

Commonwealth of Massachusetts  
County of Dukes  
The Superior Court

Civil Docket DUCV2007-00061

RE: Hall, as Trustee of the Forsythia Trust and individually et al v Martha's Vineyard  
Commission et al

TO: Michael A Goldsmith, Esquire  
Reynolds Rappaport & Kaplan  
106 Cooke Street  
PO Box 2540  
Edgartown, MA 02539

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CLERK'S NOTICE

This is to notify you that in the above referenced case the Court's action on 02/11/2011:

*RE:*

is as follows:

Motion (P#Town of Edgartown's Motion for Judgment on the Pleadings) DENIED  
as moot (Moriarty, J.) Notices mailed 2/11/2011

Dated at Edgartown, Massachusetts this 11th day of February,  
2011.

Joseph E. Sollitto, Jr.,  
Clerk of the Courts

BY:

.....  
Paula L. Berube-Devaney  
Assistant Clerk

Telephone: (508) 627-4668

Copies mailed 02/11/2011

Commonwealth of Massachusetts  
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CLERK'S NOTICE

This is to notify you that in the above referenced case the Court's action on 02/11/2011:

*RE: Plaintiff Therese M. Hall, as Trustee of the Forsythia Trust  
and individually et al's MOTION for Partial Summary Judgment on  
Count 1 of the supplemental and amended complaint, as to  
Edgartown, Town of*

is as follows:

Motion (P#67, Plt. Motion for Partial Summary Judgment) DENIED as moot  
(Moriarty, J.) Notices mailed 2/11/2011

Dated at Edgartown, Massachusetts this 11th day of February,  
2011.

Joseph E. Sollitto, Jr.,  
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CLERK'S NOTICE

This is to notify you that in the above referenced case the Court's action on 02/11/2011:

*RE: Plaintiffs' MOTION for Protective Motion for Supplemental  
Town Record or, in the alternative, To Expand the Town Record*

is as follows:

Motion (P#63, Plt. Protective Motion for a Supp. Town Record) DENIED as moot  
(Moriarty, J.) Notices mailed 2/11/2011

Dated at Edgartown, Massachusetts this 11th day of February,  
2011.

Joseph E. Sollitto, Jr.,  
Clerk of the Courts

BY: \_\_\_\_\_

Paula L. Berube-Devaney  
Assistant Clerk

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Commonwealth of Massachusetts  
County of Dukes  
The Superior Court

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Commission et al

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Edgartown, MA 02539

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CLERK'S NOTICE

This is to notify you that in the above referenced case the Court's action on 02/11/2011:

*RE: Plaintiffs' MOTION for leave to Add to the MVC Record or, in  
the Alternative, Offer of Proof on MVC Issues under Count III*

is as follows:

Motion (P#59, Plt. Motion to Add to the MVC Record) DENIED as moot (Moriarty,  
J.) Notices mailed 2/11/2011

Dated at Edgartown, Massachusetts this 11th day of February,  
2011.

Joseph E. Sollitto, Jr.,  
Clerk of the Courts

BY:

Paula L. Berube-Devaney  
Assistant Clerk

Telephone: (508) 627-4668

Copies mailed 02/11/2011

Commonwealth of Massachusetts  
County of Dukes  
The Superior Court

Civil Docket DUCV2007-00061

RE: Hall, as Trustee of the Forsythia Trust and individually et al v Martha's Vineyard  
Commission et al

TO: Michael A Goldsmith, Esquire  
Reynolds Rappaport & Kaplan  
106 Cooke Street  
PO Box 2540  
Edgartown, MA 02539

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CLERK'S NOTICE

This is to notify you that in the above referenced case the Court's action on 02/11/2011:

*RE: Plaintiff Therese M. Hall, as Trustee of the Forsythia Trust  
and individually et al's MOTION for Partial Judgment on  
pleadings (Rule 12(c)) on MVC issues under Count III(Certiori)*

is as follows:

Motion (P#51, Plt. Motion for Partial Judgment on the Pleadings) ALLOWED  
(Morarty, J.) Notices mailed 2/11/2011

Dated at Edgartown, Massachusetts this 11th day of February,  
2011.

Joseph E. Sollitto, Jr.,  
Clerk of the Courts

BY:

Paula L. Berube-Devaney  
Assistant Clerk

Telephone: (508) 627-4668

Copies mailed 02/11/2011

Commonwealth of Massachusetts  
County of Dukes  
The Superior Court

Civil Docket DUCV2007-00061

RE: Hall, as Trustee of the Forsythia Trust and individually et al v Martha's Vineyard  
Commission et al

TO: Michael A Goldsmith, Esquire  
Reynolds Rappaport & Kaplan  
106 Cooke Street  
PO Box 2540  
Edgartown, MA 02539

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CLERK'S NOTICE

This is to notify you that in the above referenced case the Court's action on 06/12/2009:

*RE: Defendant Martha's Vineyard Commission's Partial MOTION to  
Dismiss*

is as follows:

Motion (P#31:Martha's Vineyard Commission's Partial Motion to Dismiss)  
ALLOWED for the reasons set forth in the Defendant, Martha's Vineyard  
Commission partial motion to dismiss (Cornelius J. Moriarty II, Justice) Notices  
mailed 6/12/2009

Dated at Edgartown, Massachusetts this 11th day of February,  
2011.

Joseph E. Sollitto, Jr.,  
Clerk of the Courts

BY:

Paula L. Berube-Devaney  
Assistant Clerk

Telephone: (508) 627-4668

Copies mailed 02/11/2011

(80)

Commonwealth of Massachusetts  
County of Dukes  
The Superior Court

CIVIL DOCKET# DUCV2007-00061

Therese M. Hall, Individually and as Trustee of the Forsythia Trust,  
Benjamin L. Hall, Individually and as Trustee of The Ben Tom Realty Trust and Trustee  
of Starbuck's Hill, Brian M. Hall, as Trustee of Baron's Land Trust and Dukes Wood  
Realty Trust, Benjamin L. Hall, Jr., as Trustee of the Haute Montagne Trust  
vs  
Martha's Vineyard Commission,  
Town of Edgartown

JUDGMENT


This action came on before the Court, Cornelius J. Moriarty, II, presiding,  
and upon consideration thereof,

It is ORDERED and ADJUDGED:

The Martha's Vineyard Commission's designation of the five additional Special  
Ways on October 4, 2007, is VACATED.

This matter is REMANDED to the Martha's Vineyard Commission, which, if it  
elects to do so, shall have 30 days from the date of entry of this Order to reconsider the  
Town of Edgartown Planning Board's nomination of the five ways as Special Ways.  
During that time, the development moratorium shall remain in effect. Should the  
Martha's Vineyard Commission designate any or all of these five ways as Special Ways,  
it shall, with respect to each of the designated ways: (1) make all required findings and  
specifications, (2) address whether the public access requirement is met, and (3)  
address whether and how the plaintiffs will be able to access their property by motorized  
vehicle. (Moriarty, J.). Copies mailed 2/11/2011

Dated at Edgartown, Massachusetts this 11th day of February, 2011.

  
Joseph E. Sollitto, Jr.,  
Clerk of the Courts

Approved as to Form:

.....  
Justice of the Superior Court  
Copies mailed 02/11/2011

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Commonwealth of Massachusetts  
County of Dukes  
The Superior Court

CIVIL DOCKET# DUCV2007-00061

Hall, as Trustee of the Forsythia Trust and individually et al,  
Plaintiff(s)

vs

Martha's Vineyard Commission et al,  
Defendant(s)

JUDGMENT ON MOTION TO DISMISS  
(Mass.R.Civ.P. 12b)

This action came on for hearing before the Court, Cornelius J. Moriarty, II, presiding, upon the Defendant's, Martha's Vineyard Commission, motion to dismiss pursuant to Mass. R.Civ.P. 12(b), and upon consideration thereof,

It is ORDERED and ADJUDGED:

That Counts I and II of the Complaint of the plaintiff (s), Therese M. Hall, Individually and as Trustee of the Forsythia Trust, Benjamin L. Hall, individually and as Trustee of The Ben Tom Realty Trust and Trustee of Starbuck's Hill Trust, Brian M. Hall, as Trustee of Baron's Land Trust and Dukes Wood Realty Trust, Benjamin L. Hall, Jr., as Trustee of the Haute Montagne Trust is hereby dismissed against the defendant (s), Martha's Vineyard Commission and Town of Edgartown.

Dated at Edgartown, Massachusetts this 11th day of February, 2011.

  
JOSEPH E. SOLLITTO, JR.  
CLERK OF COURTS

Entered: 11 February 2011

Copies mailed 02/11/2011



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COMMONWEALTH OF MASSACHUSETTS

DUKES, ss.

SUPERIOR COURT  
CIVIL ACTION NO. 2007-00061

THERESE M. HALL<sup>1</sup> & others<sup>2</sup>

vs.

MARTHA'S VINEYARD COMMISSION & another<sup>3</sup>

MEMORANDUM OF DECISION AND ORDER

**1. Introduction**

The plaintiffs, all members of the Hall family and owners of property in Edgartown, filed this lawsuit challenging actions by the defendants, the Martha's Vineyard Commission ("the MVC") and the Town of Edgartown ("the Town"). At issue is the MVC's designation and the Town's regulation of five ancient ways in Edgartown as Special Ways of the Island Road District - Special Ways Zone, a District of Critical Planning Concern ("DCPC"). As a result of that designation and regulation, the plaintiffs' use of and access to their property along these Special Ways is restricted.

In the sole remaining claim of the plaintiffs' Fourth Amended and Supplemental Complaint,<sup>4</sup> Count III, the plaintiffs seek rulings pursuant to G. L. c. 249, § 4, against both

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<sup>1</sup>individually and as Trustee of the Forsythia Trust

<sup>2</sup>Benjamin L. Hall, individually and as Trustee of the Ben Tom Realty Trust and Trustee of Starbuck's Hill Trust; Brian M. Hall, as Trustee of Baron's Land Trust and Dukes Wood Realty Trust; and Benjamin L. Hall, Jr., as Trustee of the Haute Montagne Trust.

<sup>3</sup>the Town of Edgartown.

<sup>4</sup>The Court has, in a margin endorsement, allowed the Town's motion to dismiss the non-certiorari claims against it. See The Town of Edgartown's Response to the Martha's Vineyard Commission's Partial Motion to Dismiss, #33.

defendants. The plaintiffs challenge the lawfulness of the following MVC acts: (1) the designation of the five ways as part of the DCPC, (2) the amendments to the guidelines for development of the Island Road District - Special Ways Zone, and (3) two determinations that the Town's amended regulations of the Special Ways Zone conform to the MVC's guidelines. The plaintiffs allege that these MVC acts are in excess of the MVC's jurisdiction, unsupported by findings or evidence, based upon unlawful procedure, in violation of constitutional rights and otherwise not in accordance with the course of the common law. In Count III, the plaintiffs also assert that the Town committed procedural errors rendering unlawful the amendments to § 14.2.2 of the Town's Zoning Bylaw governing Special Ways and § 163-1 of the Town's General Bylaw, which prohibits most motorized vehicles from using the Special Ways without a special permit or recognized preexisting vehicular right of way.

Before the Court are the Plaintiffs' Motion for Partial Judgment on the Pleadings on MVC Issues Under Count III; the Plaintiffs' Motion for Leave to Add to the MVC Record or, in the Alternative, Offer of Proof on MVC Issues Under Count III; the Plaintiffs' Protective Motion for a Supplemental Town Record or, in the Alternative, to Expand the Town Record; the Plaintiffs' Motion for Partial Summary Judgment Against the Town of Edgartown on Count I; and the Town of Edgartown's Motion for Judgment on the Pleadings Under Count III.

## **2. The MVC Act**

To give context to this controversy, the Court begins by setting out the authority and procedures used by the MVC and the Town in designating and regulating the DCPC.

The purpose of the MVC Act "is to import regional -- island-wide and Statewide --

considerations into the protection of the land and water of Martha's Vineyard, considerations which, the Legislature could believe, the towns themselves had not and would not severally bring to bear." *Island Props., Inc. v. Martha's Vineyard Comm'n*, 372 Mass. 216, 229 (1977). The MVC's standards and regulations have regional significance and they, rather than local zoning provisions, control and apply to the DCPC. *Id.* at 217. In order to preserve and enhance Martha's Vineyard's unique natural, historical, cultural and other values, the MVC has authority to designate DCPCs and also to determine whether a proposed development is one of regional impact ("DRI"). The MVC Act, §§ 3, 7-18.

Pursuant to the MVC Act,

"[t]he [MVC] may . . . after notice and public hearing pursuant to [G.L. c. 30A, § 2], designate specific geographical areas on Martha's Vineyard as [DCPCs]. The designation of such areas shall be made only in accordance with the standards and criteria for [DCPCs] approved pursuant to section seven. A [DCPC] may be [d]esignated only for: . . . an area which possesses unique natural, historical, ecological, scientific or cultural resources of regional or statewide significance . . . ."

§ 8.

The designation process can commence with, as occurred here, a municipal planning board nominating areas for consideration as DCPCs. § 8. The MVC then has 45 days to reject or accept such a nomination, and an acceptance must be accompanied by a "general statement of purpose, describing the reasons for acceptance of the nomination for consideration." § 8. In designating a DCPC,

"the [MVC] shall specify why the area is of critical concern to the region, the problems associated with the uncontrolled or inappropriate development of the area, and the advantages to be gained from development of the area in a controlled manner. The [MVC] also shall specify broad guidelines for the development of the district. The issuance of such guidelines shall be based on, but need not necessarily be limited to, the following considerations: . . . (d) that development of the [DCPC] will not result in

undue harm to cultural, economic, or historical values.”

§ 8. Once the MVC designates a DCPC, the towns whose boundaries include all or part of the DCPC may adopt regulations which conform to the guidelines for the development of the DCPC as set forth in the designation. § 10. Specifically, the Town prepares proposed regulations which conform to the guidelines and transmit them to the MVC. § 10. If the MVC determines that the Town’s proposed regulations conform to the guidelines for the development of the DCPC, the MVC shall, after notice and public hearing pursuant to G. L. c. 30A, § 2, notify the four town boards of conformance to the guidelines. . § 10.

“Upon the approval by the [MVC] of proposed regulations or proposed amended regulations, the [Town] may adopt the regulations or amended regulations by a two-thirds vote on a town ballot.”

§ 10.

“The adoption of such regulations shall specify the extent to which they shall supercede the otherwise applicable local development ordinances and by-laws or be supplementary thereto. . . . All regulations so adopted shall be incorporated, without regard to the provisions of [G. L. c. 40, § 32], by the municipality into the official ordinances, by-laws, and maps of the municipality. . . . Such regulations shall be administered by the municipality as if they were part of its development ordinances and by-laws.”

§ 10.

### **3. Facts**

The following facts are taken from the administrative record, with some details being reserved for the legal analysis. See *Police Comm’r of Boston v. Robinson*, 47 Mass. App. Ct. 767, 770 (1999) (in an action in the nature of certiorari, the court is limited to a review of the administrative record).

Martha’s Vineyard has many ancient paths, also referred to as old cart paths or

proprietors' ways. The defendants seek to preserve them for their cultural, recreational and conservational significance. In 1975, the MVC's predecessor designated as a DCPC the Island Road District, which has two zones: the Major Roads Zone and the Special Ways Zone.

The designation of the Island Road District described Special Ways as "roads which have been virtually abandoned or left to infrequent use," "they have not been part of Island life and commerce for some time," and "they provide public rights of way, but are not committed to major vehicular travel." (MVC 292). The Criteria and Standards for the Special Ways Zone note that "Development near the Special Way is not so injurious as it might be along major vehicular transportation corridors . . . . [however], new vehicular roads in the area should be on new rights-of-way, thus preserving the Special Ways for alternative forms of transportation." (MVC 292). Moreover, "Towns shall, in the manner required by the Act, adopt regulations which at a minimum comply with these guidelines for the development of the [Island] Road District."

The goals of the Island Road District -- Special Ways Zone, as set forth in the 1975 designation of this DCPC, are:

"[t]o protect historic places, to retain these ways open primarily for uses such as walking and horseback riding, but not developed as a primary vehicle route except for access to properties where no alternative access exists."

(MVC 295). The Special Guidelines for the Special Ways Zone, also pursuant to the MVC's 1975 designation of this DCPC, impose three development restrictions: (1) no way or road shall be constructed within the Special Ways Zone within 20 feet of the centerline of the Special Way; (2) no Special Way shall be paved with any impervious material; and (3) any development does not result in direct vehicular access to the Special Way unless it is allowed by a special permit. (MVC 297).

Since 1975, the MVC has amended the Island Road District- Special Ways Zone to add Special Ways in several towns, including Edgartown, where in 2000, Dr. Fisher Road was designated as a Special Way. Shortly thereafter, the Town adopted regulations governing the DCPC.

On May 22, 2007, the Edgartown Planning Board (“the Board”), at a public hearing, voted to nominate five ancient ways to be added to amend the Island Road District - Special Ways Zone and thus also to amend the Town’s related zoning bylaw, § 14.2.2, which had until then only identified Dr. Fisher Road as a Special Way. The five ways to be added as Special Ways in Edgartown were Middle Line Path, Ben Tom’s Road, Pennywise Path, Tar Kiln Road, and Watcha Path. It is undisputed that, unlike Dr. Fisher Road, the five nominated ways serve as the only means of access to large portions of Edgartown, including land owned by the plaintiffs. (MVC 26).

On August 1, 2007, the Board forwarded this nomination to the MVC which, in a public meeting on August 9, 2007, voted to accept the nomination for consideration.<sup>5</sup> On September 20, 2007, the MVC conducted a public hearing on whether to expand the boundaries of the DCPC by designating the five ways as Special Ways. The MVC had already received many letters from homeowners and nonprofit organizations supporting this designation. On the other hand, the plaintiffs voiced opposition on numerous grounds, and emphasized that they owned approximately 68% of the land along the five proposed Special Ways while much of the other affected property was already in the public domain.

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<sup>5</sup>The administrative record does not contain the MVC’s acceptance of the nomination or a “general statement of purpose, describing the reasons for acceptance of the nomination for consideration” as required by § 8.

On October 4, 2007, the MVC voted to designate the five ways--with an amended description of them to include portions in which there is vehicular travel--as Special Ways within the DCPC, and specifically as a cultural or historic DCPC. (MVC 127-129). The next day, the MVC notified the Town of the designation and that "All rules and regulations that govern the other portions of the District shall also govern the newly-adopted area," but that the Town could contact the MVC if it wished to seek amendments to the regulations governing the DCPC.

The Town concluded that regulatory amendments were necessary because the regulations then in place did not address Special Ways already travelled by motor vehicle. On December 18, 2007, the Board and the Edgartown Byways Committee, at a public hearing, voted to amend Edgartown's Zoning Bylaw, § 14.2.2, by adding the five Special Ways and identifying Special Vehicular Ways within the zone. (MVC 158). Section 14.2.2 reads in part:

"The Special Ways are for non-motorized transportation and recreation only, except for those segments identified on the Map as Special Vehicular Ways and where vehicular rights of way pre-exist the designation of the Special Way."

§ 14.2.2 (d).7. The Special Vehicular Ways exception refers to segments of Special Ways that are routinely traveled by automobiles and which "provide continuity to the entire Special Way and the community maintains an interest in how these segments are further utilized." § 14.2.2 (a).

The proposed amended regulations prohibit any alteration in the width or surface of a Special Way and prohibit fences within the Special Ways Zone (20 feet from the centerline of the way), except for parcels of one acre or less in size. § 14.2.2(d). The proposed amended regulations require a special permit to develop, use or erect structures in the Special Way Zone, with such special permits being considered where

“the imposition of these regulations would otherwise deprive a landowner of all economically viable use and value of the parcel of land owned or controlled by the applicant, considered as a whole.”

In order for a Special Way to be used or expanded to a width greater than 12 feet, the applicant must obtain a special permit from the Board after the MVC has reviewed and approved the matter as a DRI. (MVC 164). The Board forwarded these proposed amended regulations to the MVC for its approval, after which the Board could proceed to submit the regulations to a vote at a Town Meeting for adoption.

On January 31, 2008, the MVC conducted a public hearing on whether to amend its guidelines for the DCPC and to determine whether proposed amendments to § 14.2.2 conform to the MVC’s guidelines for development of the DCPC. On February 7, 2008, the MVC voted to amend the guidelines to take into account some of the issues raised by the five new Special Ways.<sup>6</sup> The MVC also voted that § 14.2.2 conformed to the MVC’s guidelines for development of the DCPC.

In its written memorandum dated February 8, 2008, memorializing those votes, the MVC

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<sup>6</sup>The amendments to the guidelines are the underlined portions below:

Section 5VA 1. “No way or road shall be constructed within the Special Ways Zone which exceeds a width of twelve (12) feet unless the town elects to allow greater width by Special Permit after approval by the [MVC] as a [DRI].”

“No fences, walls, or structures shall be erected . . . within twenty (20) feet of the centerline of the Special Way, except that lesser setbacks for fences or stone walls may be allowed on small abutting lots, taking into account such factors as height, transparency and materials to prevent creation of a narrow, visually confined effect[,] in which case the town shall demonstrate that the purpose of this guideline’s intent is respected and shall determine what acreage constitutes a small lot.”

“Section 5.V. B.1: Permitted Uses: Any use permitted by the applicable town zoning district, provided that the development does not result in direct vehicular access to the Special Way. However, continued vehicular use may be allowed where specifically identified by the town as routinely travelled by motor vehicles prior to nomination.”



noted that “The Commission also finds in conformance minor points of clarification, such as were recorded in sessions on January 31, 2008 and on February 7, 2008, and any such subsequent minor points of clarification which do not change the meaning of the regulation.” (MVC 209). At that meeting, the MVC noted that “In finding conformance, the [MVC] may also choose to allow for clarification of details of the regulations, such as noted during the public hearing on January 31 and such as may arise during discussion on February 7.” (MVC 197).

On March 6, 2008, the amended regulations in § 14.2.2 were adopted by vote at a Town Meeting. Because that adopted version of § 14.2.2 was different than what the MVC, on February 7, 2008, had determined conformed to the MVC guidelines, the Town sought a second conformance determination from the MVC.<sup>7</sup>

On March 8, 2008, the Town Meeting adopted “Article 2: To see if the Town will vote to amend § 163-1 of the Edgartown Code to read:

“No person shall operate or permit the operation of a motor vehicle, motor scooter or a motorized bicycle, as defined by the Massachusetts General Laws, on a Special Way, as identified in Section 14.2.2 of the Edgartown Zoning Bylaw, within the Island Road District, a District of Critical Planning and Concern, designated as such under the authority of the [MVC]. This section shall not apply to the operation of a motor vehicle on said Special Ways by: (a) any police officer in the performance of matters related to public safety; or (b) any persons authorized by said police officer; or (c) any persons

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<sup>7</sup>For reasons explained below, the Court need not reach the plaintiffs’ claim concerning these revisions to §14.2.2, which are highlighted in the administrative record at MVC 226-229. Among the revisions are the following: (1) Although the bylaw bars the construction of fences and similar structures, pre-existing, non-conforming structures may remain but may not be expanded, and building lots that are less than one acre may have fences erected as long as they are at least 50% transparent and have certain minimum setbacks. (2) The Special Ways are for non-motorized transportation and recreation only, except for those segments identified on the Map as Special Vehicular Ways or where active vehicular rights-of-way are found by the Board after a public hearing to have pre-existed the designation of the Special Way. Moreover, the nature and extent of pre-existing vehicular use on such ways may not be increased without a special permit. (3) The Board may grant a special permit for the use or alteration of a Special Way authorizing the way to be used or expanded to a width greater than 12 feet only after the matter has been referred to the MVC as a discretionary referral or otherwise for view as a DRI. (MVA 226-229).

authorized by Section 14.2.2 of the Edgartown Zoning Bylaw. Submitted by the Planning Board.”

On April 3, 2008, the MVC voted that Article 1 -- § 14.2.2 -- as revised between December 18, 2007, and March 6, 2008, conformed to the MVC’s guidelines for development of this DCPC. The MVC but took no action on Article 2, § 163-1 of the Edgartown Code.

**4. The Plaintiffs’ Motion for Partial Judgment on the Pleadings on MVC Issues Under Count III (Certiorari)**

**a. Standard of Review**

This Court has determined that the plaintiffs can only prosecute Count III against the MVC under G. L. c. 249, § 4. The MVC had successfully advanced this argument in its motion to dismiss a non-certiorari claim, in reliance upon *Kitras v. Zoning Administrator of Aquinnah*, 453 Mass. 245, 256 (2009) (where nothing in the MVC Act permits a landowner to appeal from the MVC’s designation of a DCPC, “an action in the nature of certiorari may be brought pursuant to G.L. c. 249, § 4, to ‘correct errors in proceedings which are not according to the course of the common law, which proceedings are not otherwise reviewable by motion or by appeal’”).

“[[T]he function of a court acting pursuant to G. L. c. 249, § 4, is not to reverse or revise findings of fact but to correct errors of law. . . . The reviewing judge is limited to what is contained in the record of proceedings below. . . .”

*Police Comm’r of Boston v. Robinson*, 47 Mass. App. Ct. 767, 770 (1999) (citations and quotations omitted). Pursuant to G. L. c. 249, § 4, the court may affirm or quash such a proceeding or make “such other judgment as justice may require.”

“The requisite elements for availability of certiorari are (1) a judicial or quasi judicial proceeding (2) from which there is no other reasonably adequate remedy (3) to correct

substantial error of law apparent on the record (4) that has resulted in manifest injustice to the plaintiff or an adverse impact on the real interests of the general public."

*State Bd. of Retirement v. Woodward*, 446 Mass. 698, 703-704 (2006) (internal citations omitted). In conducting review under G. L. c. 249, § 4, the question for this Court is whether, on the basis of the evidence before them, the defendants substantially erred in a way that materially affected the plaintiffs' rights. See *Northboro Inn, LLC v. Treatment Plant Board of Westborough*, 58 Mass. App. Ct. 670, 673 (2003). The specific standard for certiorari review varies according to the nature of the action. *Forsyth Sch. for Dental Hygienists v. Bd. of Registration in Dentistry*, 404 Mass. 211, 217 (1989).

"The nature or scope of the review accommodates to the kind of administrative decision involved, and this in turn is conditioned by the type of substantive standard that is being applied . . . . Where there is a broad grant of discretionary authority to the agency, . . . the standard of review is error of law or abuse of discretion, measured by the arbitrary and capricious test. . . . But where . . . the authority of the administrative agency . . . is limited by narrow and objective criteria, judicial review becomes an assessment of the strength of the evidence supporting the agency's action. . . ."

*Mayor of Revere v. Civil Service Comm'n*, 31 Mass. App. Ct. 315, 322 (1991) (internal citations and quotations omitted).

Although the MVC agrees that certiorari is the plaintiff's only manner of proceeding on the remaining counts, it nonetheless argues that the proper standard of review of the MVC's actions is the highly deferential standard applicable to quasi-legislative actions. Certiorari is, as noted above, only available to review judicial or quasi-judicial proceedings, not quasi-legislative actions. See *Indeck v. Clients' Security Board*, 450 Mass. 379, 385 (2008). In light of the Supreme Judicial Court's recent suggestion in *Kitras* that a party challenging the MVC's

designation of a DCPC could proceed by way of certiorari, it is reasonable to infer that the Supreme Judicial Court views the MVC's DCPC designations as quasi-judicial.<sup>8</sup> See *Kitras v. Zoning Administrator of Aquinnah*, 453 Mass. at 256.

The MVC did not have broad discretion in designating the DCPC. The MVC was bound to comply with the MVC Act's provisions governing, *inter alia*, the types of areas subject to designation, the requirements for accepting and rejecting nominations, the notice, public hearing, and specification requirements for designations, and the requirements for developing DCPC guidelines. Because the MVC's authority is circumscribed by these and other procedural and substantive requirements, the Court's review of the MVC's actions is based on an assessment of the strength of the evidence supporting those actions and specifically whether there was substantial evidence in the record before the MVC to support its decisions. See *Mayor of Revere*

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<sup>8</sup>In asserting that its actions were quasi-legislative and thus subject to a highly deferential standard of review, the MVC misplaces reliance upon *Home Builders Assoc. of Cape Cod, Inc. v. Cape Cod Comm'n*, 441 Mass. 724, 735 (2004), which is distinguishable from this action in several respects. First, *Home Builders* was not an action in the nature of certiorari, but rather an action for declaratory and injunctive relief. *Id.* at 726. Second, the DCPC designation procedure in Cape Cod is different from that in Martha's Vineyard. In *Home Builders*, the designation of the Barnstable DCPC was not carried out solely by the Cape Cod Commission. Rather, "[a]mong those authorized to designate a DCPC are the commission and a municipality's board of selectmen." *Id.* at 731. In *Home Builders*, after the Cape Cod Commission "voted to accept the nomination for consideration, . . . the commission voted to forward the designation, together with a proposed county ordinance, to the Barnstable county assembly of delegates . . . for approval." *Id.* at 726. As emphasized by the court,

"Significant in this process is the fact that both the [the Barnstable County assembly of delegates] and the board of county commissioners, acting in a legislative capacity, approved the Barnstable DCPC. We do not second guess legislative decisions that have record support unless it is shown, with relative certainty, that the legislative decision is contrary to the Constitution, the enabling act, or a statute."

*Id.* at 735-736. In contrast, the designation of the DCPC here was carried out by the MVC, a body of both appointed and elected individuals. See MVC Act, § 2 (the MVC consists of 21 members, with nine being elected at large and the remaining commissioners being appointed). Moreover, the court in *Home Builders* upheld the decision below because it rested on ample record support, including detailed and comprehensive findings.

v. *Civil Service Comm'n*, 31 Mass. App. Ct. at 322.<sup>9</sup>

**b. Required Specifications and Findings by the MVC**

The plaintiffs advance a plethora of challenges to the MVC's designation of the DCPC, beginning with the MVC's failure to specify "why the area is of critical concern to the region, the problems associated with the uncontrolled or inappropriate development of the area, and the advantages to be gained from development of the area in a controlled manner." See § 8.

Although the MVC did not mention those three points in the same meeting just prior to the designation on October 4, 2007, the administrative record establishes that the MVC did specify them in the previous public hearing on September 20, 2007. (MVC 75). The MVC addressed the first point as follows:

"These ancient ways are artifacts from the Island's past. While the recorded historical references of these ancient ways apply to the European settlement of the Vineyard, many are presumed to have been established by Native Americans. Watcha Path is the only east-west route south of the Edgartown-West Tisbury Road and is an important walking and horseback-riding route. West Tisbury protected its portion of Watcha Path by designating it a Special Way in 1990. The interconnection of these ancient ways combine to allow users to travel extended distances -- even to ancient ways and paths in other towns -- that does not require using a motor vehicle. On the contrary, retention of these ancient ways fosters exercise and enjoyment of the outdoors, by visitors as well as residents."

The MVC also specified the problems associated with the uncontrolled or inappropriate development of the area, by pointing to the developed portions of some of these ways --Pennywise Path and Watcha Path-- and warning that "[u]nchecked continued expansion of development along these new ancient ways would forever erase the visual reminders they hold of the Island's

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<sup>9</sup>As discussed below, the result here would be the same even under the more lenient arbitrary and capricious test applicable to decisions by agencies with broad discretion.

past.”

As for the third specification, the MVC noted that an advantage to be gained from development of the area in a controlled manner was the recreational uses of the Special Ways by existing residents of the neighborhoods bordering the ways. (MVC 75). The MVC thus satisfied the requirement for the three specifications.<sup>10</sup>

The plaintiffs next complain that the MVC did not make findings as required by the Critical Planning District Qualifications, General Qualifications for all Districts, Appendix I, which provide that the MVC

“shall find: that present public or private regulations in a substantial part of the district cannot assure protection; and that damage to the district or impediments to proper development will be a substantial loss to the region or to two or more towns.”

(MVC 76). Although labeled qualifications, these are standards and criteria adopted by the MVC in accordance with the MVC Act, and thus have “full force and effect.” See MVC Act, § 7. The mandatory nature of these qualifications is plain from § 8 of the MVC Act, which provides that “[t]he designation of [DCPCs] shall be made only in accordance with the standards and criteria for [DCPCs] approved pursuant to section seven.” MVC Act, § 8.

The MVC never made these findings in amending the DCPC to add the five Special Ways, but instead merely listed the qualifications and then voted to designate the DCPC. The MVC does

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<sup>10</sup>The MVC further commented with respect to the third specification that “[i]f the ways are to be used by occupants of additional homes, the ways would not be compromised as long as new development complied with the provisions of the district.” This appears to imply that new homes may be added and their occupants may use the Special Ways for recreational purposes, but that additional homeowners would not be able to access their homes via motorized vehicles travelling on the Special Ways. It is not clear, however, whether the plaintiffs would be able to access, much less develop, their property, as it remains uncontroverted that there are no other roads by which they can access their property with motorized vehicles.

not deny that findings were required and not issued, but argues that there was sufficient evidence in the record to have supported such findings.

The MVC's failure to make these findings cannot be dismissed as insignificant when the stakes are so high for landowners such as the plaintiffs subject to Special Ways designations and regulations. The MVC's failure to make these findings constitutes an error of law. The plaintiffs have not established, however, that this failure, standing alone, amounts to a substantial error of law which has resulted in manifest injustice so as to warrant relief in the nature of certiorari. See *State Bd. of Retirement v. Woodward*, 446 Mass. at 703-704. That is because the evidence in the administrative record could support findings that the five ways would not be adequately preserved without designating and regulating them as DCPCs, and that failure to develop properly the five ways may result in a substantial loss to the region.

**c. Requirement That the Five Special Ways Be Accessible to Residents of More than One Town**

The plaintiffs next challenge the DCPC designation on the grounds that the MVC has not shown that the five additional Special Ways meet the criteria for a Cultural or Historic Resource District that each be "of exceptional symbolic or recreational importance to the residents of more than one town and is either visible or accessible to them or can reasonably be made so." This standard is set forth in the Specific Qualifications for Cultural or Historic Resource District. (MVC 76). It is not clear what would be needed for a way to meet the test for having exceptional symbolic or recreational importance. Turning to the more straightforward standard for the designation and regulation of a Cultural or Historic Resource District, the MVC and the Town, as proponents of these Special Ways, must establish that they are accessible or can reasonably be

made accessible to the residents of more than one town or, in other words, that the public has a right of access to them. See Specific Qualifications for Cultural or Historic Resource District (MVC 76); cf. *McLaughlin v. Town of Marblehead*, 68 Mass. App. Ct. 490, 495 (2007) (the town, as the proponent of public rights in the way, bears the burden of proving such public rights in the way), citing *Witteveld v. Haverhill*, 12 Mass. App. Ct. 876, 877 (1981).

The MVC concedes that no such determination has been made and that, in designating the five ways as part of this DCPC, the MVC assumed that they were public and reasoned that there need only be a presumption of public rights to a way. (MVC 58). The plaintiffs repeatedly raised this issue during the designation process, and the MVC dismissed it as off-point, as it continues to do in its opposition to the plaintiffs' motion for judgment on the pleadings. Such a determination is an essential prerequisite to the DCPC designation and the consequent regulations. See MVC Act, § 8; Specific Qualifications for Cultural or Historic Resource District (MVC 76). Nothing in the MVC Act supports an inference that the Legislature intended to authorize the MVC to designate and regulate Special Ways as a Cultural or Historic Resource category of DCPCs without making a reasonable effort to determine, rather than merely assuming, the public's right to access the ways.<sup>11</sup> That is particularly true where, as here, the designation and consequent regulation of the DCPC impose strict limitations on the plaintiffs' ability to access and use their property, and the plaintiffs challenged the MVC's assumption of public access.

The administrative record does not contain evidence that the public has a right to access

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<sup>11</sup>Instructive in this regard is that pursuant to G.L. c. 21A, § 11B, the Public Access Board of the Department of Fisheries, Wildlife and Environmental Law Enforcement votes to designate public access locations for, *inter alia*, trails and paths, after a public hearing, after which the department acquires the areas by purchase, gift, lease or eminent domain.



(or that such a right could reasonably be achieved) in each of these five Special Ways.<sup>12</sup> Nor is there merit to the MVC's assertion that the plaintiffs, as the parties moving for judgment on the pleadings, bear the burden of proving that the ways are not accessible to the public. To prevail in their motion on this certiorari claim, the plaintiffs must show that the MVC, in designating the DCPC, committed a substantial error of law apparent on the record that has either resulted in manifest injustice to the plaintiffs,<sup>13</sup> see *State Bd. of Retirement v. Woodward*, 446 Mass. at 703-704, or which has materially affected the plaintiffs' rights, see *Northboro Inn, LLC*, 58 Mass. App. Ct. at 673. Under either standard, the plaintiffs have met their burden. The MVC's designation of the DCPC without substantial evidence or any determination that each of the five ways meets the public access requirement, when this issue was contested by the plaintiffs during the designation proceedings, contravened the criteria for Special Ways and was in disregard of the

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<sup>12</sup>Equally unavailing is the MVC's speculation that the ways here *may* be public ways because the Appeals Court commented in a footnote that the Nantucket proprietors' ways were deemed public in *Soeder v. County Comm'rs of Nantucket*, 60 Mass. App. Ct. 780, 784-785 n.2 (2004). *Soeder* is distinguishable on several grounds, apart from its applicability to Nantucket rather than Martha's Vineyard. In *Soeder*, the owner of land abutting the proprietors' way challenged the use of the way by the public as a limited temporary emergency public access way to a public beach in the face of rapid erosion and absent other available routes. The county commissioners conducted an eminent domain proceeding to "take" for \$1 the garden planted upon the proprietor's way, which the plaintiff conceded was a public way. In *Soeder*, the newly cleared public way did not restrict the plaintiff's ability to access or use her own property abutting the way.

The determination of whether proprietors' ways are public ways has, in cases outside of Nantucket, entailed analysis of express conveyances by proprietors to towns. See, e.g., *Newburyport Redevelopment Auth'y v. Commonwealth*, 9 Mass. App. Ct. 206, 213-214, 229-230 (1980) (remanding to Land Court to determine what portions of ways were conveyed by proprietors to town, where evidence showed that proprietors sometimes voted to convey ways to town and sometimes to private parties, but expressly reserved a right of way to the public); *Bates v. Town of Cohasset*, 280 Mass. 142, 150 (1932) (proprietors granted proprietors' way to town).

<sup>13</sup>The two cases relied upon by the MVC on this point are factually and legally inapposite, although in each case, as here, the proponent of public rights in the way bears the burden of proving that it is a public way, as set forth in *McLaughlin*, 68 Mass. App. Ct. at 495. In *U.S. v. 125.97 Acres of Land*, 707 F.2d 11, 13 (1st Cir. 1983), the landowner bore the burden of proving that a way was public, to support the landowner's assertion that the town had an obligation to pay for the repair of the way or to reimburse the landowner for that amount in the valuation of land for condemnation purposes. In *Moncy v. Planning Board of Scituate*, 50 Mass. App. Ct. 715 (2001), a landowner who submitted a subdivision plan to the local planning board bore the burden of proving that the way was public in order to satisfy the subdivision frontage requirements.

MVC's burden of proving a public right of access to these ways (or that such access could reasonably be achieved). This constitutes a substantial error of law which has not only materially affected the plaintiffs' rights, but has resulted in manifest injustice to them. The DCPC designation of these ways has limited the plaintiffs' ability to access their property by motorized vehicles and to use their property. In order to access their land by motor vehicle or to expand the use or width of the roads which provide the only access to their property, the plaintiffs now must obtain a special permit and approval by the MVC reviewing the matter as a DRI. The MVC has carved out exceptions and made amendments to this DCPC to allow fences on smaller lots and motor vehicle use on certain segments, yet has failed to address fundamental issues such as whether there is a public right of access and, related to that, whether the bulk of the privately-owned land affected by the amended DCPC will be accessible by its owners. On this record, the plaintiffs have established that the MVC's designation of the five ways as Special Ways is an error of law, that it was not based on substantial evidence in the record, and that it was an abuse of discretion. Accordingly, the plaintiffs are entitled to judgment on the pleadings on Count III as against the MVC, and the DCPC designation dated October 4, 2007, must be vacated.<sup>14</sup>

Because this designation of the DCPC is invalid, the defendants' acts which are based

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<sup>14</sup> If the MVC is unable to determine that the public has a right of access to these five ways, it may explore other options, such as whether the Town or the MVC could acquire a public easement or fee simple through eminent domain proceedings as done by at least one other public entity. Cf. G.L. c. 21A, § 11B (Public Access Board of the Department of Fisheries, Wildlife and Environmental Law Enforcement acquires by lease or fee simple designated public access locations for public recreation).

As reflected in the goals and criteria for Special Ways, the DCPC designation of Special Ways should not deprive property owners of their only access to their properties, and new rights of way in the area should be granted if necessary to ensure that property owners have access to their property. See Decision of the MVC Designating the Island Road District as a DCPC. (MVC 292, 295). The Court expects the parties to act responsibly to reach a practical solution in the event that designation of these Special Ways would deprive the plaintiffs of their only means of accessing their property with motorized vehicles.

upon the flawed designation are also without legal effect. Therefore, the amended DCPC guidelines issued on February 7, 2008, the two conformance determinations dated February 7, 2008, and April 3, 2008, and the amendments adopted on March 6, 2008, to § 14.2.2 of Edgartown's Zoning Bylaw and the amendments adopted on March 8, 2008, to § 163-1 of Edgartown's General Bylaw are all invalid as they are premised upon the October 4, 2007, designation of the five Special Ways. This conclusion obviates the need to address the parties' remaining arguments in this or the other motions currently before this Court.

### **ORDER**

For all the foregoing reasons, it is hereby **ORDERED** that:

The Plaintiffs' Motion for Partial Judgment on the Pleadings on MVC Issues Under Count III (Certiorari) (# 51) is **ALLOWED**, and the Martha's Vineyard Commission's designation of the five additional Special Ways on October 4, 2007, is **VACATED**.

This matter is **REMANDED** to the Martha's Vineyard Commission, which, if it elects to do so, shall have 30 days from the date of entry of this Order to reconsider the Town of Edgartown Planning Board's nomination of the five ways as Special Ways. During that time, the development moratorium shall remain in effect. Should the Martha's Vineyard Commission designate any or all of these five ways as Special Ways, it shall, with respect to each of the designated ways: (1) make all required findings and specifications, (2) address whether the public access requirement is met, and (3) address whether and how the plaintiffs will be able to access their property by motorized vehicle.

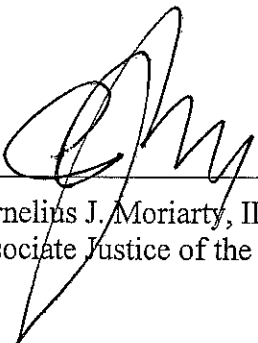
It is further **ORDERED** that:

(1) The Plaintiffs' Motion for Leave to Add to the MVC Record or, in the Alternative, Offer of Proof on MVC Issues Under Count III (#59) is **DENIED** as moot.

(2) The Plaintiffs' Protective Motion for a Supplemental Town Record or, in the Alternative, to Expand the Town Record (# 63) is **DENIED** as moot.

(3) The Plaintiffs' Motion for Partial Summary Judgment Against the Town of Edgartown on Count I (# 67) is **DENIED** as moot.

(4) The Town of Edgartown's Motion for Judgment on the Pleadings is **DENIED** as moot.



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Cornelius J. Moriarty, II  
Associate Justice of the Superior Court

**Dated:** January 31, 2011