1,000-foot designation that wouldn't apply to ways that are routinely traveled Special Ways. The word routine is problematic. He doesn't know how you can enforce or decide what that means.

**Ben Hall** commented on the proposed amendments to the by-law.

- The by-law was redrafted in the spring initially. There was an agreement by the Planning Board that it wasn't going to work that well and it needed to be refined. He worked with a group of people that got together to specifically draft around some of these issues. One of the ways that they were trying to draft around it was to come up with an idea to try to handle situations where you clearly have different types of districts that need to be regulated entirely separately from all the other types of regulations.
- In Massachusetts there's a rubric of zoning that says that every lot in a district has to be treated in the same way. If you're going to have different treatment for different lots in the district, then you really have to have a different district and split your districts and have a different district that's designated.
- The idea for a special vehicular way was something that he kicked around and he told that group that he thought it was totally illegal to make a special vehicular way, but that as a separate by-law altogether that a special vehicular way would be a good way to handle the situation like most of Pennywise Path where you have these lots where people live and all these lots coming off and fences that are right up on the edge of the road.

- There is a situation where there's a fence that's literally one foot off the edge of the road and on the other side a huge oak tree. If a fire truck had to get down there, he's not sure it could really get down there.
- After the Commission nominated the roads, the Town was supposed to draft it. And the board wasn't meeting anymore. And then the By-Ways committee was supposed to be drafting. He asked for the By-Ways Committee minutes, but they don't keep minutes so there wasn't any evidence as to what actually was discussed.

**Doug Sederholm** said the Commission is concerned with the conformance of the regulations and the substantive comments the public has about them.

**Ben Hall** said the way the regulations were developed and the history of how they came to be is important for the Commission to know to understand that what's before it is not well-reasoned, hasn't been carefully thought out and hasn't had a lot of public input.

- There was a public meeting notice at the end of November for a hearing in December. It wasn't until after the public meeting notice that the regulations that are being looked at were developed. In fact, it was less than a week before the hearing that changes were still getting spit out. There were two or three people who were coming up with the ideas and trying to enact what's before the Commission. There was a great deal of pressure to get the regulations done. While he can appreciate that, he thinks there was a rush to judgment.
- The last sentence of the proposed by-law says *it is beyond the jurisdiction of the planning board by such action to either grant or extinguish public or private rights of way that may exist in a special way*. He can't agree more and asked why that's at the end of the by-law; it should be up in the preamble. It should be the theme off of which the by-law is being drafted. But it doesn't do that. It does the opposite. It does specifically take away – it extinguishes public and private rights of way and gives the Planning Board a specific modality through which to process the extinguishment of people's private rights of way on these roads. Now you've put the burden on people to have to prove they have a right of way so they can use it. An outside forum has to decide whether you have a right to get to your own property, so every time anybody wants to go to their property that doesn't have a specific right of way -- and that would be all the small lot owners that have been excepted from most of the power of the regulations – now you have to go to court. You're putting the burden of proving that you have a right to get to your property – you have to go to court to prove it before the Planning Board's even going to let you go through this process because they could just deny you and say no.
- This by-law exempts all of the little lots – all the people who have already done their development. They have already 'interfered with' and taken away the ambience that people were looking to preserve in these ways. Those sections shouldn't even be in this way. The other people who are being affected are the large land owners that haven't done the development that have maintained a nice feel about the properties are being fully punished here and are being held to a much higher standard. That is not fair.
- He referred to the Special Ways map that creates special vehicular ways. He can understand why it was a problem for Jim Athearn and Chris Murphy and why it's a problem for the Commission. He thinks it's a huge problem. It was identified – it was set

up and established in an arbitrary way. There wasn't really a study. There was no impact study of what the impact is of the whole thing.

- Ben Tom's Road from where they show the Special Vehicular Way is regularly and routinely traveled by cars every day. He's sure on the site visit they saw cars going up and down Ben Tom's. It's the biggest and best shortcut that everybody takes from the beach. Everybody who lives on the Island will take that way in the summertime to avoid going through the Triangle. That should be a Special Vehicular Way if anything should be a Special Vehicular Way, that little stretch right there.
- The Special Vehicular Ways are exempt from a lot of the regulations. He asked what makes that fair. It sets up a whole separate criterion for the little people whose lots are already developed and the bigger people are being punished. So you don't get the benefit of having an assumed vehicular use.
- In effect, the Commission is adopting a map. That's the only map. It's not identified by map and parcel number so you don't know where it begins and ends. It's hard to tell where it begins and ends. The mode of determining what is a routinely traveled way has not really been defined except to say we're trying to let the people be grandfathered that are already kind of on those roads already. We're going to impose the big regulations on the people that own the big lands. The description of the property – you were asking for some clarification during the hearing. In 14.2.b.2, the description of Ben Tom's Road – he's not sure what the west fork is. It's not defined. It's not clear from the maps or the assessor's maps.
- The development regulations do not allow you to improve, work on the road, to put rap down on the road.
- He got a letter from the Watcha Path Road Association. He noted that most of the people on the Watcha Path Road Association are on the Special Vehicular Way. Even the Special Vehicular Way is not allowed to have the surface of the road touched. They put down tons of rap last year. And they've got a tractor going up and down it on a regular basis. So those sections of the road can be maintained but if someone wants to drive the road, they can't maintain that stretch of road. They can't fill in the chuckholes. They have to suffer with getting their car scratched. They have to suffer with getting their car stuck in the mud. They're not allowed to put stones in a huge deep hole. It's not allowed. He doesn't see how that's fair.
- Section 2.d.2 says there shall be no alteration of the surface of a Special Way. The next sentence states that this provision is not intended to prohibit routine maintenance and repair. **Ben Hall** said he doesn't know how the Commission or the Planning Board can apply that. The language is so poorly drafted that it doesn't work. The language should not be *it is not intended* but *except that you can do routine maintenance and repairs of special ways*. And it's not consistent with the guidelines which say that you can't construct a road within a Special Way that exceeds a width of twelve feet. But it implies that you're allowed to do construction up to twelve feet and here they're saying that you can't alter the surface or the width of the public way. There's no consideration for public safety. You can't allow by special permit that which you have prohibited. You prohibited the alteration to the width in the surface. That means that all these roads – no filling

chuckholes. There are road associations. You just put them out of business. If the by-laws going to be absolutely applied then no more fixing the roads.

**Doug Sederholm** responded that the Commission is not preventing routine maintenance and repair of the existing road.

**Mark London** suggested language to the effect of *it should not be altered other than routine maintenance*. **Ben Hall** agreed that the language should be *should not be altered other than maintenance*.

**Ben Hall** said the next section says you can't pave it with impervious materials. He has no problem with that. He wants that but he doesn't want number two because it says you can't repair your own road. You can't alter the surface of the road means you can't put any dirt or stones down, you can't scrape it, you can't touch the surface of the road. In theory you can't pick up a stone off the road and throw it into the woods.

**Doug Sederholm** disagreed that the section says you can't repair your own road. He said Ben Hall's argument could be argued but he doesn't believe anyone applying common sense would look at it that way. He is a clerk for a 2-mile long dirt road and has some idea how this is done. He thinks common sense would prevail.

**Ben Hall** suggested using common sense language that allows it and doesn't create an arbitrary provision.

**Christina Brown** asked if Ben Hall could help the Commission focus on whether the regulations are consistent with the guidelines, rather than the specific wording. Specific wording can be worked out by the Town.

**Ben Hall** said the wording hasn't been worked out by the Town because they wouldn't allow – they refused to adopt recommendations and language that had been presented to them on a number of occasions and they just decided to draft them on the back of a napkin before the hearing.

**Christina Brown** said the Commission's task is to look at whether the proposed regulations are consistent with the guidelines.

**Ben Hall** said that he believed that's one of the considerations.

- He respectfully disagreed with Mark London's sentiment and in that which Christina Brown just said that you should not allow towns to pass unworkable, unfair, by-laws. They only have the by-laws because the Commission is giving them permission to have these by-laws. It's the Commission's power that they draw off of under which they put these in. These are super zoning regulations. These could pass muster as non-zoning. So zoning rules may or may not apply.
- Additionally, no DCPC has ever, except by its internal language, allowed grandfathering. No pre-existing non-conformity has ever been allowed under DCPC regulations. Unless the regulations actually say you are grandfathered and your pre-existing non-conforming property is protected, you're not protected because this is not zoning. This is superzoning. This is DCPC. We're working with a different animal here and people need to appreciate that the Commission has a hammer and it is hammering a nail down

into the town and you have to accept these regulations because they meet our guidelines. I think you have to study them a little bit more and say they're workable and they're fair.

There was a further discussion of the Commission's responsibility with respect to the regulations.

- **Doug Sederholm** said the Commission doesn't say that a town has to adopt regulations. The Commission's job is to determine whether the regulations are in conformance with the guidelines. Then the Town at the town meeting has to decide by a 2/3 vote whether it's going to adopt it. And there are opportunities for amendments from the floor at the Town Meeting. Ben Hall's concerns would be addressed at the Town Meeting.
- **Ben Hall** said the Commission also has the power to say these aren't workable regulations. It's within the statutory mandate that if these are not regulations that the Commission finds palatable, the Commission it will draft the regulations if Commissioners so decides. So there's another way for these regulations to be put into effect and, at that point, as he reads the statute, there is no town vote. The Commission imposes it.
- **Doug Sederholm** said the town has a year in which to develop the regulations.
- **Roger Becker** said the Town is going to vote on this. The townspeople can decide whether the wording is the way they want it or not. We don't need the Commission to address that. The question is whether the proposed regulations meet the guidelines.

**Ben Hall** added the following comments.

- The guidelines are based on the premise that the Special Ways are roads that have been virtually abandoned or left to infrequent use and that they are not committed to vehicular travel. So the overriding principle of the guidelines has to be from the preamble of the very purpose for which the Commission set up these Special Ways. Regardless of what the specific guidelines say, the Commission needs to look overall at whether or not what's being proposed actually meets the Commission's definition and the purposes for which the Commission is setting up these Special Ways.
- Another specific problem with these bylaws is in Section 4, D4, you're not allowed to remove vegetation except as part of a special permit, except where natural vegetation has been removed prior to December 1, 2007.
- He said he doesn't know what B or C mean. The width of a Special Way zone extends beyond a pre-existing fence. He's not sure of what right of removal you would have for vegetation. Does that mean in front of your fence or behind your fence?
- It's not clear or workable.

**Roger Becker** explained that if your fence is within the Special Way zone, you may be allowed to remove existing vegetation. B is for a pre-existing fence. C is for lots that could have a fence.

**Ben Hall** said again that's for lots that are only up to one acre because the one-acre lots get the special rights to have the fences and nobody else does.

**Ben Hall** spoke about Section D.7, Special Ways for non-motorized transportation. *Except for those segments identified on the map as Special Vehicular Ways or where vehicular rights pre-exist the designation of the Special Way is problematic.*

- He suggested that vehicular rights pre-exist on every single one of these ways. That's how they got there. The Planning Board says they can't extinguish them at the very last sentence. And yet there's a sense that now they're for non-motorized transportation. You no longer have the rights.
- This particular section does the exact opposite of what the Commission said it can't do and what the by-law itself says it can't do. Where rights pre-exist, you can't take them away, but the by-law is taking them away.

**Ben Hall** spoke about Section F.1.c: *Vegetation in immediate surroundings are consistent with the purpose of this by-law.* The Planning Board is supposed to seek to determine if the vegetation around an access is consistent with the purpose of the by-law. He doesn't know what that purpose is. He doesn't know what that means. He doesn't know if that's workable.

**Ben Hall** spoke about Section F.5. *Where new roadways or other vehicular or utility rights of ways are permitted or created by the Town of Edgartown.*

- This by-law doesn't allow you to put any underground utility – you can't put an underground utility within a Special Way Zone because it would require you to either alter the surface of the way or to remove existing vegetation within the Special Way Zone. You can't do it so therefore there will be no more utilities going along these Special Ways.
- He doesn't think that has anything to do with the purposes of it. He doesn't understand why it isn't addressed in the by-law. It envisions the Town of Edgartown creating something when it's not clear that the Town has any control – the Town itself as a public entity – that these roads are public in nature. That's still a matter of some debate.

**Ben Hall** urged the Commission to reject these and send them back for more clarity so that they can be worked on and tightened up. And so they can be made more consistently applicable generally to all of the people in the District, not exempting one hundred people on one little stretch of road that could have been easily left out of the district to begin with. He doesn't know why it got added back in.

**Ben Hall** said he wanted to add to something that Jim Athearn pointed out. It's hard to say that you can't allow cars to go over roads when they've been driving over the roads.

- One of the major themes and problems with this by-law is the idea to try to eradicate and eliminate people's vehicular rights in these roads that were historically created for vehicles. And now the Commission is taking them away. The Commission is wiping out that history.
- The Commission is creating a Shangri-La Disney-like atmosphere that was not the historic purpose for these ways. The Commission is trying to create a recreational use in a zone -- that is great but that isn't what the idea of the Special Ways is about. It's supposed to be about preserving the history of these ways. The history of these ways is that they're vehicular.
- There are ways of regulating these ways to preserve a recreational feel, to preserve a rural feel, without wiping out and intentionally extinguishing people's rights to use these roads for the very purposes for which they were created.

- He urged the Commission to reject these and say that they don't meet the guidelines. He urged the Commission to review the guidelines to tighten them up so that they have stronger impetus and can be applied in an objective manner. He thanked the Commission for listening.

**Christina Brown** asked if Ben Hall has his notes in writing.

- **Ben Hall** said he could prepare them.
- **Doug Sederholm** said he could keep the written record open until a few days before February 7, when Commissioners will be deliberating.

There was a discussion of the 1,000-foot rule.

- **Chris Murphy** said he would like to go over the exception to the 1,000-foot rule. He doesn't understand the exemption from it.
- **Jo-Ann Taylor** explained that if you have a Special Way and the idea is to keep it from being a vehicular access if possible, if you were to force somebody to that 1,000 foot, you might make them open up 900 feet more than they would otherwise have to. They could otherwise put their driveway closer to what's already there.
- **Chris Murphy** asked whether the exemption could allow for multiple driveways from a subdivided lot onto a Special Way.
- **Jo-Ann Taylor** and **Mark London** explained that 1,000 feet is for safety and to avoid multiple entries. Aim is to cluster the entrances and avoid extending travel on the road more than necessary.
- **Ben Hall** said it's never been an issue because the Commission has never tried to establish a Special Way on a fully populated road.
- **John Breckenridge** said that there is regular practice today where the Island Road District does have provisions where the exemption to the 1,000 feet is permitted by a special permit coming from the Planning Board.
- **Chris Murphy** said he has no problem with the 1,000 foot exemption as Mark London described. It's the multiple curb cuts that could be a problem and he thinks it can be fixed very easily. The location of an access onto a property is not his concern; it's multiple accesses that would cause a problem.
- **Ben Hall** said that when you're talking about these old ways, you also have to keep in mind, for instance, a 40-acre parcel of land with one entrance onto it with 60 or 70 houses. 120 cars at 8:00 in the morning all coming out of one entrance onto a dirt road. He thinks the Commission wants to allow more than one entrance. The Commission ought to leave it in the hands of a board to decide how many entrances there should be and give them the flexibility and not limit them to saying just one.

**Roger Becker** addressed the question of why a regulation is needed for the section of road that is routinely used by vehicles.

- These are historically parts of the Special Way, and have been routinely used by cars. The protection they are giving it is specifically that it can't be widened or paved. There will be some control over the fencing along the way, which is important in relation to the guidelines.

- It wasn't easy to make the decision to include these sections but it was really hard to make the decision to exclude them. The Planning Board had strong support for inclusion at the hearing and there weren't any objections except by Mr. Hall.

**Chris Murphy** asked about the part of the map marked as 'Jeep Use'. He said that just because someone drives through there doesn't mean they have the right to. If the Town's purpose is to make it a non-vehicular trail, it seems that there's a stronger piece that the Commission is not doing while saying that we'll make this a non-vehicular trail.

**Doug Sederholm** explained that the 'Jeep Use' designation should be ignored. His understanding is that section of Ben Tom's is a Special Way, not a Special Vehicular Way. They will not encourage it being developed anymore than it is already.

**Chris Murphy** said that there are a few big pieces that haven't been developed and all the rest of the land has been developed. Are the owners of the big pieces being punished essentially for not having developed their land, since they won't be able to do a development using this road as their access or at best they'll only be able to do a very limited development. While he lauds the idea of protecting open space, he wonders whether the Commission is being heavy-handed, punishing the guy who comes in last to do his development.

**Doug Sederholm** said that was a discussion of the merits and that particular point should be raised during deliberations and is an important point to consider.

**Jim Athearn** said the amendment to the guidelines affects the whole Island. **Jo-Ann Taylor** confirmed that Planning Boards in other towns were solicited to know this was happening.

**Ben Hall** commented on the uses requiring special permit.

- You're going to be allowed a special permit to develop or use or do something or build a structure if the imposition of the regulations deprives the landowner of all reasonable use.
- In Massachusetts, that goes way beyond what is required for a taking of property. It stretches the envelope well beyond what a landowner needs to show that is unreasonable. To take all the reasonable use of the property – to say that they have to go to that standard to get any sort of special permit whatsoever is exceedingly heavy-handed.
- If you really look at these ways, you have to ask why some of these other ways in town that are actually at risk for being lost – why aren't they included in these provisions. The extension of Ben Tom's Road that goes all the way to Vineyard Haven Road.
- There are certain people in town that own – the Mercier family is very politically connected in Town – that stretch of the road was omitted. That stretch of the road goes through people's yards. You can see it on the ground. It's on some of the old maps. It's on the assessors' maps. That's not proposed to be protected. That's one that the Town could literally lose in a few years because someone has put a little shed up in the middle of the way. One of those old ways could actually be fully lost to people being able to go up and down and across those roads. There are actually a few others in town.
- The heavy-handed nature of it – we feel so singled out because in almost every instance we are the major landowner on the stretches of road that are being proposed. So we feel extremely singled out.

There was a discussion about the scope of dealing with the regulations.

- **Andrew Woodruff** asked about modifying the regulations after the hearing is closed. What can Commissioners do in their discussions?
- **Doug Sederholm** said first they would determine whether or not and to what extent the Commission would modify its guidelines. Then Commissioners will address regulations. They could determine that regulations are consistent with guidelines and send them back as they are. They could determine that as a whole that they're not consistent and send them all back to the Planning Board. Or they could identify the portions that are consistent and those that are inconsistent and send them back to see what the Planning Board will do. The Commission wouldn't necessarily amend them and send them back to the Planning Board.
- **Mark London** suggested that the Commission could make suggestions to the Planning Board as to how regulations could be consistent with guidelines, or could find them in conformance provided certain changes are made.
- **Doug Sederholm** clarified that, having had a public hearing on the guidelines, the guidelines could, in deliberation, be amended, or the Commission could entertain additional amendments that are consistent with the issues on the table.

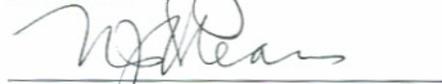
**Jo-Ann Taylor** clarified that Section 5.V.b.1., regarding vehicular use, is a guideline, not a regulation. The regulation doesn't have to read exactly like the guideline. It has to be in conformance with the guideline.

**Doug Sederholm** closed the oral testimony of the public hearing and left the written record open until 5:00 p.m. on Tuesday February 5, 2008. The Commission will deliberate and decide the issues at its meeting on February 7, 2008

The meeting adjourned at 10:00 p.m.



Chairman



Clerk-Treasurer

3-6-08

Date

3-6-08

Date