

Town of Aquinnah
Planning Board Plan Review Committee

Decision on the application of the Gorda Realty Trust (as amended)

Project Location: Off Moshup Trail, Aquinnah, MA 02535
Assessors Map 12, Parcel 38 (and easement across
Assessors Map 12, Parcels 41, 143 and 144)

Applicant: Maria A. Kitras
James J. Decoulos, Trustees
Gorda Realty Trust
38 Bow Road
Belmont, MA 02478

Representatives: James J. Decoulos
c/o Decoulos & Company
185 Alewifebrook Parkway
Cambridge, MA 02138

Peter J. Feuerbach, Esq.
Rubin and Rudman, LLP
50 Rowes Wharf
Boston, MA 02110

A. BACKGROUND/HEARINGS

1. Maria A. Kitras and James J. Decoulos, as Trustees of the Gorda Realty Trust (the "Trust") filed an application for Special Permits under Sections 3 and 13 of the Aquinnah Zoning Bylaws (and any other sections that might be applicable) with the Planning Board Plan Review Committee (PBPRC) to construct a three (3) bedroom house, a driveway, a septic system, underground utilities, and a well on an approximately three acre vacant parcel of land shown on Assessors Map 12 as Lot 38 (Set-off Lot 232)(the "Trust Parcel"). The project involves wetland replication and the extension of an existing driveway with a bridge and underground utilities over an easement held by the Trust and on a lot owned by Jane B. and Mark J. Miller Map 12, Parcel 41; Set-Off Lot 708. The Trust signed and dated the application on July 22, 2011, and it was received by the Town on July 25, 2011.

2. The PBPRC originally scheduled the application for public hearing and a site visit on September 13, 2011, but, on September 7, 2011, received a communication from the Trust's representative requesting that the hearing be continued to the next available date because the Trust had "realized that an insufficient number of abutters may have received the mailed notice of the hearing." The Trust further requested that the PBPRC mail new notices to a revised list of abutters, and specifically requested that the Trust's application "should be considered under both Section 3 and Section 13". That request was granted, the matter was scheduled for October 4,

2011, and, on September 13, 2011, the Trust executed a document agreeing “to extend the limit of the time period in which the [PBPRC] must make a decision on this matter by 21 days, to Monday January 2, 2012.” A copy of that document was filed with the Town Clerk.

3. The Trust depicted the layout of its original request on Revision #2 (9/27/11) of a Decoulos and Company “Certified Plot Plan, Assessor Map 12, Parcel 38, Aquinnah MA”, created 7/22/11. The Trust amended this plan several times during the hearing process, including Revision #4 (10/18/11), which “Replaced bridge and 18” culvert with open bottom culverts, reduced wetland fill area.”

4. The final plan submitted to PBPRC is Revision #5 (11/15/11), which sought to show frontage on the northeast section of the Trust Parcel. The PBPRC took final action on Revision #5.

5. The PBPRC held public hearings on the Trust’s application on October 4, October 18, November 15, November 22, and November 29, 2011, and conducted a site visit on October 4, 2011.

6. The PBPRC received multiple letters from the Trust’s representative, including letters dated September 7, 2011, September 30, 2011, October 13, 2011, November 18, 2011, and November 28, 2011, all of which were entered into and as part of the record. The Trust offered other submissions at the various hearings, all of which were entered in the record.

7. The PBPRC referred the specific question whether the Trust Parcel complies with the frontage requirement enacted by the May 10, 2011, Annual Town Meeting to its legal counsel. Counsel submitted an opinion to the PBPRC dated October 26, 2011, which is also part of the record.

8. The PBPRC held its final hearing on November 29, 2011, and closed the hearing record on that date. The PBPRC proceeded to discuss the Trust’s application, and voted on various findings as well as a decision. The PBPRC voted to reconvene on December 6, 2011, to review a written decision memorializing its findings and decision.

B. FINDINGS

The PBPRC makes the following findings:

1. Based on the results of PAL’s comprehensive archaeological survey and its review by the Mass. Historical Commission, no further archaeological survey is required and we adopt the recommendations of Mass. Historic regarding protection of the “feature” as our order of conditions on this project.

2. Under Section 13.4-1(B.), the proposed house site is not “open and highly visible”. Accordingly, the proposed siting and height (slightly under 24 feet) of the proposed house is permissible under the Zoning Bylaw.

3. The siting of the proposed driveway (not the proposed “frontage”) on the Trust Parcel, as shown on Revision #5 (11/15/11), complies with siting guidelines contained in the Zoning Bylaw; however, the Trust and the PBPRC agreed to alter the siting of the driveway by 5 or so feet in either direction to avoid the removal of old growth trees. Final driveway siting requires approval of the PBPRC: trees to be removed will be tagged and trees to be preserved within 20 feet of the edge of the final driveway will be marked on the plot plan.

4. The assembly of four, 18 foot span open bottom culverts on cement footings, with retaining walls of cement block, geotextile mesh and fill, designed to support a road for a distance of more than 130 feet to cross fifty-six feet of wetland at a height up to almost 6 feet above grade, is a “structure” as defined in Section VII of the Zoning Bylaw because, taken together, they are “a combination of materials assembled at a fixed location to provide support.”

5. This structure (the culverts) is situated less than 30 feet from a property line. See Plan Revision # 5 and Sections 3.5(1) and 13.4-6(A) of the Zoning Bylaw. The Trust does not have a variance from the Zoning Board of Appeals (“ZBA”) authorizing the siting of a structure within 30 feet of a property line. (The PBPRC also does not address the issue whether the ZBA has the authority to grant variances under Section 13.4-6(A), as that provision was enacted under the authority of the Martha’s Vineyard Commission.).

6. The Trust does not have the necessary approvals from DEP and NHESP. The original plan included a bridge to cross the wetlands, and that plan had received all necessary permits from DEP and NHESP. The Trust subsequently amended its plan to replace the bridge with 4 open bottomed culverts, and it appears that this amendment would require review/approval from DEP and NHESP.

7. The Trust should resolve the challenge to its proposed use of their easement, assuming the Trust can satisfy the other deficient aspects of its application identified in this decision. The owner of the abutting Lot (Map 12, Parcel 41; Set-Off Lot 708), upon which the open bottom culverts are to be constructed, disputed, in writing, the Trust’s right to construct anything greater than 10 feet wide on Parcel 41 since that is the stated width of the easement granted and the culverts are approximately 18 feet wide. The PBPRC suggests that this issue be resolved by either a court ruling or a written agreement between the parties prior to taking action on any subsequent application.

8. The Trust parcel does not have 200 feet of frontage on a public or private way as required by Sections 13.4-10 (and the definition contained in Section 7.1) of the Zoning Bylaw, as enacted by the 2011 Annual Town Meeting and as approved by the Martha’s Vineyard Commission. The opinion from the office of Town Counsel (see letter of October 26, 2011) ruled that the Trust parcel is not “grandfathered” and does not qualify as a pre-existing lot under Section 3.4-1 of the Zoning Bylaw. The Trust’s plan (Revision #5 (11/15/11)) shows a 40 foot wide right of way running along the boundary and within the interior of the Trust Parcel for approximately 320 feet; however, that way is not a Town approved public way or private way, and does not connect with any Town approved public way or private way on an abutting lot. The Trust did not present a plan showing a private way providing frontage. The proposed way is not an existing road or even a proposed road. In addition, it appears that the Trust simply intends to

extend an existing driveway to and through its easement to create the requisite frontage; however, a driveway cannot be used to establish frontage under the Zoning Bylaw (Section 7). The PBPRC finds that the Trust Parcel lacks sufficient frontage to qualify for a special permit.

C. DECISION

Based on the above findings and other information submitted during the course of the hearings, the PBPRC unanimously voted to DENY the applicant's Special Permit requests because:

1. The applicant has not received a variance from the ZBA for siting a structure within 30 feet of a property line (per item 5 above);
2. The applicant has not received the necessary approvals from DEP and NHESP for the amendment to their plan (per item 6 above);
3. The applicant should resolve the challenge to the proposed use of its easement across Map 12, Parcel 41; Set-Off Lot 708 (per item 7 above);
4. The application as presented does not have adequate frontage on a Public or Private Way (per item 8 above); and
5. The PBPRC also concludes that this project, as proposed, is not in harmony with the general purpose and intent of the Aquinnah DCPC (Section 13.1), and other special permit criteria identified in the Zoning Bylaw, because:
 - a. The size, mass, and design of the bridge and culverts is not consistent with the rural character of the Town and is not in harmony with its cultural and natural environment (Sections 2.2-2(I); 6.3-1/6.3-2; and 13.1-1);
 - b. The magnitude of the work required to construct a small single family house on the Trust parcel (e.g., a large bridge/culverts and the over 260 foot run of septic pipe which goes through/under two streambeds), and its impact on the land (including the wetlands), does not honor the significance of the land for the people of Gay Head/Aquinnah (Sections 2.2-2(I); 6.3-1/6.3-2; and 13.1-1); and
 - c. For all of these reasons, the proposed project does not honor the significance of the land for the people of Gay Head/Aquinnah, and is a development that is not in harmony with its cultural and natural environment.

Peter Temple, Chair

Berta Welch

Jim Newman

Carlos Montoya

Sarah Thulin

Jed Smith

JoAnn Eccher

Dated: December 6, 2011

Filed with the Aquinnah Town Clerk on:

Mailed to the Applicant and all parties in interest on: