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July 23, 2001

BY CERTIFIED MAIL - RETURN RECEIPT REQUESTED
and
BY FEDERAL EXPRESS

Docket Clerk
Office of Administrative Appeals
Department of Environmental Protection
One Winter Street
Boston, MA 02108

RE: Notice of Claim for an Adjudicatory Hearing
Wetlands File No. SE 27-237

Dear Sir or Madam:

The Aquinnah Conservation Commission (the "Commission") hereby requests that the Department of Environmental Protection (the "DEP") hold an Adjudicatory Hearing to review the Superseding Order of Conditions ("SOC") issued by the DEP to the Gorda Realty Trust (the "Trust") on July 12, 2001.

Pursuant to 310 C.M.R. 1.01(6), the following information is provided:

a.) DEP Wetland File Number: SE 27-237

Applicant: Paul D. Pettegrove
Gorda Realty Trust
248 Andover Street
Peabody, MA 01960

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Project Address: Moshup Trail
Map 12, Lot 38

b.) Party Filing Request: Aquinnah Conservation
Commission
65 State Road
Aquinnah, MA 02535

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Michael A. Goldsmith, Esq.
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Kaplan, L.L.P.
P.O. Box 2540
106 Cooke Street
Edgartown, MA 02539
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c.) Parties of Record:

Aquinnah Conservation Commission
65 State Road
Aquinnah, MA 02535

Tena J. Davies
Bureau of Resource Protection
Southeast Regional Office
Department of Environmental Protection
20 Riverside Drive
Lakeville, MA 02347

Paul D. Pettegrove
Gorda Realty Trust
248 Andover Street
Peabody, MA 01960

James J. Decoulos, PE, LVSP
248 Andover Street
Peabody, MA 01960

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Jack and Joanne Fruchtmann
1807 Kenway Road
Baltimore, MD 21209

Hanni Dinkeloo
Massachusetts Wildlife
Rabbitt Hill Road
Westborough, MA 01881

d.) Facts Which Are Grounds For Proceedings, Objections To
Superseding Order Of Conditions And Relief Sought

1. Facts Which Are Grounds For Proceedings:

The applicant, Paul D. Pettegrove, is Trustee of the Gorda Realty Trust ("Gorda"), which owns a parcel of vacant land, known as set-off lot 232, in the Town of Aquinnah (also shown on the Aquinnah Assessors Map 12, Lot 38) (the "parcel"). The sole beneficiaries of the Trust are James J. Decoulos and Maria Kitras. Mr. Decoulos is a Professional Engineer and a Licensed Site Professional, and he personally provided most, if not all, of the engineering and surveying work in support of the Trust's application for approval under the Wetlands Protection Act (WPA) (G. L. c. 130, §§ 40 et seq.) from the DEP.

The parcel is generally rectangular in shape with a triangular protrusion at its southeastern end. The parcel consists primarily of wetlands: according to Mr. Decoulos's own surveys, at least two-thirds of the parcel is comprised of wetlands under the Act. The parcel allegedly contains three non-contiguous "upland" areas that may not be classified as wetlands under the statute - although one underlying issue here is that the DEP has relied almost exclusively on Mr. Decoulos's own survey and engineering work. The ACC contends that a more objective analysis of the parcel's ecosystem would establish that wetlands consume an even higher proportion of the parcel's surface area - perhaps 80 to 90% - which would undermine the foundation of the applicant's proposal.

The applicant intends to construct a single family dwelling, install a well, and build an on-site sewage disposal system on the parcel. While the parcel lacks frontage on any private or public way, the applicant enjoys an easement over several

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intervening parcels from Moshup's Trail (the nearest public way) and proposes to cut an approximate 300 foot - which includes a 50 foot long and 10 foot wide bridge - access road to reach the parcel via the easement. The applicant then proposes to extend that road as a driveway for an additional 600 feet up to the dwelling. The dwelling, well, and septic system all are to be constructed within the 100 foot buffer zone to both bordering vegetated wetland (BVW) and inland Bank. The proposed access road, driveway, and 300 feet of connecting sewer line will cross both BVW and inland Bank. The ostensible purpose of the bridge is to arch over an identified area containing sphagnum moss that is underwater year-round.

In addition to the damage that the construction and use of the proposed facilities would inflict on the resource, the applicant also proposes to fill five different areas along the access road and driveway - apparently to render those routes passable on a year-round basis - and replace the resulting wetlands loss by "replicating" BVW in one of the so-called uplands areas. The total permanent impact to wetlands resources is 2362 square feet, according to Mr. Decoulos's calculations, although he notes that the project will temporarily alter 1375 additional square feet of resource area.

The parcel also contains other types of wetlands, wildlife, and plants that the SOC fails to address. The parcel contains a watershed divide, and two streams run through the property and discharge into different areas. The parcel itself and bordering lands - which have been declared an area of Critical Environmental Concern - contain a variety of rare plant life, which most likely include the *Arethusa bulbosa*. The resource area may also provide habitat and cover for several rare, endangered, or threatened wildlife species, including the Northern Harrier Hawk.

Procedurally, on July 28, 1998, the applicant filed a Notice of Intent with the Aquinnah Conservation Commission (ACC) requesting an order of conditions for the project. After duly noticed public hearings, the ACC issued a denial of the application under both the Town's Wetland By-Law and the Act on September 12, 1998. The applicant has challenged that decision in the Superior Court, but recently filed a Joint Stipulation that the matter is moot pending the appeal of a related Land

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Court decision that concerns non-Wetlands issues affecting the parcel.

On November 9, 1998, the applicant filed a request for superseding conditions with the DEP. After that request was denied, the applicant filed a request for an adjudicatory hearing. The applicant moved to dismiss that appeal on March 30, 2001.

The applicant filed a second Notice of Intent with the ACC on March 15, 2000. The ACC was precluded from acting upon the second notice of intent because, under the authority of Chapter 831 of the Acts of 1977, the Martha's Vineyard Commission ("MVC"), a regional planning body, was considering whether the Town should be designated as a District of Critical Planning Concern ("DCPC"). Circumventing the local permitting process, the applicant then directly sought the issuance of an SOC from DEP. After two project changes that reduced the size of the proposal's impact on wetlands below the threshold imposed under 301 C.M.R. 11.03(3)(b)(1)(d) - and thereby evading review by the Secretary of the Massachusetts Executive Office of Environmental Affairs - the DEP considered the applicant's proposal and issued the relevant SOC's on July 12, 2001. The ACC filed this timely request for an adjudicatory hearing.

2. Objections To Superseding Order of Conditions:

A. Jurisdiction.

A threshold legal question is whether the DEP had jurisdiction to issue an SOC. At the time the applicant filed its second notice of intent with the ACC, the MVC was reviewing a proposal to declare the entire Town of Aquinnah as a DCPC. Concern (DCPC). See St. 1977, c. 831, as amended. The MVC's review process triggered a moratorium on development, absent MVC approval, that precluded either the ACC or DEP from approving the proposal. See generally Crocker Martha's Vineyard Commission, 407 Mass. 77 (1990). DEP issued the SOC in error, because it had no authority to do so.

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B. The Property Fails To Meet The Requirements
Of 310 C.M.R. 10:54(4), 10:55(4) & 10:56(4).

(i) *Inland Bank.* The DEP concedes that the applicant's project will have a direct impact on inland Bank. The applicant has failed to overcome the presumption that the affected inland Banks play a role in the protection of the interests set out in 310 C.M.R. 10:54(1). Even were the applicant to overcome the presumption, the SOC fails to address how the proposed project will not impair the inland Bank's functioning under 310 C.M.R. 10:54(a). Under the DEP's own performance standards, the SOC must be sufficient so that the proposed activity - cutting a road, building a bridge, and constructing a home, well and on-site septic system - will not impair the inland Bank's stability, its water carrying capacity, the ground water/surface water quality, and the inland Bank's capacity to provide for important wildlife habitat functions.

(ii) *Bordering Vegetated Wetland.* Special Conditions 1 through 6, which by and large adopt wholesale the replication sequencing and plan devised by Mr. Decoulos, do not satisfy the DEP's own performance standards under 310 C.M.R. 10:55(4)(b) to ensure that the replacement area will function in a manner similar to the lost wetlands area. The applicant proposes to fill five different areas of BVW - some of the zones are located along the access easement and some border the driveway. To replace the lost resource, the applicant proposes to replicate the BVW in only one zone on the parcel.

While the applicant ostensibly meets the basic replication criteria by matching total lost resource area with total replaced resource area, there is no evidence that the applicant satisfies any of the other criteria under 310 C.M.R. 10:55(4)(b). The ACC contends, moreover, that the cumulative impact of the collateral damage which will stem from filling five different zones of BVW far outweighs whatever utility the replaced area will provide. Next, there is no evidence - and none of the Special Conditions address - that the ground water and surface elevation of the replacement area is approximately equal to that of the lost area, that the overall horizontal configuration and location of the replacement area with respect to the bank is similar to the lost area, and that the replacement area has an unrestricted hydraulic connection to the same waterway associated with the lost area.

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The applicant's proposed layout of the entire project makes satisfying the DEP's performance standards for replacing lost BVW unlikely here: the proposed access road runs up a grade from Moshup's Trail along and across the resource area and then the proposed driveway cuts across the parcel at a 90 degree angle, which functionally separates the replaced area from several of the lost areas. The applicant appears to concede this deficiency in its Notice of Project Change to MEPA (dated October 31, 2000) (which provided the factual foundation for the SOC), at page 19: "Efforts have been made with abutters to provide the replication area in a setting that more closely meets the objectives of 310 C.M.R. 10.55(4)(b) to no avail. Therefore, the Proponent met the requirements as best as possible given the land that it has under control. The hydrologic elevations and location of the replication area were matched in the best location held under the ownership of the Proponent." The ACC contends in this Appeal that selected replication area does not adequately match the lost area under the DEP's performance standards and the SOC does not sufficiently work to ensure that the proposed project activity will not destroy or impair the critical resource area in question.

(iii) *Streams*. The applicant appears to deny that the parcel supports protected streams under the Act. Special Conditions 7 and 8, however, provide a protocol for the applicant to install a pressure sewer line that necessarily crosses a stream that runs through the parcel. Those conditions do not satisfy the DEP's performance standards under 310 C.M.R. 10:56(4), because they do not adequately prevent impairment to the resource's water carrying capacity within the defined channel and the ground/surface water quality.

Requiring the applicant to force the sewer line through and across the resource area horizontally and precluding it from trenching within 25 feet of the stream channel will not prevent damage to that vital resource. The potential for seepage from the line, the collateral damage created by the construction, and the disruption to the sensitive area will impair the interests specified in 310 C.M.R. 10:56 and under the Act.

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C. Overall Interests of the Act.

The DEP's findings underlying the SOC establish that land on which the applicant proposes to build an access road, construct a bridge, cut a driveway, drill a well, set a house, and install an on-site septic system with a 300 foot sewer line is significant to six of the nine interests protected by the Act. The parcel in issue is almost entirely made up of BVW, contains two streams, and has sections of inland Bank. It borders on area that local authorities have determined to be critical to the environment. The land in all likelihood supports identifiable protected plant life, and provides a habitat for other rare or endangered wildlife.

The interests identified are simply too varied and broad to be adequately protected by a series of conditions. There is a lack evidence demonstrating that the imposed special conditions satisfy the DEP's performance standards to overcome the presumptions that the proposed work will damage inland Bank, BVW, streams, and other plant and animal life. The ACC reserves its right to broaden the scope of this adjudicatory hearing consistent with 310 C.M.R. 1:01.

3. Relief Sought.

The ACC does not believe that it is possible to protect the interests established under the Act by imposing conditions on a proposal of the applicant's scale and scope. Accordingly, the ACC seeks a final order denying the applicant's request for approval to proceed in the identified resource areas.

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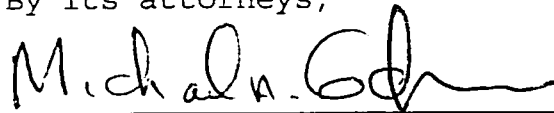
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- e.) Statement of Service. Copies of this Notice of Claim for an Adjudicatory Hearing have been sent by Certified Mail to all parties of record as listed in part c above.

Respectfully submitted

AQUINNAH CONSERVATION COMMISSION

By its attorneys,

A handwritten signature in dark ink, appearing to read "Michael A. Goldsmith", is written over a horizontal line.

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