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October 18, 2016

Martha's Vineyard Commission  
33 New York Avenue  
Oak Bluffs, MA 02557

**Re: DRI 660, Oak Bluffs Water District Solar Farm**

Dear Commissioners:

The Vineyard Conservation Society (VCS) is a non-profit environmental advocacy organization representing more than 1,000 year-round and seasonal residents.

With respect to DRI 660, we wish to echo the testimony of Dr. David Foster (Director of the Harvard Forest), colleague organizations, and many members of the community, expressing deep concerns about:

- removal of ecological buffers protecting the quality of our water supply
- impacts on habitat, and
- protection of significant forest communities.

We also wish to add our concern that this DRI fits the description of lands subject to the protections of the 97<sup>th</sup> Amendment to the State Constitution. Article 97 requires legislative action before any change of use of open space lands, as is proposed here.

Article 97 is a legislative remedy intended to stem the loss of open space held by the public (state, city, or town), through change of use or conversion to inconsistent uses. Article 97 also authorized the use of eminent domain taking to acquire interests in land for open space protection.

That is what the town availed itself of in this case. The Order of Taking clearly states that, at the September 1987 Town Meeting, the inhabitants of the town of OB identified the proposed use of the property to be taken and the public use to be served, specifically being the protection of the town water supply.

We must disagree with the applicant's attorney, who argues that the Order of Taking was deficient (and therefore avoids Article 97 requirements) due to failure to adequately recite the water protection purpose of the taking because that statement of purpose was set apart from the rest of the document in a "Whereas" clause. Such an interpretation would arguably be correct in the context of a contract document, but not in the case of the "Whereas" recitals in this document.

Specifically, the definition of “Whereas” is, “given the fact that.” It is to be used to interpret the intended meaning of a document, in this instance, the Order of Taking. There is no question that it was intended to be an operative and integral part of that document. It clearly describes the September 17, 1987 meeting where voters of the Town identified the public use to be served by the acquisition, “being specifically the protection of the town water supply and the establishment of a well.” So we believe it is incorrect to say that the title to the land fails to contain the requisite restrictive language simply because that language is contained in the Whereas clauses.

The applicant also argues that the deed from the Town to the Water District contained no language restricting its use to town water-related purposes. Setting aside the question of whether that conveyance was subject to Article 97 as well (see below), with what other purposes would the Water Commissioners be charged in this instance?

In our conservation and environmental protection work, the “bible” – the go-to resource – with respect to Article 97, is the 1974 Attorney General’s opinion interpreting the Amendment. Attorney general Robert Quinn wrote (emphasis added):

- Article 97 seeks to prevent government from ill-considered misuse of public lands . . . If land is misused, a portion of the public’s natural resources may be lost forever.
- The types of "natural resources" covered by Article 97 included, among other things, underground and surface waters, forests, and all uncultivated flora, together with land, soil resources, and open spaces.
- The legislature did not propose this Amendment nor was it approved by the voting public without a sense of history, nor void of a purpose worthy of a constitutional amendment. . . It is clear that land taken or acquired . . . is now to be subjected to the two-thirds vote requirement for changes in use or other dispositions.”

As to the conveyance to the Water District (on the larger parcel subject to the Taking), that too appears to have triggered an Article 97 obligation. As the AG Opinion makes clear:

I conclude that the “dispositions” for which a two-thirds roll call vote of each branch of the General Court is required include transfers of legal or physical control between agencies of government without limitation and without regard to whether the transfer be for the same or different uses or consistent or inconsistent purposes.

So, in our view, the issue is whether this DRI proposes a change of use. Even if one argues that installing photovoltaic panels will have no impact on forests or water quality protection (which was the purpose of the acquisition), there’s no avoiding the fact that it is still a change of use triggering Article 97 provisions.

Amongst other steps, a bill must be placed before each of the two houses of the legislature, and a supermajority – a two thirds vote – is required to proceed. The policy of the state environmental affairs office also requires a unanimous vote of the local conservation commission, a two-thirds vote of the town meeting, as well as a filing of an Environmental Notification Form (ENF) with the MA Environmental Policy Act (MEPA) unit at the Executive Office of Environmental and Energy Affairs (EOEEA).

**Clearly, the state doesn’t take such conversions lightly, nor should the MVC.**

Importantly, the state has a policy of no net loss of Article 97 lands. Any disposition requires that EOEEA find that exceptional circumstances exist, including that ". . . no feasible and substantially equivalent alternatives exist (monetary considerations notwithstanding)." Further, real estate of ". . . equal or greater fair market value, and significantly greater resource value" must be provided as an offset.

To our knowledge, none of these requirements have been accomplished by the applicant.

Please be aware that this issue is occurring all over the state, and we will be seeing it increasingly here on Martha's Vineyard, as worthy public projects compete for limited existing open space.

Our perspective is that as an Island, we need to be united in defense of our Article 97 lands.

Finally, it is important to thank those volunteers who have worked hard to explore ways to develop renewable energy capacity in Oak Bluffs and other Island towns. In this instance, it is a case of right idea, wrong location. We urge the water district to work with town leadership, other boards, and with you the MVC, to plan deliberately and responsibly for these necessary facilities at appropriate locations.

Thank you for the opportunity to comment.

Sincerely,

Brendan O'Neill  
Executive Director