

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

TRIAL COURT OF THE COMMONWEALTH
SUPERIOR COURT DIVISION
CIVIL ACTION NO: *ESCV 2002-1828A*

MARIA KITRAS, as Co-Trustee of
Gorda Realty Trust
and JAMES J. DECOULOS, as Co-Trustee of
Gorda Realty Trust

Plaintiffs

vs.

SARAH THULIN, RICHARD LEE and
STEVEN YAFFE

As they are members of the Conservation
Commission of the Town of Aquinnah
and Individually and THE TOWN OF
AQUINNAH

Defendants

10/28/02
AMENDED VERIFIED COMPLAINT

INTRODUCTION

This action involves the continued efforts to build a single family dwelling on a parcel of land created in 1878 in the Town of Aquinnah (formerly known as Gay Head) on the island of Martha's Vineyard. For the past five years, Defendants have purposefully denied every opportunity for the Plaintiffs to build on their property. All the statutory and regulatory standards at the local and state level have been complied with and the Plaintiffs have been forced to address frivolous requirements that never have been required for a proposal of this scale.

The action seeks declaratory relief pursuant to G.L. c. 231A for the alleged denial of a wetlands permit by the Defendants, the Town of Aquinnah Conservation Commission. The Defendants, who are not subject to administrative review pursuant to G.L. c. 249, §4, have allegedly issued a decision to deny the Plaintiffs a permit under the local wetlands bylaw. As detailed in the chronological account that follows, there have been obvious attempts to stall this project from many town officials and surrounding property owners. Accordingly, this action also names the Town of Aquinnah as a Defendant.

As a result of discriminatory actions by the Defendants, the complaint also requests relief for civil rights violations pursuant to 42 USC § 1983, 42 USC § 1985 and G.L. c.12, § 11I.

PARTIES

1. The plaintiff, Maria Kitras, is a Co-Trustee of Gorda Realty Trust (Gorda) with an address at 3 Electronics Avenue, Danvers, Essex County, Massachusetts.
2. The plaintiff, James J. Decoulos, is a Co-Trustee of Gorda Realty Trust (Gorda) with an address at 3 Electronics Avenue, Danvers, Essex County, Massachusetts.
3. The defendant, Town of Aquinnah (the Town), is a municipal corporation duly organized and existing under the laws of the Commonwealth of Massachusetts and conducts its business at 65 State Road, Aquinnah, Dukes County, Massachusetts.
4. The following named Defendants are duly appointed members of the Conservation Commission of the Town of Aquinnah (ACC) and are also named individually:

Sarah Thulin, East Pasture Road, Aquinnah, Dukes County, MA;
Steven Yaffee, 6 Maple Hill Drive, Aquinnah, Dukes County, MA;
Richard Lee, Lighthouse Road, Aquinnah, Dukes County, MA.

ALLEGATION OF FACTS COMMON TO ALL COUNTS AND CAUSES OF ACTION

5. The ACC, acting on behalf of the Town, administers all filings made pursuant to the Massachusetts Wetlands Protection Act G.L. c. 131, § 40 (the WPA) and the associated regulations at 310 CMR 10.000.
6. The Declaration of Trust for Gorda is recorded at the Dukes County Registry of Deeds (DCRD) in Book 717, Page 401. The Trustee as originally recorded was Paul D. Pettegrove.
7. Kitras and Decoulos are the sole beneficiaries of Gorda.
8. Kitras and Decoulos are wife and husband.
9. Gorda claims ownership in fee simple of a certain parcel of real property known as set-off lot 232 located in Aquinnah, Dukes County, MA and the parcel is referred to by the Aquinnah Assessors as on Map 12, Parcel 38 (Lot 232).
10. Gorda purchased Lot 232 together with an easement from Moshup Trail in a deed dated December 17, 1997 and said deed is recorded at the DCRD in Book 717, Page 404.
11. The grant of the easement to Lot 232 was from Jeffrey L. Madison to Gorda's

predecessor in title, George H. Blackwell and Margaret B. Gubser, and is recorded in DCRD Book 640, Page 895.

12. Gorda also claims ownership in fee simple of a certain parcel of real property known as set-off lot 243 located in Aquinnah and the parcel is referred to by the Aquinnah Assessors as on Map 12, Parcel 48.
13. Set-off lot 243 does not have the benefit of an express easement to a public way.
14. Kitras succeeded Paul D. Pettegrove as sole Trustee as recorded at the DCRD in Book 841, Page 628.
15. Decoulos was appointed a Co-Trustee from Kitras as recorded at the DCRD in Book 886, Page 851.
16. At the annual town meeting on May 12, 1998, the Town approved Article 4 of the Town warrant which consisted of the Aquinnah Wetlands/Water Resource Protection Bylaw.
17. The Town failed to comply with the requirements of G.L. c. 40, § 32 which states in pertinent part: "Before a by-law...takes effect it shall also be published in a town bulletin or pamphlet, copies of which shall be posted in at least five public places in the town; or instead of such publishing in a town bulletin or pamphlet and such posting, copies thereof may be published at least twice at least one week apart in a newspaper of general circulation in the town."

First Wetlands Application

18. On July 28, 1998, the Plaintiffs filed a Notice of Intent (NOI) under the requirements of the WPA with the ACC requesting an Order of Conditions for the development of a single house on Lot 232. DEP issued file number 27-211 for the project.
19. The Massachusetts Attorney General approved the Aquinnah Wetlands/Water Resource Protection By-Law (the Local Bylaw) on August 18, 1998.
20. A public hearing was held on the Plaintiffs' NOI on August 19, 1998. The hearing was continued to September 10, 1998.
21. At the public hearing of the ACC held on September 10, 1998, the Plaintiffs received from the ACC a copy of regulations which the ACC claimed to have adopted on September 4, 1998 pursuant to section seven of the Local Bylaw.

22. Section seven of the Local Bylaw states in pertinent part: "After public notice and public hearing the Commission may promulgate rules and regulations to effectuate the purposes of this by-law."
23. The ACC failed to comply with the requirements of section seven of the Local Bylaw by failing to provide public notice and conduct a public hearing prior to its adoption of regulations on September 4, 1998.
24. The ACC failed to comply with the notice requirements of G.L. c. 40A §11 in enacting regulations on September 4, 1998.
25. On September 12, 1998, the ACC issued a denial of the NOI relying on the WPA, the Local Bylaw and the regulations the ACC claimed to have adopted pursuant to the Local Bylaw.
26. On October 6, 1998, Gorda requested a Superseding Order of Conditions from DEP under the authority of the WPA.
27. An appeal from the ACC decision under the Aquinnah Wetlands/Water Resource Protection By-Law was filed in Middlesex Superior Court on or about November 6, 1998 (Docket Number MICV1998-05515D).
28. On March 2, 1999, Gorda proposed changes to the original NOI and requested that DEP continue considering the appeal based upon DEP Policy 91-1 "Plan Changes: Administrative Appeals Policy for the Review of Project Plan Changes."
29. On April 2, 1999, DEP denied the request for a Superseding Order of Conditions (SOC) based upon the NOI changes not conforming to DEP Policy 91-1.
30. On April 12, 1999, Gorda appealed DEP's denial of the SOC to the DEP Office of Administrative Appeals.
31. On March 30, 2001, Gorda filed a stipulation of dismissal of the claim for an adjudicatory appeal to DEP.
32. On April 6, 2001, DEP dismissed the administrative appeal and declared the negative SOC final.

Interference with Percolation Testing

33. A Request for Determination of Applicability under the WPA was filed with the ACC to conduct percolation testing on the western portion of the Site on March 2, 1999.
34. The ACC heard the request at a public hearing on March 23, 1999, voted to approve the work (subject to the testing being conducted by hand), never issued a formal Negative Determination of Applicability and the request was therefore constructively approved under the WPA.
35. Percolation testing was schedule with Aquinnah Board of Health agent Cynthia Barletta on March 31, 2000.
36. Percolation testing holes were hand excavated on March 30, 2000 in anticipation of the testing on March 31, 2000.
37. Shortly before Barletta was to arrive on Lot 232 on March 31, 2000, the ACC improperly issued a Cease and Desist Order through the Aquinnah Police Department by hand delivery.
38. Barletta suggested to Decoulos during a telephone conversation on March 31, 2000 to cover the hand excavated holes with tarp until the testing could be rescheduled.
39. The ACC was notified in follow-up correspondence and telephone discussions from Decoulos of the previous approval to conduct the digging within the buffer zone.
40. Upon arriving at the site on April 24, 2000 for the rescheduled percolation testing, Decoulos observed that the tarps had been uncovered; rain or water had flowed into the excavated holes; and, one of the holes had been deliberately filled with vegetative debris.
41. The actions Decoulos observed on Lot 232 on April 24, 2000 were reported to the Aquinnah Police Department as acts of vandalism to private property. See Exhibit 1.

Second Wetlands Application

42. Based upon the additional field investigations and recommendations from DEP, a second NOI was filed with the ACC on March 15, 2000. DEP issued file number 27-237 for the project.
43. On March 17, 2000, the Town Clerk notified Decoulos by certified mail that the ACC "cannot act on your request for a Notice of Intent for Map 12 Lot 38. All applications for a permit of any type must go before the Martha's Vineyard Commission for approval first."

44. The ACC alleged that the moratorium associated with the MVC review of a town-wide District of Critical Planning Concern (DCPC) prevented their review under the authority of Chapter 831 of the Acts of 1977, as amended.
45. According to a records review by DEP on June 6, 2001, between April 22, 1999 and May 23, 2000, fifteen (15) NOIs were submitted to the ACC and DEP as required under the WPA for regulated work in the Town of Aquinnah.
46. Based on DEP records, the ACC did not request any other NOI applicants go before the MVC for approval first.
47. On May 30, 2000, Decoulos requested the issuance of a Superseding Order of Conditions from DEP due to the failure of the ACC to hold a meeting and issue an Order of Conditions under the WPA.
48. DEP counsel disagreed with the ACC interpretation of the moratorium preventing review and on June 8, 2000, DEP notified Decoulos that they would issue a Superseding Order of Conditions under the WPA.
49. On June 9, 2000, DEP informed Decoulos that the project would require review under the Massachusetts Environmental Policy Act (MEPA), G.L. c. 30, §§ 61 through 62H, due to the exceedance of a wetland threshold found in 301 CMR 11.03 (3)(b)1.d: alteration of 5,000 square feet of bordering vegetated wetland. The requirement was based on the cumulative permanent and temporary alterations of wetland resources of greater than 5,000 square feet.
50. On June 15, 2000, Gorda filed an Environmental Notification Form (ENF) with the MEPA Unit.
51. On July 10, 2000, the ACC commented on the ENF to Secretary of Environmental Affairs Bob Durand that they had "...very serious concerns about the development being proposed for this sensitive site." They stated that Lot 232 "...includes and is proximate to sites included in the Habitat for Rare Species in the Natural Heritage Atlas and a survey plus an EIR should be done at the very least." They were of the opinion that "...this property is probably closer to 80-90% wetland compared to the 68% in the ENF."
52. On July 12, 2000, MEPA conducted a site visit to inspect the land and hear comments from local officials and citizens.

53. After reviewing the ENF, attending Lot 232 visit on July 12, 2000 and discussing the project with Sarah Thulin, Chairman of the ACC, Hanni Dinkeloo of the Massachusetts Natural Heritage & Endangered Species Program (NHESP) commented to Secretary Durand on July 18, 2000 that the "rare orchid *Arethusa* (*Arethusa bulbosa*) is known to occur in the close vicinity of the proposed project." Ms. Dinkeloo recommended in her letter that "a qualified expert survey the area that will be impacted by the proposed driveway for this species from late May until mid-June to ensure that this project complies with MESA."
54. *Arethusa* is referenced as a "threatened" plant species by NHESP. "Threatened" species are defined by NHESP as native species which are likely to become endangered in the foreseeable future, or which are declining or rare as determined by biological research and inventory.
55. "Endangered" species are defined by NHESP as native species which are in danger of extinction throughout all or part of their range, or which are in danger of extirpation from Massachusetts, as documented by biological research and inventory.
56. *Arethusa* is referenced as a plant found in bogs in the definition of bogs in the WPA.
57. The WPA defines bogs as follows:
The term "bogs" as used in this section shall mean areas where standing or slowly running water is near or at the surface during a normal growing season and where a vegetational community has a significant portion of the ground or water surface covered with sphagnum moss (*Sphagnum*) and where the vegetational community is made up of a significant portion of one or more of, but not limited to nor necessarily including all, of the following plants or groups of plants: aster (*Aster nemoralis*), azaleas (*Rhododendron canadense* and *R. viscosum*), black spruce (*Picea mariana*), bog cotton (*Eriophorum*), cranberry (*Vaccinium macrocarpon*), high-bush blueberry (*Vaccinium corymbosum*), larch (*Larix laricina*), laurels (*Kalmia angustifolia* and *K. polifolia*), leatherleaf (*Chamaedaphne calyculata*), orchids (*Arethusa* (*emphasis added*), *Calopogon*, *Pogonia*), pitcher plants (*Sarracenia purpurea*), sedges (*Cyperaceae*), sundews (*Droseraceae*), sweet gale (*Myrica gale*), white cedar (*Chamaecyparis thyoides*).
58. The area proposed for filling of the wetland resource area falls outside the current "Estimated Habitats Map of Rare Wildlife and Certified Vernal Pools" published by NHESP. Additionally, Lot 232 and the associated easement fall outside the current "Priority Habitats of Rare Species" published by NHESP for species protected under the Massachusetts Endangered Species Act, G.L. c. 131A (MESA) and the associated regulations at 321 CMR 10.000.
59. On July 24, 2000, Secretary Durand determined that the single family dwelling project required the preparation of an Environmental Impact Report (EIR).

60. The scope of the EIR request included a full evaluation of wetland resources to minimize impacts on wetlands and the survey of the proposed driveway area for the presence of the threatened orchid *Arethusa bulbosa*.
61. On September 14, 2000, biologist Mario DiGregorio of the environmental consulting firm Horsley & Witten conducted a site investigation to evaluate potential *Arethusa* habitat.
62. DiGregorio is considered a leading expert on *Arethusa* in the Commonwealth.
63. On October 18, 2000, DiGregorio prepared a report on the impact of the project on the *Arethusa*. He noted his experiences with *Arethusa* habitat on the Cape and Islands always required a sphagnum moss habitat association with cranberry, an ombotrophic (nutrient poor) species, typical of bogs. It was also his opinion that the wetland resource area of the proposed driveway exhibited characteristics of a wet meadow as defined in the WPA, not a bog.
64. On October 31, 2000, Gorda submitted a Notice of Project Change to the MEPA Unit. The changes to the project included a re-delineation of wetland resources, the report from Mr. DiGregorio and a fifty (50) foot bridge to reduce wetland impacts to below MEPA thresholds.
65. On December 8, 2000, Secretary Durand issued a decision that the project continued to require an EIR.
66. The December 8th decision was inconsistent with the MEPA regulations at 301 CMR 11.03 (3)(b)1.d.
67. On February 15, 2001, a second Notice of Project Change was submitted to the MEPA Unit.
68. On March 26, 2001, Secretary Durand issued a decision that the project no longer required the preparation of an EIR and that the project could proceed with two conditions. First, a survey was requested for the orchid *Arethusa bulbosa* during its growing season and secondly, DEP was required to ensure that a stream that ran through Lot 232 was not perennial and subject to riverfront provisions under the WPA.
69. Mr. DiGregorio conducted two separate field investigations during the 2001 *Arethusa* growing season and found no evidence of the orchid within the project footprint or surrounding area.
70. Both conditions requested by Secretary Durand on March 26, 2001 have been satisfied.

71. Before issuing the Superseding Order of Conditions, DEP requested the investigation of soils in the vicinity of the proposed wetland replication area.
72. On April 27, 2001, Technical Drilling Services, Inc. of Sterling, MA (TDS) was on Lot 232 with a GeoProbe 54DT direct push boring machine operated by Peter Newsham to investigate soil conditions. Information about the investigation was forwarded to DEP.
73. During the boring investigation on April 27th, two small diameter driven wells were installed by TDS at the location of the percolation test holes on the western portion of Lot 232. The purpose of the wells was to obtain accurate groundwater elevations for the septic design.
74. The wells installed by TDS complied with the small diameter driven well standards established in the DEP policy entitled "Standard References for Monitoring Wells".
75. On July 12, 2001, DEP issued a Superseding Order of Conditions approving the construction of a bridge, driveway, house, well and septic system on Lot 232.

Administrative Appeal at the Massachusetts Department of Environmental Protection

76. On July 23, 2001, neighboring property owners Joann Fruchtman and Jack Fruchtman (the Fruchtmans) appealed the decision of DEP to issue a Superseding Order of Conditions. Said appeal was filed by hand delivery to the DEP Office of Administrative Appeals (OAA). The appeal was assigned DEP Docket No. 2001-114.
77. On July 23, 2001, the ACC appealed the decision of DEP to issue a Superseding Order of Conditions. Said appeal was received by DEP-OAA on July 24, 2001 and assigned DEP Docket No. 2001-115.
78. Pursuant to 310 CMR 10.05(7)(j), the appeal of the decision from DEP by the ACC was filed one day late.
79. On January 23, 2002, the ACC and the Fruchtmans filed a Joint Motion to Vacate the Superseding Order of Conditions from DEP with the DEP-OAA (January 23rd Motion to Vacate). See Exhibit 2.
80. In an affidavit from Sarah Thulin (the Thulin Aff.) attached to the January 23rd Motion to Vacate, Thulin claims in Paragraph 8 that the ACC voted to deny the second NOI on July 25, 2000.
81. Exhibit D of the Thulin Aff. contained alleged minutes from an alleged meeting of the ACC on July 25, 2000.

82. Thulin claims that the ACC voted unanimously to deny the second NOI (Thulin Aff. ¶ 8).
83. Exhibit D of the Thulin Aff. claims that Steven Yaffe "declared that he is an abutter and therefore has to state his conflict of interest."
84. Steven Yaffe abuts Lot 232 to the west and owns Lot 230.
85. Exhibit D of the Thulin Aff. claims that the ACC invoked the Rule of Necessity to achieve a quorum for the vote on July 25, 2000.
86. Plaintiffs never received a decision from the ACC on their alleged July 25, 2000 meeting.
87. DEP never received a decision from the ACC on their alleged July 25, 2000 meeting.
88. The Fruchtmans filed a Motion to Renew the Motion to Vacate the Superseding Order of Conditions with DEP-OAA on August 28, 2002.
89. Plaintiffs filed a Motion in Opposition to Renew the Motion to Vacate the Superseding Order of Conditions with DEP-OAA on September 3, 2002.
90. DEP counsel Rebecca Cutting filed a Motion to Dismiss Appeal as Moot or, in the Alternative to Stay and Memorandum in Opposition to the Motion to Renew the Motion to Vacate the Superseding Order of Conditions with DEP-OAA on September 5, 2002. See Exhibit 3.
91. On September 13, 2002, Administrative Law Judge Francis X. Nee issued a Show Cause Order to the parties regarding Docket Nos. 2001-114 and 2001-115. See Exhibit 4.
92. DEP has been deceived by the ACC into believing that:
- a) there was an official meeting of the ACC on July 26, 2000;
 - b) the minutes from the meeting which surfaced on January 23, 2002 reflected a decision; and,
 - c) a final decision from the ACC was not appealed under the Local Bylaw.
93. Based upon the deceptive allegations of the ACC, Judge Nee is intending on staying the administrative appeal until the validity of the denial under the Local Bylaw is addressed.
94. The willful preparation of a false report with the intent to deceive DEP is a violation of G.L. c. 268, § 6.

COUNT ONE
(Declaratory Judgment)

95. Defendant Steven Yaffe did not receive a written determination prior to July 25, 2000 from any official of the Town of Aquinnah that his interest in the decision of the second NOI was "not so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect" See G.L. c. 268A, § 19.
96. The Rule of Necessity allegedly adopted at the July 25, 2000 meeting of the ACC was improperly invoked.

WHEREFORE, the Plaintiffs respectfully request that this Honorable Court make a binding declaration that the alleged vote of Steven Yaffe was a violation of G.L. c. 268A, § 19 and that the alleged vote of the ACC on July 25, 2000 under the Local Bylaw be annulled for lack of a quorum.

COUNT TWO
(Declaratory Judgment)

97. The ACC violated Section 5 of the Local Bylaw by not issuing a written determination of its alleged July 25, 2000 decision within 21 days of the close of the public hearing thereon.

WHEREFORE, the Plaintiffs respectfully request that this Honorable Court make a binding declaration that the alleged vote of the ACC on July 25, 2000 was never issued and that the alleged decision under the Local Bylaw be annulled.

COUNT THREE
(Deprivation of Rights)

98. The alleged decision of the ACC on July 25, 2000 was enacted in bad faith and solely for the purpose of denying the Plaintiff's project.
99. The alleged decision of the ACC on July 25, 2000 was enacted with the intent to deprive Plaintiffs of their rights, privileges or immunities secured by the United States Constitution, the laws of the United States, the Massachusetts Constitution and the laws of the Commonwealth of Massachusetts.
100. As a result of the willful and intentional actions of the Defendants, the Plaintiffs have been deprived of their rights, privileges or immunities secured by the United States Constitution, the laws of the United States, the Massachusetts Constitution and the laws of the Commonwealth of Massachusetts.

WHEREFORE, the Plaintiffs request that this Honorable Court enter judgment against the Defendants individually for damages, including punitive damages plus interest and costs.

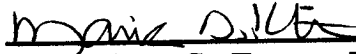
COUNT FOUR
(Conspiracy to Interfere with Civil Rights)

101. The members of the ACC and officials from the Town of Aquinnah have acted in concert to deny Plaintiff's project.
102. The members of the ACC and officials from the Town of Aquinnah have conspired to deprive Plaintiffs of their rights, privileges or immunities secured by the United States Constitution, the laws of the United States, the Massachusetts Constitution and the laws of the Commonwealth of Massachusetts by crafting a decision substantially after the alleged decision of July 25, 2000 solely for the purpose of denying Plaintiff's project.
103. As a result of the willful and intentional concerted actions of the Defendants, the Plaintiffs have been deprived of their rights, privileges or immunities secured by the United States Constitution, the laws of the United States, the Massachusetts Constitution and the laws of the Commonwealth of Massachusetts.

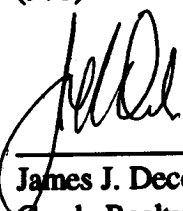
WHEREFORE, the Plaintiffs request that this Honorable Court enter judgment against the Defendants individually for damages, including punitive damages plus interest and costs.

Dated: October 28, 2002

Respectfully Submitted,



Maria Kitras, Co-Trustee, *Pro Se*
Gorda Realty Trust
3 Electronics Avenue
Danvers, MA 01923
(978) 979-0763



James J. Decoulos, Co-Trustee, *Pro Se*
Gorda Realty Trust
3 Electronics Avenue
Danvers, MA 01923
(978) 979-0763

EXHIBIT 1



AQUINNAH POLICE DEPARTMENT Incident Report

Inc#: 00-075

Name: DECOULOS
(Last)
Address: (local) None

James
(First) (MI)

Date: 4-25-00 Time: 1300

Phone: 508-532-8154 or Cell Phone 612-7414

(off-island) 248 Andover Street , Peabody , Ma 01960

Location of Incident: Decoulos Property off Moshup Trail
Aquinnah , Ma.

Involving Domestic Abuse:
Yes ☐ No ☒

Ambulance Refusal:
Yes ☐ No ☒ N/A ☒

Complaint (type): Vandalism to building site test holes

On tuesday april 25 at 13:00 hrs. Mr. James J. Decoulos came to my station and reported to me. Between March 31 2000. and this date 4-25-00 he had vandalism done to his building site test holes area. Mr. Decoulos was last on the property 3-31-00. Mr. Decoulos said that someone had

- 1.) Removed the tarps he had over the 2 test holes these tarps over the holes were held in place by wood stakes which was pulled up.
- 2.) Stuffed into 1 hole was leaves and twigs and wood stakes
- 3.) Because due to the condition that rain water had entered into the holes . Mr. Decoulos said that this could lead to a artificately mound condition which would effect the testing results in the holes.

Mr. Decoulos felt that someone had entered his property site. And caused the vandalism. I asked Mr. Decoulos was the property posted against trespassing he said no.


Reporting Officer: Sergeant Michael Marshall
Action Taken:

7/11

EXHIBIT 2

RACKEMANN, SAWYER & BREWSTER

PROFESSIONAL CORPORATION
COUNSELLORS AT LAW
ESTABLISHED 1886

ONE FINANCIAL CENTER
BOSTON, MASSACHUSETTS 02111-2659

AREA CODE 617-542-2300
TELECOPIER 617-542-7437

REC'D
CERT MAIL
1/24/02
JD

RICHARD J. GALLOGLY
(617) 551-1172

January 23, 2002

BY HAND

Deneen Simpson, Docket Clerk
Office of Administrative Appeals
Department of Environmental Protection
One Winter Street, 3rd Floor
Boston, MA 02108

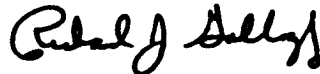
**RE: In the Motion of Maria Kitras, Trustee, Gorda Realty Trust
Docket Nos. 2001-114 and 2001-115, File No. SE 27-237**

Dear Ms. Simpson:

Enclosed for filing in the above-captioned matter please find a Joint Motion to Vacate Superseding Order and Supporting Memorandum submitted by petitioners Jack and JoAnn Fruchtman and the Aquinnah Conservation Commission. This matter is before Administrative Law Judge Nee.

Thank you for your assistance.

Very truly yours,



Richard J. Gallogly

RJG:sc

Enclosure

cc: James J. Decoulos (by certified mail w/encl.)
H. Rebecca Cutting, Esq. (by certified mail w/encl.)
Michael A. Goldsmith, Esq. (by first class mail w/encl.)
Daniel Gilmore (by certified mail w/encl.)

**COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

In the Matter of:)
)
)

Maria Kitras, Trustee,
Gorda Realty Trust)
)
)
_____)

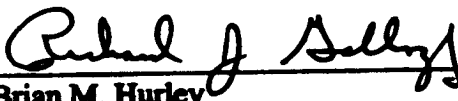
Docket No. 2001-114 and 2001-115
File No. SE 27-237
Aquinnah, Massachusetts

JOINT MOTION TO VACATE SUPERSEDING ORDER OF CONDITIONS

Pursuant to 310 CMR 1.01(11)(d), the petitioners Jack and JoAnn Fruchtman and the Town of Aquinnah Conservation Commission hereby jointly move to dismiss this matter and vacate the superseding order of conditions issued by the Department of Environmental Protection on July 12, 2001. A memorandum in support of this Motion is submitted herewith.

Respectfully submitted,

Jack and JoAnn Fruchtman,
by their attorneys,



Brian M. Hurley
Richard J. Gallogly
RACKEMANN, SAWYER & BREWSTER, P.C.
One Financial Center
Boston, Massachusetts 02111
(617) 542-2300

Aquinnah Conservation Commission,
by its attorney

Ronald H. Rappaport RSG
Ronald H. Rappaport
REYNOLDS, RAPPAPORT & KAPLAN, L.L.P.
106 Cooke Street
P.O. Box 2540
Edgartown, Massachusetts 02539

Dated: January 23, 2002

**COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

In the Matter of:)
)
)

Maria Kitras, Trustee,
Gorda Realty Trust)
)
)
)
_____)

Docket No. 2001-114 and 2001-115
File No. SE 27-237
Aquinnah, Massachusetts

**MEMORANDUM IN SUPPORT OF JOINT MOTION TO VACATE
SUPERSEDING ORDER OF CONDITIONS DUE TO FAILURE TO
OBTAIN APPROVAL UNDER THE LOCAL WETLANDS BYLAW**

This memorandum is submitted on behalf of Jack and JoAnn Fruchtman and the Town of Aquinnah Conservation Commission ("Petitioners") in support of their Joint Motion to Vacate Superseding Order of Conditions.

INTRODUCTION

On March 15, 2000, the Applicant filed a Notice of Intent (the "Notice") with the Aquinnah Conservation Commission ("ACC") in accordance with the provisions of the Massachusetts Wetlands Protection Act, G.L. c. 131, Section 40 (the "Wetlands Act") and the Aquinnah Wetlands By-law (the "Aquinnah By-law"). A true copy of the Aquinnah By-law is attached to the Affidavit of Sarah Thulin, attached as Exhibit A (the "Thulin Aff."). The Notice sought authorization to construct a single-family residence (the "Project") on a parcel of land identified on Aquinnah Assessors Map 12 as Parcel 38. In accordance with the provisions of the

Martha's Vineyard Commission, a moratorium on the issuance of development permits in the Town of Aquinnah was in effect at the time of the filing of the Notice. (Thulin Aff., ¶ 4).

On May 30, 2000, the applicant filed a Request for Superseding Order of Conditions with the Department of Environmental Protection (the "Department") based on the failure of the ACC to hold a public hearing on the Notice within twenty-one days following the filing of the Notice. (Thulin Aff., ¶ 6). The ACC held a public hearing to review the Notice on July 25, 2000. (Thulin Aff. ¶ 8). The minutes of the July 25, 2000 meeting, which reflect the decision of the ACC to deny the Notice under both the Wetlands Act and the Aquinnah By-law (the "Decision"), were filed in the office of the ACC on July 26, 2000. (Thulin Aff. ¶ 8). The ACC has not received notice of any appeal of the Decision under the Aquinnah By-law. (Thulin Aff. ¶ 9). A true copy of the Decision is attached to the Thulin Affidavit.

The Department issued a Superseding Order of Conditions authorizing the Project on July 12, 2001 (the "Superseding Order").

ARGUMENT

A. The Decision of the Aquinnah Conservation Commission Is Final and Unappealed

The Decision was filed in the office of the ACC on July 26, 2000, and no notice of an appeal under the Aquinnah By-law has been received by the ACC. (Thulin Aff. ¶¶ 8 and 9). The Applicant argues that the failure of the ACC to hold a public hearing within twenty-one days following the filing of the Notice results in the Notice being constructively approved under the Aquinnah By-law, and that such constructive approval became effective prior to the public hearing on July 25, 2000.

The law on the issue of review of local wetland by-law decisions is well settled. An action in court is the exclusive means of challenging a local wetlands by-law denial. See T.D.J. Dev. Corp. v. Conservation Comm'n of North Andover, 36 Mass. App. Ct. 124 (1994) and cases cited therein. The Department is without jurisdiction to review a decision under a local wetlands by-law "in any respect, whether as to its timeliness or otherwise, and the bylaw denial's timeliness is for the courts alone to determine." In the Matter of Howard Fafard, 3 DEPR 222, 224 (1996) (Administrative Law Judge Silverstein refused to consider applicant's argument that the local denial was untimely, ruling that the constructive approval question was for the courts alone to determine). In this instance, the Applicant failed to either appeal the Decision pursuant to G.L. c. 249, § 4, or to seek a declaratory judgment from the courts that the Notice was constructively approved. Because the Department is without jurisdiction to consider whether the Project was constructively approved under the Aquinnah By-law, the Decision denying the Project must be treated as final. Id.

B. The Superseding Order of Conditions Must Be Vacated Due To The Existence Of A Final Decision Denying the Project Under The Aquinnah Wetlands By-law

General Condition 3 of the Superseding Order provides as follows:

This Order does not relieve the permittee or any other person of the necessity of complying with all other applicable federal, state or local statutes, ordinances, by-laws or regulations.

Due to the existence of a final and unappealed denial under the Aquinnah By-law, the Applicant is unable to construct the Project in compliance with General Condition 3 of the Superseding Order. In such situations, further project review under the Wetlands Act is a futile academic exercise, and the Superseding Order must be vacated. See In the Matter of Howard Fafard, ¹¹ supra. The instant matter is strikingly similar to the situation in Matter of Howard

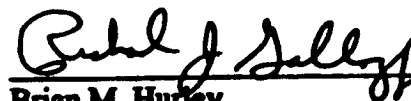
Fafard, where the applicant obtained a superseding order of conditions following the failure of the conservation commission to hold a public hearing within the required time frame. The conservation commission subsequently denied the project under the local wetlands ordinance. The applicant never filed an appeal of the denial under the local ordinance, claiming he had a constructive approval under the local ordinance. Administrative Law Judge Silverstein vacated the superseding order of conditions, and further ruled that there was no basis for concluding that administrative economy would be promoted by staying the appeal pending a refiling of the notice of intent under the local ordinance. The decision in Matter of Fafard is controlling. It should be followed in this instance.¹

CONCLUSION

For all the foregoing reasons, the Petitioners respectfully request that the Superseding Order be vacated.

Respectfully submitted,

Jack and JoAnn Fruchtman,
by their attorneys,



Brian M. Hurley
Richard J. Gallogly
RACKEMANN, SAWYER & BREWSTER, P.C.
One Financial Center
Boston, Massachusetts 02111
(617) 542-2300

¹ Even were the Applicant to take the position that the Decision is ineffective because it was memorialized only in the minutes of the public hearing and was not set forth in a more formal written document, the result would be the same. As noted above, the Department is without jurisdiction to review the form of local wetland bylaw decisions. The courts alone must address that question. No decision under the local by-law is equivalent to a denial under the local by-law. Without an approval under the Aquinnah By-law, the Applicant is unable to comply with General Condition 3 of the Superseding Order. Absent an approval under the Aquinnah By-law, the Superseding Order must be vacated.

**Aquinnah Conservation Commission,
by its attorney**

Ronald H. Rappaport *RSK*
**Ronald H. Rappaport
REYNOLDS, RAPPAPORT & KAPLAN, L.L.P.
106 Cooke Street
P.O. Box 2540
Edgartown, Massachusetts 02539**

Dated: January 23, 2002

Certificate of Service

I, Richard J. Gallogly, Esq., do hereby certify, under pains and penalty of perjury, that on January 23, 2002, I served the enclosed Memorandum in Support of Motion to Vacate Superseding Order of Conditions by delivering copies thereof to the authorized representative for each party to this proceeding via certified mail/return receipt requested.

Representative Party

James J. Decoulos
Decoulos & Company
248 Andover Street
Peabody, Massachusetts 01960

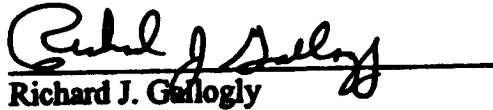
APPLICANT
Maria Kitras, Trustee
Gorda Realty Trust

H. Rebecca Cutting, Esq.
Office of General Counsel
Department of Environmental Protection
One Winter Street
Boston, Massachusetts 02108

DEPARTMENT OF ENVIRONMENTAL
PROTECTION

Daniel Gilmore
Department of Environmental Protection
Southeast Regional Office
20 Riverside Drive
Lakeville, MA 02347

DEPARTMENT OF ENVIRONMENTAL
PROTECTION


Richard J. Gallogly

**COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

In the Matter of:)
)
)

Maria Kitras, Trustee,
Gorda Realty Trust)
)
)
_____)

Docket No. 2001-114 and 2001-115
File No. SE 27-237
Aquinnah, Massachusetts

AFFIDAVIT OF SARAH THULIN

I, Sarah Thulin, do hereby depose and state as follows:

1. I am the Chairperson of the Town of Aquinnah Conservation Commission ("ACC"). I have served as a member of the ACC since 1998.
2. On March 15, 2000, James DeCoulos filed a Notice of Intent (the "Notice") with the ACC in accordance with the provisions of the Massachusetts Wetlands Protection Act, G.L. c. 131, Section 40 and the Aquinnah Wetlands By-law (the "Local By-law") on behalf of the Gorda Realty Trust. The Notice sought authorization to construct a single-family residence (the "Project") on a parcel of land identified on Aquinnah Assessors Map 12 as Parcel 38.
3. A true copy of the Local By-law, adopted by the Town of Aquinnah on May 12, 1998, approved by the Attorney General on August 18, 1998, is attached as Exhibit A.
4. In accordance with the provisions of the Martha's Vineyard Commission, a moratorium on the issuance of development permits was in effect throughout the Town of Aquinnah at the time of the filing of the Notice.
5. The moratorium on the issuance of development permits ended on May 23, 2000.

6. On May 30, 2000, James DeCoulos filed a Request for Superseding Order of Conditions with the Department of Environmental Protection based on the failure of the ACC to hold a public hearing on the Notice within twenty-one days following the filing of the Notice.

7. The ACC scheduled a public hearing concerning the Notice for July 11, 2000. A copy of the legal notice of the July 11, 2000 public hearing, as published in the Vineyard Gazette on June 30, 2000, is attached as Exhibit B. Due to an error with the description of the property, the public hearing was rescheduled to July 25, 2000. A copy of the legal notice of the July 25, 2000 public hearing, as published in the Vineyard Gazette on July 7, 2000, is attached as Exhibit C. I personally informed James DeCoulos that the ACC was holding a public hearing on his Notice of Intent.

8. The ACC held a public hearing on the Notice under the Local By-law and under the Wetlands Protection Act on July 25, 2000. At the July 25, 2000 public hearing, the ACC voted unanimously to deny the Notice. The ACC's decision on the Notice (the "Decision") is reflected in the minutes of the meeting. A true copy of the minutes of the meeting, which were placed in the files of the ACC on July 26, 2000,, are attached as Exhibit D.

9. The ACC has not received notice of any appeal of the Decision.

Signed under the pains and penalties of perjury this 18 day of January 2002.



Sarah Thulin

Exhibit A
Thulin Affidavit
January 18, 2002

Exhibit A

J9. 90

ARTICLE FOUR: To see if the Town will vote to adopt the following Town By-law, a.k.a. "Wetlands/Water Resource Protection":

Section 1: Purpose

The purpose of this bylaw is to protect the wetlands, related water resources, and adjoining lands areas in Gay Head by prior review and control of activities deemed by the Conservation Commission likely to have significant adverse impact or significant cumulative adverse effect upon wetland values, including but not limited to the following: public or private water supply, groundwater, flood control, erosion and sedimentation control, storm damage prevention, prevention of water pollution, fisheries, shellfish, wildlife habitat, recreation, agriculture, and aquaculture values (collectively, the "wetland values protected by this bylaw").

Section 2: Jurisdiction

Except as permitted by the Conservation Commission or as provided in this bylaw, no person shall remove, fill, dredge, build upon, or alter the following resource areas: any freshwater wetland, coastal wetland, marsh wet meadow, bog or swamp and land lying within 200 feet thereof; any bank, beach, dune, or flat and land lying within 200 feet thereof; any lake, river, pond, stream, estuary, or the ocean; any land under said waters; or any land subject to flooding or subject to inundation by groundwater, surface water, tidal action, or coastal storm flowage and land lying within 200 feet thereof.

Section 3: Exceptions

The permit and application required by this bylaw shall not be required for maintaining Gay Head's salt ponds for the culture of fish and shellfish, or for maintaining, repairing, or replacing, but not substantially changing or enlarging, an existing and lawfully located structure or facility used in the service of the public to

provide electric, gas, water, telephone, telegraph or other telecommunications services, or for replacing pilings or repairing but not changing or expanding existing and lawfully located docks and moorings, provided that written notice has been given to the Commission prior to commencement of work, and provided that the work conforms to performance standards in regulations adopted by the Commission.

The permit and application required by this bylaw shall not apply to emergency projects necessary for the protection of the health or safety of the public, provided that the work is to be performed by or has been ordered to be performed by an agency of the Commonwealth or a political subdivision thereof, provided that the advance notice, oral or written, has been given to the Commission prior to the commencement of work or within 24 hours after commencement, provided that the work is

performed only for the time and place certified by the Conservation Commission for the limited purposes necessary to abate the emergency project a permit application shall be filed with the Commission for review as provided in this bylaw. Upon failure to meet these and other requirements of the Commission, the Commission may after notice and a public hearing, revoke or modify an emergency project approval and order restoration and mitigation measures.

The permit and application required by this bylaw shall not apply to maintenance of drainage and flooding systems of cranberry bogs, to work performed for normal maintenance or improvement of land in agricultural use or in aquacultural use.

Other than stated in this section the exceptions provided in the Wetlands Protection Act shall not apply.

Section 4: Applications for Permits and Requests for Determination

Written application shall be filed with the Commission to perform activities regulated by this bylaw affecting resource areas protected by this bylaw. The application shall include such information and plans as are deemed necessary by the Commission to describe proposed activities and their effects on the environment. No activities shall commence without receiving and complying with a permit issued pursuant to this bylaw.

The Commission may accept as the application and plans under this bylaw the Notice of Intent and plans filed under the Wetlands Protection Act, G.L., c. 131, Sec. 40.

Any person desiring to know whether or not proposed activity or an area is subject to this bylaw may request in writing a Determination of Applicability (Request for Determination). Such a request for determination shall contain data and plans specified by the regulations of the Commission. The Commission may waive the filing fee and costs and expenses for an application or request filed by a person having no financial connection with the property which is the subject of the request.

In addition to the filing fee, the Commission is authorized to require any applicant to pay the reasonable costs and expenses borne by the Commission for specific expert engineering and consultant services deemed necessary by the Commission to review a Notice of Intent and/or Request for Determination up to a maximum of two thousand and five hundred dollars (\$2,500.00). Said payment can be required at any point in the deliberation prior to a final decision rendered. Said services may include but are not necessarily limited to wetlands survey and delineation, wetland resource area reports,

hydrogeologic and drainage analysis, wildlife evaluation, shellfish surveys and environmental/land use law. The Commission is hereby authorized to charge for said fee when a Notice of Intent and or Request for Determination proposes any of the following: 250 square feet or greater of alteration of fresh water or coastal wetland; 25 linear feet or greater of alteration of a bank or waterway; 250 square feet or greater of alteration of the 100 foot buffer zone of the resource area; alteration of greater than 250 square feet of land under a water body; discharge of any pollutants into or contributing to surface or groundwater of resource areas; or the construction of a detention or retention basin. Any unused portion of said fee shall be returned by the Commission to the applicant within forty-five calendar days of written request for same by the applicant unless the Commission decides in a public meeting that other action is necessary. Any applicant aggrieved by the imposition of, or size of the fee, or any act related thereto, may appeal according to the provisions of Massachusetts General Laws.

Section 5: Notice and Hearings

Any persons filing an application or a request for determination with the Commission at the same time shall give written notice thereof to all abutters according to the most recent records of the assessors, including those across a travelled way and those within 300 feet across a body of water. The notice to abutters shall enclose a copy of the application or request, with plans, or shall state where copies may be examined and obtained by abutters free of charge. When a person requesting a determination is other than the owner, the request, the notice of the hearing and the determination itself shall be sent by the Commission to the owner as well as to the person making the request.

The Commission shall conduct a public hearing on any application and a public meeting on the determination of applicability, with notice given at the expense of the applicant, five working days prior to the hearing, in a newspaper of general circulation in Gay Head.

The Commission shall have authority to continue the hearing to a date announced at the hearing, for reasons stated at the hearing, which may include receipt of additional information and plans required of the applicant deemed necessary by the Commission in its discretion. In the event the applicant objects to a continuance or postponement, the hearing shall be closed and the Commission shall take action on such information as is available.

The Commission shall issue its permit or determination in writing within 21 days of the close of the public hearing thereon.

Section 6: Permits, Determinations, and Conditions

Determinations: If, in response to a Request for Determination, the Commission determines that the activities which are the subject of the application are within the area described in section two and that such activities will alter the resource area, the applicant must then apply for a permit for such activities.

If the Commission after a public hearing determines that the activities which are the subject of the application are likely to have a significant adverse impact or significant cumulative effect upon the wetland values protected by this bylaw, the Commission within 21 days of the close of the hearing, shall issue or deny a permit for the activities

requested. If it issues a permit, the Commission shall impose conditions which the Commission deems necessary or desirable to protect those values, and all activities shall be done in accordance with those conditions.

The Commission is empowered to deny a permit for failure to submit necessary information and plans requested by the Commission; for failure to meet the design specifications, performance standards, and other requirements in regulations of the Commission; for failure to avoid or prevent unacceptable significant or cumulative effects upon the wetlands values protected by this bylaw; and where no conditions are adequate to protect those values.

A permit shall expire three years from the date of issuance. Notwithstanding the above, the Commission in its discretion may issue a permit expiring five years from the date of issuance for recurring or continuous maintenance work, provided that the annual notification of time and location of work is given to the Commission. Any permit may be renewed once for an additional one year period, provided that a request for renewal is received in writing by the Commission prior to expiration or is renewed by the Commission prior to its expiration.

For good cause the Commission may revoke or modify a permit issued under this bylaw after public notice and public hearing, and notice to the holder of the permit.

The Commission may combine the permit or other action on an application issued under this bylaw with the Order of Conditions issued under the Wetlands Protection Act.

If the applicant is denied a permit for the activity he proposes, he may appeal to a special meeting of a joint committee of the majority of each of the following permitting Boards: Board of Selectmen, Board of Health, Planning Board. The meeting shall be called by the chairman of the Board of Selectmen and written notice shall be made to the applicant and to all members of the boards concerned. After hearing all the evidence provided by the applicant and the Conservation Commission, said committee shall, by majority vote, decide if the proposed activity is likely to have a significant or cumulative effect upon the value of Gay Head resources protected by this law.

Section 7: Regulations

After public notice and public hearing the Commission may promulgate rules and regulations to effectuate the purposes of this bylaw. Failure by the Commission to promulgate such rules and regulations or a legal declaration of their validity by a court of law shall not act to suspend or invalidate the effect of this bylaw.

Section 8: Definitions

The following definitions shall apply in the interpretation and implementation of this bylaw. Otherwise the definitions adopted in the Regulations governing the Massachusetts Wetland Protection Act (Chapter 131, Section 40) compiled and in full force and effect 6/30/83, shall apply.

The term "person" shall include any individual, group of individuals, association, partnership, corporation, company, business organization, trust, estate, the United States Government, the Commonwealth and all political subdivisions thereof to the extent subject to town bylaws, administrative agency, public or quasi-public corporation or body, Gay Head, and any other legal entity, its legal representatives, agents or assigns.

The term "alter" shall include, without limitation, the following activities when undertaken to, upon, within or affecting resource areas protected by this bylaw:

- a) Removal, excavation or dredging of soil, sand, gravel, or aggregate materials of any kind;
- b) Changing of pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns, or flood retention characteristics;
- c) Drainage or other disturbance of water level or water table;
- d) Dumping, discharging or filling with any material which may degrade water quality;
- e) Placing of fill, or removal of material, which would alter elevation;
- f) Driving of piles in new locations;
- g) Destruction of wetland vegetation. Mowing of lawns and normal maintenance of trees and shrubs and the non-commercial cutting of firewood for personal use shall not be considered destruction;
- h) Changing water temperature, biochemical oxygen demand, or other physical or chemical characteristics of water;
- i) Any activities, changes or work which may cause or tend to contribute to pollution of any body of water or groundwater.

Section 9: Security

As part of a permit issued under this bylaw, in addition to any security required by any other municipal or state board, agency or official, the Commission may require that the performance and observance of the conditions imposed hereunder be secured wholly or in part by a proper bond or deposit of money or negotiable securities or other undertaking of financial responsibility sufficient in the opinion of the Commission.

Section 10: Enforcement

The Commission, its agents, officers, and employees shall have authority to enter upon privately owned land for the purpose of performing their duties under this bylaw and may make or cause to be made such examinations, surveys or sampling as the Commission deems necessary.

The Commission shall have authority to enforce this bylaw, its regulations, and permits issued thereunder by violation notices, administrative orders, and civil and criminal court actions.

Upon request of the Commission, Board of Selectmen and Town Counsel shall take legal action for enforcement under civil law. Upon request of the Commission the Chief of Police shall take legal action for enforcement under criminal law.

Municipal boards and officers, including any police officer or other officer having police powers, shall have authority to assist the Commission in enforcement.

Any person who violates any provision of this bylaw, regulations thereunder, or permits issued thereunder, shall be punished by a fine of not more than \$300.00. Each day or portion thereof during which a violation continues shall constitute a separate offense.

In the alternative to criminal prosecution, the Commission may elect to utilize the non-criminal disposition procedure set forth in G.L. c. 40, Section 21D.

Section 11: Burden of Proof

The applicant for a permit shall have the burden of proving by a preponderance of the credible evidence that the work proposed in the application will not have unacceptable significant or cumulative effect upon the wetland values protected by this bylaw. Failure to provide adequate evidence to the Commission supporting this burden shall be sufficient cause for the Commission to deny a permit or grant a permit with conditions.

Section 12: Relation to the Wetlands Protection Act

This bylaw is adopted under the Home Rules Amendment of the Massachusetts Constitution and the Home Rule statutes, independent of the Wetlands Protection Act, G.L. c. 131, Section 40, and regulations thereunder and independent of the Zoning Act, Massachusetts General Laws, Chapter 40A.

Section 13: Severability

The invalidity of any section or provision of this bylaw shall not invalidate any other section or provision thereof, nor shall it invalidate any permit or determination which previously has been issued.

Exhibit B
Thulin Affidavit
January 18, 2002

**NOTICE
AQUINNAH PLANNING BOARD
PLAN REVIEW COMMITTEE**

On Thursday, July 27, 2000 at 7:15 PM the Planning Board Plan Review Committee will hold a public hearing in the Aquinnah Town Offices to act on a request for a Special Permit under Chap. 4, Sect. 4.1.01 AND 13.2 of the Aquinnah Zoning bylaw, filed by Scott Harrison to construct an addition to an existing dwelling.

Location: State Rd/Moshup Trail, Map 11 Lot 30

Site visit: July 27, 2000 at 6:00 PM
Jun30-Jul7-01

**NOTICE
AQUINNAH PLANNING BOARD
PLAN REVIEW COMMITTEE**

On Thursday, July 27, 2000 at 7:45 PM the Planning Board Plan Review Committee will hold a public hearing in the Aquinnah Town Offices to act on a request for a Special Permit under Section 4 of the Aquinnah Zoning bylaw, filed by Mark Wheaton to construct a new dwelling with related activities, including a cub out.

Location: off Lighthouse Rd./Map 5 Lot 30.1
Site visit: July 27, 2000 at 6:45 PM
Jun30-Jul7-01

**NOTICE
AQUINNAH CONSERVATION COMMISSION**

On Tuesday, July 25, 2000 at 7:30PM a public hearing will be held at the Aquinnah Town Offices under the Aquinnah Wetlands bylaw to act on a Notice of Intent filed by Angela Kass to construct a single family dwelling, with related activities within 200 ft. of a wetland.

Location: Lighthouse Rd. Map 4 Lots 23.1 and 23.2

Site visit: July 25, 2000 at 6:15PM
Jun30-01

**TOWN OF AQUINNAH
PUBLIC HEARING**

On Tuesday, July 11, 2000 at 8:30PM a public hearing will be held at the Aquinnah Town Offices under the Massachusetts Wetlands bylaw and the Aquinnah Zoning bylaw to act on a Notice of Intent filed by Gordie Peckey Trust to construct a single family dwelling, with related activities in a buffer zone.

Location: Moshup Trail Map 12 Lot 30
Site visit: July 11, 2000 at 6:45PM
Jun30-01

Exhibit C
Thulin Affidavit
January 18, 2002

FRIDAY, JULY 7, 2000

VINEYAI

CLASSIFIED ADS

LOST & FOUND

LOST ANTIQUE SILVER LOCKET

On Sunday, 6/4, at Black Point Beach, about 50 feet to left of walkway, toward dunes. Contains pictures of my mother and brother. A graduation gift of great sentimental value. If found, please call 627-4311 days, 686-7873 evenings.

LOST SUNGLASSES

Serapiel. Brown wire frames with oval-shaped lenses, "B" in corner of one lens. Lost Friday, June 30, in Edgartown. (802)993-4878.

ANNOUNCEMENTS

REACH OVER 4,000,000 READERS

With just one phone call New England Press Association can place your classified ad in more than 200 newspapers throughout the state New England region. Call your local newspaper or NEPA at (617)373-6610 for more information.

LEGAL NOTICES

AQUINNAH

NOTICE

AQUINNAH CONSERVATION COMMISSION

On Tuesday, July 25, 2000 at 7:45 PM a public hearing will be held at the Aquinnah Town Offices under the Massachusetts Wetlands Protection Act and the Aquinnah Zoning bylaw to act on a Notice of Intent filed by Gorda Reedy Trust to construct a single family dwelling, with related activities in a buffer zone.

Location: Moshup Trail Map 12 Lot 38
Site visit: July 26, 2000 at 6:00 PM

JUL7-11

AQUINNAH

NOTICE

AQUINNAH PLANNING BOARD PLAN REVIEW COMMITTEE

On Thursday, July 27, 2000 at 7:30 PM the Planning Board Plan Review Committee will hold a public hearing in the Aquinnah Town Offices to act on a request for a Special Permit under Section 13.2 of the Aquinnah Zoning bylaw, filed by Rudolfo Cardona to construct an addition to an existing dwelling on a non-conforming lot.

Location: off Lighthouse Rd. Map 5 Lot 78
Site visit: July 27, 2000 at 6:30 PM
Jun30,jul7-21

NOTICE

AQUINNAH PLANNING BOARD PLAN REVIEW COMMITTEE

On Thursday, July 27, 2000 at 6:00 PM the Planning Board Plan Review Committee will hold a public hearing in the Aquinnah Town Offices to act on a request for a Special Permit under Section 13.2 of the Aquinnah Zoning bylaw, filed by SCB I Ireland Partnership to construct an addition to a non-conforming structure nine (9) ft. from a lot line.

Location: Harpoon Hollow Map 5 Lot 147
Site visit: July 13, 2000 at 7:00 PM
Jun30,jul7-21

NOTICE

AQUINNAH PLANNING BOARD PLAN REVIEW COMMITTEE

On Thursday, July 27, 2000 at 6:15 PM the Planning Board Plan Review Committee will hold a public hearing in the Aquinnah Town Offices to act on a request for a Special Permit under Section 4 of the Aquinnah Zoning bylaw filed by Moshup Aquinnah, LLC to clear out, install a lawn, install an irrigation system and replace structure.

Location: Moshup Trail Map 12 Lot 68
Site visit: July 27, 2000 at 6:45 PM
Jun30,jul7-21

NOTICE

AQUINNAH PLANNING BOARD PLAN REVIEW COMMITTEE

On Thursday, July 27, 2000 at 7:15 PM the Planning Board Plan Review Committee will hold a public hearing in the Aquinnah Town Offices to act on a request for a Special Permit under Chap. 4, Sect. 4.1.01 AND 13.2 of the Aquinnah Zoning bylaw, filed by Scott Hansen to construct an addition to an existing dwelling.

Location: State Rd/Moshup Trail, Map 11 Lot 30
Site visit: July 27, 2000 at 6:00 PM
Jun30,jul7-21

AQUINNAH

NOTICE

AQUINNAH PLANNING BOARD PLAN REVIEW COMMITTEE

On Thursday, July 27, 2000 at 7:45 PM the Planning Board Plan Review Committee will hold a public hearing in the Aquinnah Town Offices to act on a request for a Special Permit under Section 4 of the Aquinnah Zoning bylaw, filed by Mark Wheaton to construct a new dwelling with related activities, including a curb cut.

Location: off Lighthouse Rd./Map 5 Lot 3U.1
Site visit: July 27, 2000 at 6:45 PM
Jun30,jul7-21

CHILMARK

CHILMARK ZONING BOARD OF APPEALS

There will be a public hearing Tuesday July 11, 2000 at 8:20 PM in the Chilmark Town Offices to act on a petition by the Chilmark Community Church under section 4.1C of the Chilmark Zoning By-Laws for a Special Permit to construct an education building not less than 16' from the rear property line at 9 Menemahs Crossroad, Assessors parcel 26-87.

Pamela F. Bunker
Assistant

Jun30,jul7-21

CHILMARK ZONING BOARD OF APPEALS

There will be a public hearing Tuesday July 11, 2000 at 8:40 PM in the Chilmark Town Offices to act on a petition by the Burlingame Nominee Trust under section 4.1Ae & 2.14 of the Chilmark Zoning By-Laws for a Special Permit to construct a swimming pool and pool building on their property at 14 Wakamen Rd, Assessors parcel 24-164.

Pamela F. Bunker
Assistant

Jun30,jul7-21

CHILMARK ZONING BOARD OF APPEALS

There will be a public hearing Tuesday July 11, 2000 at 8:00 PM in the Chilmark Town Offices to act on a petition by the Chilmark Aerle Realty Trust under section 4.2Aa of the Chilmark Zoning By-Laws for a Special Permit to construct a swimming pool on their property at 28 The Aerle, Assessors parcel 20-63.

Pamela F. Bunker
Assistant

Jun30,jul7-21

Exhibit D
Thulin Affidavit
January 18, 2002

Hearing for Gorda Realty Trust was opened at approx 8:30PM July 25th, 2000. Site visit at 6PM attended by Steve Yaffe, Sarah Thulin, and Rick Lee. No applicant or representative of the applicant showed up for the site visit. No applicant or representative showed up for the hearing.

Present at hearing were Sarah Thulin, Rick Lee and Steve Yaffe. Steve declared that he is an abutter and therefore has to state his conflict of interest. The committee invoked the rule of necessity due to the fact that we would not have had a quorum without Steve. Both Rick and Sarah voted to allow Steve to speak and act on this notice of intent. Also present were abutter Peter Ochs, and Jack Fruchtman.

Jack presented his letter which he had sent to MEPA telling of his concerns about this project. He would like to enter this as his statement to the ACC and asked that we deny this project based on all the reasons he set forth in his letter. Peter Ochs spoke against the project as well and was especially concerned about the entire driveway into this piece of land. It runs along almost his entire property line. The area for this road is very wet and Peter told of various years where the area was completely flooded. This runs into a very sensitive wetland resource area for the entire Moshup Trail Conservation Area.

The committee entered into the record our letter sent to MEPA with our concerns about this project.

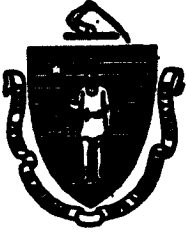
The committee discussed the plan and could find no area of the house, septic, well and driveway proposal that did not have an adverse effect on a wetland or the buffer area of the wetland. Sarah Thulin commented that she has never seen a request before the committee with replication of wetland let alone the extent of the proposed replication project. There are two streams on the property that would have to be crossed again and again for various activities on this building site. Sarah handed a copy of the MEPA order from Secretary Durand to the members of the committee. They are asking the applicant to do an EIR and the scope of the EIR is extensive. There are many concerns that they obviously have about the project that the ACC also has. Rick felt that with all the knowledge of the sensitivity of this area and the many site visits we have had throughout the past several years that he is prepared to deny this project both under the State Wetland Laws and our own Aquinnah Town by-law "Wetlands/Water Resource Protection". The purpose of our by-law is to protect the wetlands, related water resources, and adjoining land areas in Aquinnah. If we feel that a project will have significant adverse impact or significant cumulative adverse impact upon wetland values such as public or private water supply, groundwater, flood control, erosion and sedimentation control, storm damage prevention, prevention of water pollution, fisheries, shellfish, wildlife habitat, etc. we have a duty to deny the project and ask the applicant to reapply with an alternative plan that will minimize the overall impact to our resources. At this time the committee felt we should deny this proposal.

Rick Lee moved to deny the notice of intent for Gorda Realty Trust. Sarah Thulin seconded. All members voted in favor of denial.

Meeting closed at approx. 9:45 PM.

Sarah Thulin
Chairperson

EXHIBIT 3



COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

JANE SWIFT
Governor

BOB DURAN
Secretary

LAUREN A. LIS
Commissioner

September 5, 2002

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

Re: In the Matter of Paul D. Pettegrove, Trustee
Gorda Realty Trust: File No. SE 27-237
Docket Nos. 2001-114 & 115

Dear Ms. Simpson:

Enclosed for filing and docketing in the above-captioned matter please find the Department of Environmental Protection's Memorandum in Response to the Petitioners' Motion to Renew the Motion to Vacate. Please bring this to the attention of Judge Nee.

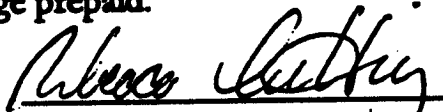
Sincerely,

Rebecca Cutting, Sr. Counsel

CERTIFICATE OF SERVICE

I, Rebecca Cutting, do hereby certify that I did on this date serve a copy of the aforementioned papers in this matter on the Parties of Record as shown on the attached Service List by first class mail postage prepaid.

September 5, 2002


Rebecca Cutting

This information is available in alternate format by calling our ADA Coordinator at (617) 874-6872.

DEP on the World Wide Web: <http://www.state.ma.us/dep>

SERVICE LIST

In the Matter of Paul D. Pettegrove, Trustee, Gorda Realty Trust
DEP Docket Nos. 2001-114 & 2001-115
File No. SE 27-237

REPRESENTATIVE

James J. Decoulos
Decoulos & Company
248 Andover Street
Peabody, MA 01960

Richard J. Gallogly, Esq.
Rackemann, Sawyer & Brewster
One Financial Center – 29th Floor
Boston, MA 02111-2659

Ronald H. Rappaport, Esq.
Michael A. Goldsmith, Esq.
P.O. Box 2540
106 Cooke Street
Edgartown, MA 02539

Cc:

Daniel Gilmore
DEP – Southeast Regional Office
20 Riverside Drive
Lakeville, MA 02347

PARTY

APPLICANT
Maria Kittras, Trustee
Gorda Realty Trust

PETITIONERS (2001-114)
Jack & JoAnn Fruchtman

PETITIONERS (2001-115)
Aquinnah Conservation Commn.

**COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

In the Matter of

Paul D. Pettegrove, Trustee)

)
)
)
)
)
)

DEP Docket Nos. 2001-114
& 2001-115
File No. SE 27-237

Aquinnah

**DEPARTMENT OF ENVIRONMENTAL PROTECTION'S MOTION
TO DISMISS APPEAL AS MOOT OR, IN THE ALTERNATIVE TO
STAY AND MEMORANDUM IN OPPOSITION TO THE MOTION
TO RENEW THE MOTION TO VACATE THE SUPERSEDING ORDER
OF CONDITIONS**

Now comes the Department of Environmental Protection ("the Department") and files this its Memorandum in Response to the Fruchtmans' Motion to Vacate the Superseding Order of Conditions dated August 28, 2002. The Department opposes the Motion to Vacate the Superseding Order of Conditions as it reaches too far, well beyond the remedy proscribed by the Department's policy regarding local wetland bylaw denials (DWW Policy 89-1) which provides only for a stay of the SOC appeal not for its nullification. Further, the Department moves to dismiss this appeal as moot in light of the Applicant's apparent failure to appeal the local bylaw denial or, in

the alternative, should the Administrative Law Judge so determine, for a stay¹ of this appeal in accordance with the aforementioned policy.

BACKGROUND

The procedural history of this appeal reveals a lengthy course of motion practice first commencing in January of this year with the Joint Motion to Vacate Superseding Order filed by petitioners Jack and JoAn Fruchtmann (the "Fruchtmans") and the Aquinnah Conservation Commission (the "ACC") (collectively "the Petitioners"). By Rulings dated April 8, 2002, Administrative Law Judge Francis X. Nee determined, *inter alia*, that the Department had jurisdiction to issue the Superseding Order of Conditions (the "SOC") because the ACC had failed to timely act on the Notice of Intent in the time period required by the "Massachusetts Wetlands Protection Act", G.L. c. 131, s. 40 (the "Act"). See 310 C.M.R. 10.05(7)(b)4. In his April Rulings ALJ Nee "set out the essential facts, which are not in dispute,..." that established the timeframes within which the ACC was required to act under the Department's "Wetlands Protection Regulations", 310 C.M.R. 10.00 ("the Regulations"). The April Rulings go on to find, on the basis of these undisputed facts, that the Department had acted properly under the Regulations when it took up and issued the SOC. This finding was based upon the fact that the ACC failed to hold a public hearing on the Notice of Intent within twenty-one days of

¹ A stay might allow the Applicant an opportunity to reapply for a local permit using the SOC approved plans and attendant conditions.

its filing as required by the Act and the Regulations. The April Rulings also denied the motion to vacate and remand the matter to the ACC as well as denying the Petitioners' Motion for Summary Decision.

More recently, in May 2002, the Petitioners requested Judge Nee to complete his rulings by taking up their Motion to Vacate the SOC on the grounds that the Applicant had failed to appeal the ACC's denial under the local wetlands bylaw. This Judge Nee did by a Ruling issued August 23, 2002 in which he denied the Petitioners' Motion to Vacate the SOC as they had failed to show that the local denial was based on a provision of the bylaw that is more restrictive than the Act and Regulations. It is important to observe that Judge Nee's most recent ruling makes no further findings especially regarding the propriety of a motion to vacate an SOC properly issued under state law. The Petitioners have now renewed their Motion to Vacate alleging that the ACC denial was grounded on a provision of the local bylaw more stringent than that of the Act and Regulations.

DISCUSSION

As the preceding procedural history of this matter sets forth, it has been determined in this forum that the Department had authority to issue the SOC. As the SOC itself directs at General Condition 3 (a "boilerplate" condition issued statewide in all SOC's) the permittee must obtain all other applicable permits required by law and act in compliance with such permits inclusive of those required by, and issued

under, local bylaws. Thus, even with an SOC in hand, a permittee cannot proceed unless and until it obtains all other necessary permits. There is thus no reason to vacate a properly issued SOC simply because a local permit is not obtained. The Regulations only require that applicants apply for all "obtainable permits" that are "feasible to obtain at the time the Notice of Intent is filed²." 310 C.M.R. 10.05(4)(e).

Moreover, the Department's "Appeal Stay Policy", DWW 89-1 (rev'd March 1, 1995) does not require the nullification of the SOC which the Petitioners here repeatedly demand. Instead the Policy allows for a stay of the Department's appeal process during the pendency of an appeal to Superior Court of a local bylaw denial. The Policy does not address the situation where an applicant fails to appeal its local denial to Superior Court. However, it seems clear that if the local denial becomes final, any appeal in this forum becomes moot. Neither this logical result nor the Policy require a validly issued SOC to be vacated. Furthermore, General Condition 3 of the SOC itself requires compliance with all other applicable permits.

The Department thus respectfully submits that the record in this matter appears to warrant a dismissal of this appeal as mooted by the failure of the Applicant to appeal the local denial. Absent any proof of such appeal this matter should be dismissed. Because the SOC imposed additional conditions on the work it would be premature and an unnecessarily harsh result to vacate it before the

² Arguably, at least according to the ACC, no local permits could be issued at the time the Notice of Intent was filed since the ACC viewed the "Area of Critical Planning Concern" designation as an impediment. That impediment has since been removed by the enactment of the requisite regulations.

Applicant was afforded the opportunity to revisit the local permitting process. The ACC reviewed only those plans before it when it issued its denial not those subsequently submitted to the Department and approved by it under the SOC.


Although the ACC has appealed the Department's conditions and objects to the plans as so approved, it will not be harmed (nor will the Fructmans) if the Applicant is required by his failure to appeal to reapply for a local wetlands permit. It is possible that the issues the Petitioners raise here may be addressed in the local forum. In any event, there is no reason to argue the merits of the SOC if the local denial is final.

The Department therefore now moves that this appeal be dismissed in light of the unappealed denial as mooted thereby, or alternatively to stay these proceedings in accordance with DWW Policy 89-1, in order to conserve its resources and those of the Office of Administrative Appeals. The Department maintains that its SOC is not invalidated by the lack of a local wetlands permit. The two obligations to obtain the necessary wetlands permits under state and local law, although related, are separate and distinct.

Respectfully submitted,

DEPARTMENT OF ENVIRONMENTAL PROTECTION

By its Attorney:


Rebecca Cutting, Sr. Counsel

**Office of General Counsel
One Winter Street
Boston, MA 02108
(617) 556-1002
fax (617) 556-1002**

September 5, 2002

EXHIBIT 4

**COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

September 13, 2002

In the Matter of:

**Maria Kitras, Trustee,
Gorda Realty Trust**

**Docket Nos. 2001-114 & 115
File No. SE27-237
Aquinnah**

SHOW CAUSE ORDER

The parties are ordered to show cause why this matter should not be stayed while the applicant continues to prosecute a Superior Court challenge to the validity of the local wetlands bylaw, which it initiated after the conservation commission denied it permission for an earlier project on a nearby lot.

BACKGROUND

This case from the Town of Aquinnah concern two appeals of a superseding order of conditions that the Department issued to the applicant, the Gorda Realty Trust. The superseding order of conditions authorizes the Trust to build a house, well, subsurface sewage disposal system, and a driveway, a portion of which will be carried over a bordering vegetated wetland on a bridge.

Previously, the petitioners, the Aquinnah Conservation Commission and Jack and JoAnn Fruchtmann, who are abutters to the project, moved to vacate the superseding order of conditions and dismiss the appeal as moot. They based their motion on the Trust's failure to initiate a court appeal of the denial of its project under the local wetlands bylaw.

On August 23, 2002, I denied the motion because the moving parties failed to show that the local denial was based on a portion of the Aquinnah bylaw that is more restrictive than the Wetlands Protection Regulations. See Matter of Howard Fafard, Docket No. 96-040, Final Decision, 3 DEPR 222 (December 4, 1996) and Matter of Allen W. Bath, Docket Nos. 97-041 and 97-044, Final Decision, 4 DEPR 193 (November 13, 1997).

The Fruchtmans renewed their motion and added an assertion that the Conservation Commission's determined to deny the project was based on a portion of the bylaw that is more restrictive than the Wetlands Protection Regulations.¹ Both the applicant and the Department filed responses.

DISCUSSION

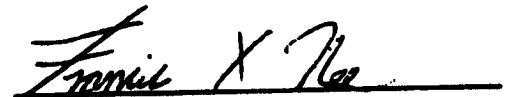
In its response, the applicant brought to my attention its Superior Court challenge to the Aquinnah bylaw. In that case, the applicant asserts that the entire bylaw is invalid because it was not enacted properly. Coincidentally, the adjudicatory appeals that rose from the same action as the court challenge to the bylaw are also assigned to me. I have stayed those cases until the bylaw matter is decided in court.

Rather than rule on the motion, I intend to stay this proceeding until the validity of the bylaw has been decided in the related Superior Court case.

¹ First they assert that the bylaw is more restrictive because it extends pre-construction jurisdiction 200 feet from resource areas, while the Wetlands Protection Regulations extend pre-construction jurisdiction only 100 feet from resource areas. Second, they argue that the bylaw is more restrictive because it prohibits adverse effects on buffer areas, while the Wetlands Protection Regulations prohibit adverse impacts to resource areas only.

ORDER

The parties are ordered to show cause why this matter should not be stayed until the Superior Court decides whether the local wetlands bylaw is valid. Responses to this order must be in writing and must be filed in this office and served on the other parties by September 27, 2002.


Francis X. Nee
Administrative Law Judge

SERVICE LIST

In Re: Maria Kitras, Trustee, Gorda Realty Trust
Docket Nos. 2001-114 & 2001-115

File No. SE 27-237

Representative

James J. Decoulos
Decoulos & Company
248 Andover Street
Peabody, MA 01960

Richard J. Gallogly, Esq.
Rackemann Sawyer & Brewster
One Financial Center - 29th Floor
Boston, MA 02111-2659

Ronald H. Rappaport, Esq.
P.O. Box 2540
106 Cooke Street
Edgartown, MA 02539

H. Rebecca Cutting, Esq.
DEP - Office of General Counsel
One Winter Street
Boston, MA 02108

cc:
Daniel Gilmore
DEP - Southeast Regional Office
20 Riverside Drive
Lakeville, MA 02347

Date: September 13, 2002

Party

APPLICANT
Maria Kitras, Trustee
Gorda Realty Trust

PETITIONER
(2001-114)
Jack/JoAnn Fruchtman

CONCOM
PETITIONER
(2001-115)
Aquinnah Conservation Commission

DEPARTMENT
Dept. of Environmental Protection

DEPARTMENT
Dept. of Environmental Protection