

July 7, 2008

By Hand

Assistant Clerk
Middlesex Superior Court
40 Thorndike Street
Cambridge, MA 02141

2008 2585
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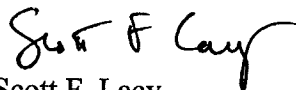
Re: Maria A. Kitras and James J. Decoulos as co-trustees of Gorda Realty Trust v.
Town of Aquinnah Conservation Commission, et al.

Dear Sir/Madam:

I am enclosing for filing in the above matter the Complaint, Civil Cover Sheet and Category Sheet. Also enclosed are a check for the filing fee in the amount of \$275.00 and a check in the amount of \$20 for four summonses.

Thank you.

Sincerely,


Scott F. Lacy

Enclosures

FORM 1

CIVIL ACTION COVER SHEET	DOCKET NO.(S)	Trial Court of Massachusetts Superior Court Department County: <u>Middlesex</u>												
PLAINTIFF(S) <u>MARIA A. KITRAS and JAMES J. DeCoulos as co-trustees of Gorda Realty Trust</u>		DEFENDANT(S) <u>TOWN of AQUINNAH Conservation Commission et al.</u>												
ATTORNEY, FIRM NAME, ADDRESS AND TELEPHONE <u>Scott F. Lacy and Arthur P. Kreiger</u> <u>Anderson + Kreiger LLP</u> <u>One Canal Park, Suite 200 Cambridge</u> Board of Bar overseers number: <u>633323 + 279870</u>		ATTORNEY (if known)												
Origin code and track designation														
Place an x in one box only: <div style="display: flex; justify-content: space-between;"> <div style="width: 45%;"> <input checked="" type="checkbox"/> 1. F01 Original Complaint <input type="checkbox"/> 2. F02 Removal to Sup. Ct. C.231, s. 104 (Before trial) (F) <input type="checkbox"/> 3. F03 Retransfer to Sup. Ct. C. 231, s. 102C(X) </div> <div style="width: 45%;"> <input type="checkbox"/> 4. F04 District Court Appeal C.231, s. 97 & 104 (After trial) (x) <input type="checkbox"/> 5. F05 Reactivated after rescript; relief from judgment/ Order (Mass.R.Civ.P. 60)(x) <input type="checkbox"/> 6. E10 Summary process Appeal (x) </div> </div>														
TYPE OF ACTION AND TRACK DESIGNATION (See reverse side)														
CODE NO. <u>C99</u>	TYPE OF ACTION (Specify) <u>Cartian appeal of summary judgment</u>	TRACK IS THIS A JURY CASE? () Yes (X) No												
The following is a full, itemized and detailed statement of the facts on which plaintiff relies to determine money damages. For this form, disregard double or treble damage claims; indicate single damages only.														
TORT CLAIMS														
(Attach additional sheets as necessary)														
A. Documented medical expenses to date: <table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 80%;">1. Total hospital expenses</td> <td style="width: 20%; text-align: right;">\$</td> </tr> <tr> <td>2. Total doctor expenses</td> <td style="text-align: right;">\$</td> </tr> <tr> <td>3. Total chiropractic expenses</td> <td style="text-align: right;">\$</td> </tr> <tr> <td>4. Total physical therapy expenses</td> <td style="text-align: right;">\$</td> </tr> <tr> <td>5. Total other expenses (describe)</td> <td style="text-align: right;">\$</td> </tr> <tr> <td colspan="2" style="text-align: right;">Subtotal \$</td> </tr> </table>			1. Total hospital expenses	\$	2. Total doctor expenses	\$	3. Total chiropractic expenses	\$	4. Total physical therapy expenses	\$	5. Total other expenses (describe)	\$	Subtotal \$	
1. Total hospital expenses	\$													
2. Total doctor expenses	\$													
3. Total chiropractic expenses	\$													
4. Total physical therapy expenses	\$													
5. Total other expenses (describe)	\$													
Subtotal \$														
B. Documented lost wages and compensation to date \$ C. Documented property damages to date \$ D. Reasonably anticipated future medical and hospital expenses \$ E. Reasonably anticipated lost wages \$ F. Other documented items of damages (describe) \$ G. Brief description of plaintiff's injury, including nature and extent of injury (describe) \$ <div style="text-align: right;">TOTAL \$</div>														
CONTRACT CLAIMS														
(Attach additional sheets as necessary)														
Provide a detailed description of claim(s): <div style="text-align: right;">TOTAL \$</div>														
PLEASE IDENTIFY, BY CASE NUMBER AND COUNTY, ANY RELATED ACTION PENDING IN THE SUPERIOR COURT DEPARTMENT														
"I hereby certify that I have complied with the requirements of Rule 5 of the Supreme Judicial Court Uniform Rules on Dispute Resolution (SJC Rule 1:18) requiring that I provide my clients with information about court-connected dispute resolution services and discuss with them the advantages and disadvantages of the various methods."														
Signature of Attorney of Record <u>Scott F. Lacy</u>		Date: <u>7/7/08</u>												

FORM 1 (continued)
CIVIL ACTION COVER SHEET
INSTRUCTIONS

SELECT CATEGORY THAT BEST DESCRIBES YOUR CASE

CONTRACT		REAL PROPRTY		MISCELLANEOUS	
A01	Services, labor and materials (F)	C01	Land taking (eminent domain) (F)	E02	Appeal from administrative Agency G.L. c.30A (X)
A02	Goods sold and delivered (F)	C02	Zoning Appeal, G.L. c. 40A (F)		
A03	Commercial Paper (F)	C03	Dispute concerning title (F)	E03	Action against Commonwealth Municipality, G.L. c.258 (A)
A08	Sale or lease of real estate (F)	C04	Foreclosure of mortgage (X)	E05	All Arbitration (X)
A12	Construction Dispute (A)	C05	Condominium lien and charges (X)	E07	c.112, s.12S (Mary Moe) (X)
A99	Other (Specify) (F)	C99	Other (Specify) (X)	E08	Appointment of Receiver (X)
TORT		EQUITABLE REMEDIES		E09	General contractor bond, G.L. c. 149, s.29,29a (A)
B03	Motor Vehide negligence-Personal injury/property damage (F)	D01	Specific performance of contract (A)	E11	Workman's Compensation (X)
B04	Other negligence-personal injury/property damage (F)	D02	Reach and Apply (F)	E12	G.L.c.123A,s.12 (SDP Commitment) (X)
B05	Products Liability (A)	D06	Contribution or Indemnification (F)	E14	G.L. c. 123A, s. 9 (SDP Petition) (X)
B06	Malpractice-medical (A)	D07	Imposition of Trust (A)	E15	Abuse Petition, G.L. c. 209A (X)
B07	Malpractice-other (Specify) (A)	D08	Minority Stockholder's Suit (A)	E16	Auto Surcharge Appeal (X)
B08	Wrongful death, G.L. c.229, s.2A (A)	D10	Accounting (A)	E17	Civil Rights Act, G.L. c. 12, s.11H (A)
B15	Defamation (Libel-Slander) (A)	D12	Dissolution of Partnership (F)	E18	Foreign Discovery proceeding (X)
B19	Asbestos (A)	D13	Declaratory Judgment G.L. c. 231A (A)	E19	Sex Offender Registry G.L.c. 178M,s.6 (X)
B20	Personal Injury-Slip & Fall (F)	D99	Other (Specify) (F)	E25	Pleural Registry (Asbestos cases)
B21	Environmental (F)			E95	Forfeiture G.L.c. 94C,s.47 (F)
B22	Employment Discrimination (F)			E96	Prisoner Cases (F)
B99	Other (Specify) (F)			E97	Prisoner Habeas Corpus (X)
				E99	Other (Specify) (X)

TRANSFER YOUR SELECTION TO THE FACE SHEET.

EXAMPLE:

CODE NO.	TYPE OF ACTION (SPECIFY)	TRACK	IS THIS A JURY CASE?
B03	Motor Vehicle Negligence-Personal Injury (F)	<input checked="" type="checkbox"/>	Yes <input type="checkbox"/> No

SUPERIOR COURT RULE 29

DUTY OF THE PLAINTIFF. The plaintiff or his/her counsel shall set forth, on the face sheet (or attach additional sheets as necessary), a statement specifying in full and itemized detail the facts upon which the plaintiff then relies as constituting money damages. A copy of such civil action cover sheet, including the statement as to the damages, shall be served on the defendant together with the complaint. If a statement of money damages, where appropriate is not filed, the Clerk-Magistrate shall transfer the action as provided in Rule 29(5)(C).

DUTY OF DEFENDANT. Should the defendant believe the statement of damages filed by the plaintiff in any respect inadequate, he or his counsel may file with the answer a statement specifying in reasonable detail the potential damages which may result should the plaintiff prevail. Such statement, if any, shall be served with the answer.

**A CIVIL ACTION COVER SHEET MUST BE FILED WITH
EACH COMPLAINT, BUFF COLOR PAPER.
FAILURE TO COMPLETE THIS COVER SHEET THOROUGHLY AND
ACCURATELY MAY RESULT IN DISMISSAL OF THIS ACTION.**

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

Superior Court Department
Civil Action No.

_____)
MARIA A. KITRAS and JAMES J. DECOULOS,)
as they are Co-Trustees of Gorda Realty Trust,)
Plaintiffs,)
v.)
TOWN OF AQUINNAH CONSERVATION)
COMMISSION, SARAH THULIN, WALTER)
DELANEY and KATHERINE NEWMAN,)
as they are members of the Conservation)
Commission of the Town of Aquinnah,)
Defendants.)
_____)

COMPLAINT

1. This is an action in the nature of certiorari pursuant to General Laws Chapter 249, Section 4, challenging a decision by the Aquinnah Conservation Commission (the "Commission") under the Aquinnah Wetlands/Water Resource Protection Bylaw (the "Bylaw") denying the Plaintiffs' proposed single-family house on a parcel in the Town of Aquinnah (the "Town") on Martha's Vineyard. A copy of the decision is attached as Exhibit A.

The Parties and the Property

2. The Plaintiff Maria A. Kitras is a Co-Trustee of Gorda Realty Trust ("Gorda") with an address at 38 Bow Road, Belmont, Middlesex County, Massachusetts.

3. The Plaintiff James J. Decoulos is a Co-Trustee of Gorda with an address at 38 Bow Road, Belmont, Middlesex County, Massachusetts.

4. Ms. Kitras and Mr. Decoulos are the sole beneficiaries of Gorda.

5. The Defendant Commission is a duly constituted conservation commission of the Town pursuant to G.L. c. 40, §8C, with an office at 65 State Road, Aquinnah, Massachusetts.

The Commission is the permit granting authority under the Massachusetts Wetlands Protection Act, M.G.L. c. 131, §40 (the "Act"), and the Bylaw.

6. The following Defendants are duly appointed members of the Commission:

- Sarah Thulin, East Pasture Road, Aquinnah, MA;
- Walter Delaney, 15 Lighthouse Road, Aquinnah, MA; and
- Katherine Newman, Meeting House Way, Aquinnah, MA.

7. Gorda owns a parcel known as Set-Off Lot 232 in Aquinnah, MA, referred to on the Aquinnah Assessors as Map 12, Parcel 38 ("Lot 232").

8. Gorda purchased Lot 232 together with an easement from Moshup Trail (the "Easement") in a deed dated December 17, 1997, recorded at the Dukes County Registry of Deeds at Book 717, Page 404.

9. The Easement was granted from Jeffrey L. Madison to Gorda's predecessors in title, George H. Blackwell and Margaret B. Gubser, recorded at Registry Book 640, Page 895.

10. The Easement is Gorda's sole means of legal access to Lot 232.

11. As more fully discussed below, the Plaintiffs, for almost 10 years, have sought permission to construct a house, well, subsurface sewage disposal system and access driveway on Lot 232. As part of that project, the Plaintiffs propose to extend the existing access road within the Easement area to connect to Lot 232.

First Wetland Application

12. On July 28, 1998, the plaintiffs filed a Notice of Intent ("NOI") under the Act with the Commission requesting an Order of Conditions for a single-family house on Lot 232.

13. On September 12, 1998, the Commission denied permission for the project.

Second Wetland Application

14. On March 15, 2000, after additional field investigations and design changes, Gorda filed a second NOI with the Commission.

15. The Commission did not act on the application as required under the Act or the Bylaw, asserting that a moratorium associated with the Martha's Vineyard Commission's review of a town-wide District of Critical Planning Concern ("DCPC") prevented their review pursuant to Chapter 831 of the Acts of 1977, as amended.

16. On May 23, 2000, the moratorium expired.

17. On May 30, 2000, Gorda requested a Superseding Order of Conditions ("SOC") from the Department of Environmental Protection ("DEP") due to the Commission's failure to hold a meeting and issue an Order of Conditions under the Act.

18. On June 9, 2000, DEP informed Gorda that the project would require review under the Massachusetts Environmental Policy Act ("MEPA"), G. L. c. 30, §§ 61-62H, because the project exceeded the threshold in 301 CMR 11.03 (3)(b)1.d. because it would alter more than 5,000 square feet of bordering vegetated wetland.

19. On June 15, 2000, Gorda filed an Environmental Notification Form ("ENF") with the MEPA Unit of the Executive Office of Environmental Affairs (n/k/a the Executive Office of Energy and Environmental Affairs), as required by MEPA.

20. The wetland resource area proposed for filling falls outside the "Estimated Habitats Map of Rare Wildlife and Certified Vernal Pools" issued by Massachusetts Natural Heritage & Endangered Species Program ("NHESP"). Additionally, Lot 232 and the Easement fall outside the "Priority Habitats of Rare Species" issued by NHESP for species protected under the Massachusetts Endangered Species Act, G. L. c. 131A and the regulations, 321 CMR 10.000.

21. However, on July 24, 2000, Secretary Durand determined that a threatened orchid *Arethusa bulbosa* may grow in the Easement area and that the project required the preparation of an Environmental Impact Report ("EIR"). He requested that the EIR include a full evaluation of wetland resources to minimize impacts on wetlands and the survey of the proposed driveway area for the presence of *Arethusa bulbosa*.

22. On July 25, 2000, more than two months after the MVC moratorium ended, the Commission voted to deny the NOI under both the Act and the Bylaw, while the SOC and MEPA review were still pending. A written decision was not provided to the Plaintiffs.

23. On September 14, 2000, biologist Mario DiGregorio of Horsley & Witten, the Plaintiffs' environmental consultant, conducted a site investigation to evaluate potential *Arethusa* habitat. On October 18, 2000, Mr. DiGregorio prepared a report on the impact of the project on *Arethusa*. He concluded that the wetland resource area of the proposed driveway exhibited characteristics of a wet meadow as defined in the Act, not a bog, whereas *Arethusa* habitat on the Cape and Islands requires a sphagnum moss habitat, typical of bogs.

24. On October 31, 2000 and February 15, 2001, Gorda submitted Notices of Project Change to the MEPA Unit. The changes included a new delineation of wetland resources within the Easement area, Mr. DiGregorio's report, and a proposed 50-foot bridge within the Easement area to reduce potential wetland impacts.

25. On March 26, 2001, Secretary Durand issued a Certificate that the project as modified would not adversely affect *Arethusa* habitat, to the extent there was any within the Easement area, or alter more than 5000 square feet of BVW, and therefore no longer required the preparation of an EIR. That decision enabled the project to proceed with respect to MEPA.

26. On July 12, 2001, DEP issued a SOC approving the construction of a driveway

and bridge within the Easement area, and a house, well, septic system and driveway on Lot 232.

27. On July 23, 2001, Jack and JoAnn Fruchtman, who own property abutting the Easement area but not Lot 232, and the Commission appealed the SOC by requesting an adjudicatory hearing in the DEP Office of Administrative Appeals ("DEP-OAA")¹ alleging that the wetlands in the Easement area were not properly delineated and that the project would impact more than 5000 square feet of BVW (No. SE 27-237). Both the Fruchtmans and Commission alleged that the wetland boundary established by the Plaintiffs, and approved by DEP, within the Easement area that provides legal access to Lot 232 (on Lot 708) was inaccurate.

28. On January 23, 2002, the Fruchtmans and the Commission filed a Joint Motion to Vacate the Superseding Order of Conditions from DEP with the DEP-OAA. That Motion was denied on April 8, 2002.

29. On September 13, 2002, Magistrate Francis X. Nee issued a Show Cause Order to the parties regarding the Fruchtmans and Commission's appeals, which involved the validity of the SOC under the Act, staying the appeals until the validity of the July 25, 2000 denial under the Bylaw was addressed.

30. On September 27, 2002, the Plaintiffs filed a complaint against the Commission and the Town appealing the denial of their application under the Bylaw. Civil Action No. ESCV2002-1828-A (Essex Superior Court).

31. After participating in the DALA appeal for over a year and a half, the Commission on or about December 23, 2002, settled with Gorda regarding their appeal under the Bylaw. The settlements provided for (a) an approval of the Plaintiffs' single-family house

¹ Since January 20, 2004, administrative appeals from DEP decisions have been handled by the Division of Administrative Appeals ("DALA").

project (including the proposed access road and 50-foot bridge within the Easement area) under the Bylaw (the "2001 Permit") and (b) dismissal of the Commission's appeal of the SOC. At or about the same time, the Aquinnah Board of Health also settled a separate challenge by Gorda to a denial of a proposed septic system on Lot 232 under Title 5 of the State Environmental Code, 310 CMR 15.000.

32. By its terms, the 2001 Permit related back to July 12, 2001 (the date of DEP's SOC) and was to expire on July 12, 2004.

33. On February 10 and 11, 2004, a hearing was held at DALA on the Fruchtmans' and Commissions' appeal on July 23, 2001. The Fruchtmans alleged that the wetland boundary established by the Plaintiffs within the Easement area was inaccurate and that the proposed wetland replication did not comply with DEP performance standards.

34. In July 2004, Gorda sought a one-year extension of the 2001 Permit on the grounds that, through no fault of Gorda's, the DALA proceeding had not yet been resolved. The Commission denied that request on the ground that the plaintiffs were unable to attend the Commission's meeting.

35. On August 23, 2005, Magistrate Nee, more than four years after the Fruchtmans' appeal had been initiated, recommended that the DEP Commissioner approve the SOC for the second wetland application (the "2000 NOI") confirming that the wetlands delineation in the Easement area was accurate and that the proposed wetland replication complied with applicable DEP performance standards.

36. On November 5, 2005, Commissioner Golledge issued a final decision adopting Magistrate Nee's recommendation. No party appealed that decision.

Third and Fourth Wetland Application

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37. On August 31, 2005, Gorda submitted to the Commission a NOI application consistent with the 2000 NOI and 2001 Permit for review under the Bylaw.

38. On October 11, 2005, the Commission issued a written decision denying the 2005 NOI application. Among other reasons, the Commission denied that application because Gorda declined to allow the Commission to utilize its own expert to evaluate the application and its cumulative impact or effect on the values protected by the Bylaw. Gorda did not appeal that decision.

39. On November 2, 2006, Gorda tried again. It submitted to the Commission another NOI application consistent with the 2000 NOI and 2001 Permit for review under the Bylaw. The same result followed, with the same rationale.

Fifth Wetland Application

40. On March 2, 2007, Gorda again submitted to the Commission a NOI consistent with the 2000 NOI and 2001 Permit for review under the Bylaw to construct a single-family house on Lot 232 and extend the existing access road within the Easement area to reach Lot 232 across a 50-foot bridge.

41. The design and plans were consistent with the plans submitted with the 2000 NOI and incorporated into the 2001 Permit and subject to the DEP SOC and DALA proceedings.

42. The Commission held an initial public hearing on March 20, 2007. At that hearing, it voted to hire consultants Mark Langanello and Peter Fletcher (the "Commission's Consultants") to peer review the project.

43. Pursuant to Section 4 of the Bylaw, the maximum cost that an applicant bears for review by peer review consultants is \$2,500, which Gorda agreed to pay.

44. The Commission's Consultant conducted an initial site evaluation on May 25,

2007 without Gorda or its representative present.

45. Notwithstanding the absence of specific application and plan submission requirements under the Bylaw, the Commission's Consultants requested additional details on the plans, and flagging in the field.

46. The Commission's Consultant conducted an evaluation of the site on September 28, October 16 and October 29, 2007.

47. On November 8, 2007, the Commission's Consultants submitted a report entitled "Questions and Concerns Regarding The Site Plan Map". Their comments focused on plan details, the methodology used to delineate wetlands, wetland delineation within the Easement area, potential impacts to banks and inquiries into whether a vernal pool existed on Lot 232.

48. On November 13, 2007, the Commission held a continued public hearing on the 2007 NOI application. The Commission's Consultants did not attend and the matter was continued to January 10, 2008.

49. On December 11, 2007, Gorda submitted a written response to the Commission's Consultants' report, including a Wetland Delineation Plan dated December 5, 2007, and a report by Mr. DiGregorio dated November 27, 2007, including additional Field Data Sheets, disputing the existence of a vernal pool on Lot 232. The responsive material also confirmed that the Mr. DiGregorio followed the methodology set forth in the Massachusetts DEP Handbook Delineating Bordering Vegetated Wetlands Under the Massachusetts Wetlands Protection Act (March 1995) to delineate the wetlands.

50. The Parties then took the following steps:

- On December 26, 2007, the Commission's Consultants submitted a "Project Review Comments Report". They sought additional plan modifications regarding the

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intermittent streams located on Lot 232 and their own wetland delineation within the Easement area, which was inconsistent with the wetland delineation approved by DEP and confirmed by DALA. The issues raised regarding the wetland delineation within the Easement area were similar to those the Commission had raised in its appeal of the SOC.

- On January 17, 2008, Gorda responded to that report and provided amended plans as requested by the Commission and its Consultants depicting both the DEP approved wetland delineation and the Commission Consultant's delineation within the Easement area.

- On February 25, 2008, the Commission, its Consultants, Gorda and Mr. DiGregorio held another site visit.

- On February 28, 2008, the Commission's Consultants submitted another Project Review Comments Report. Again, the comments focused on the wetland delineation in the Easement Area, Lot 232 (where both parties agreed to the wetland delineation line after making a few field adjustments), plan details, concerns about differences among the various plans revisions throughout the course of the hearing process, potential vernal pool habitat on Lot 232 and additional engineering information.

- On March 11, 2008, Gorda submitted revised site plans dated March 10, 2008 with the additional requested information. As shown on the wetlands delineation plan and reflected in subsequent correspondence, Gorda and the Commission's Consultant concurred regarding the wetland delineation on Lot 232.

51. After that point, the parties focused on the Easement area, where the Parties did not agree on the wetland delineation. They took the following steps:

- On March 18, 2008, the Commission's Consultants submitted a third Project Review Comments Report.
- On the same date, the Commission held a continued public hearing on the 2007 NOI application and further continued it to April 8, 2008.
- On March 31, 2008, Gorda submitted a letter responding to the Commission's Consultants' questions regarding the Easement area delineation, with attachments including a table detailing the amount of wetlands impacted using both the DEP approved wetland delineation line within the Easement area and the Commission Consultant's delineation line, and plans detailing an alternative bridge design. Since the Commission Consultants did not agree with the wetland delineation approved by DEP and confirmed by DALA within the Easement area, the Plaintiffs proposed an alternative bridge – a 100-foot pile-supported wood bridge – to further mitigate any potential impact.
- On April 8, 2008, the Commission's Consultants submitted a Professional Review Comments Report summarizing their concerns about the unresolved issues regarding the wetland delineation in the Easement area, potential vernal pool habitat and proposed retaining wall on Lot 232, compliance of the proposed wetland replication with DEP performance standards and potential peer review of engineering plans.
- On April 17, 2008, Gorda submitted a responsive letter, with attachments, reiterating that the wetland delineation within the Easement area had been approved by DEP and confirmed by DALA and should control, there was no certified vernal pool located on Lot 232, the evidence did not support a finding that a vernal pool was located on Lot 232, and vernal pools are not a specific resource protected under the Bylaw, providing information regarding the

proposed retaining wall and confirming that the plans were prepared in compliance with applicable survey and engineering standards. Gorda requested that the Commission close the public hearing.

52. The Commission closed the public hearing on April 17, 2008. It voted to deny the application. It filed that decision with the Town Clerk on May 7, 2008.

53. The Commission erroneously found that Gorda's proposal for the site and the Easement does not adequately or accurately describe or depict existing conditions (including wetland resource area boundaries) and proposed conditions (including wetland resource area impacts), or meet the requisite performance standards for work within a wetland.

54. The wetland delineation within the Easement area that was confirmed by DEP and upheld by DALA was controlling. The Commission erroneously concluded that that delineation did not apply to its review.

55. Gorda's plans complied with acceptable engineering standards, as did the supplemental plans stamped by a registered land surveyor that were requested by the ACC.

56. The project will not permanently impact more than 5000 square feet of bordering vegetated wetlands. Since the Commission's Consultants never attended any of the public hearings, did not discuss the bridge design until March 2008 (a year after the NOI was filed), and disputed the wetland delineation approved by DALA within the Easement, Gorda proposed an alternative bridge design.

57. Under the alternative design, Gorda proposed to construct a 100-foot (instead of 50-foot) pile-supported bridge within the Easement area, and a 30-foot pile-supported wood bridge to cross the intermittent stream on Lot 232 to further mitigate any potential adverse impacts.

58. Under the alternative bridge design, the total amount of wetland fill, both permanent and temporary, would amount to less than 5000 square feet, even using the Commission's Consultants' delineation in both the Easement area and Lot 232.

59. The evidence required a finding that the proposed retaining wall on Lot 232 in the vicinity of wetland flag W21 would protect the nearby wetland resource.

60. The evidence required a finding that shadowing from the pile-supported wood bridge would not be harmful to the wetland habitat.

61. Vernal pools are not specifically a protected resource under the Bylaw, and there is no certified vernal pool on Lot 232.

62. As shown on the March 28, 2008 plans, Gorda proposes to replicate 4200 square feet of wetlands. Under the alternative bridge design, the total amount of wetland fill, both permanent and temporary, would equal 4024 square feet even using the Commission's Consultants' delineation lines in both the Easement area and Lot 232. Accordingly, Gorda proposes to replicate wetlands at more than a 1:1 ratio.

COUNT I
(Chapter 249, Section 4)

63. The Plaintiffs repeat and re-allege the allegations of Paragraphs 1-63, above.

64. The Bylaw does not define wetland, the area to be delineated, differently than the Act.

65. Therefore, the Commission was bound by the wetland delineation in the Easement area that was approved by DEP and confirmed by DALA.

66. The Bylaw does not have separate or different performance standards for wetland replication than the Act or DEP's regulations. Accordingly, the Commission's conclusion that

the proposed replication failed to meet DEP performance standards, even though DEP had found that the replication complied with those standards, was erroneous.

67. The Commission's denial of Gorda's NOI application is arbitrary and capricious, constitutes clear error of law apparent on the record, exceeds the Commission's authority under Bylaw, and is based on errors of law.

COUNT II **(Federal Taking)**

68. The Plaintiffs repeat and re-allege the allegations of Paragraphs 1-67, above.

69. The Commission's denial of Gorda's NOI application and determination regarding the impact to the wetland resources in the Easement area constitute a taking of property without just compensation under the Fifth Amendment of the U.S. Constitution.

70. The Plaintiffs have exhausted their administrative remedies.

COUNT III **(State Taking)**

71. The Plaintiffs repeat and re-allege the allegations of Paragraph 1-70, above.

72. The Commission's denial of Gorda's NOI application and determination regarding the impact to the wetland resources in the Easement area constitute a taking of property under Articles X and XII of the Massachusetts Constitution.

73. The Plaintiffs have exhausted their administrative remedies.

COUNT IV **(Bad Faith)**

74. The Plaintiffs repeat and re-allege the allegations of Paragraphs 1-73, above.

75. The Commission treated the Plaintiffs' NOI application for this site differently than other similarly situated projects. DEP records reflect that , between April 22, 1999 and May

23, 2000, 15 NOIs were submitted to the Commission and DEP as required under the Act for regulated work in the Town, but that the Commission did not request any other applicants to go before the Martha's Vineyard Commission for approval first.

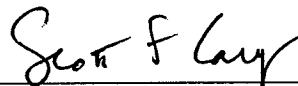
76. Additionally, a direct abutter filed a NOI application while Gorda's 2007 NOI review was pending. Even though the abutter proposed significant work that could impact the same resource areas, the Commission did not require peer review.

77. The Commission's denial of Gorda's NOI application and procedural treatment of its NOI applications for this property constitutes bad faith.

WHEREFORE, Gorda requests that the Court:

1. Annul the Commission decision denying Gorda's application.
2. Declare that the Commission has unlawfully taken Gorda's property and access rights under the Fifth Amendment of the U.S. Constitution and Articles X and XII of the Commonwealth of Massachusetts Constitution and award it compensatory damages, interest and attorney's fees.
3. Declare that the Commission acted in bad faith and award Gorda attorney's fees and costs.
4. Grant it such other relief as is just and proper.

By its attorneys,



Arthur P. Kreiger (BBO #279870)
Scott F. Lacy (BBO #633363)
ANDERSON & KREIGER LLP
One Canal Park – Suite 200
Cambridge, MA 02141
617-621-6500

Dated: July 7, 2008

{A0061845.1}

AQUINNAH CONSERVATION COMMISSION

DECISION

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

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

Representatives: James J. Decoulos
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DEP File No.: SE 27-237

I. BACKGROUND

A. Gorda's proposed project.

1. Maria A. Kitras and James J. Decoulos, as Trustees of the Gorda Realty Trust (the "Applicant" or "Gorda"), filed a Notice of Intent, dated March 2, 2007 (the "2007 NOI"), requesting a permit under the Aquinnah Wetlands/Water Resource Protection By-law (the "By-law") to construct: a driveway, a three-bedroom house, a septic system and a well (the "project") on Assessors Map 12, Parcel 38 ("Parcel 38" or the "site"). The NOI also sought permission to construct a 10 foot wide driveway and a 50 foot bridge to cross a wetland area within an easement leading to the site over which the Gorda has a purported legal right to pass.

2. The 2007 NOI was, at the time of its filing, identical in all material respects to prior Notices of Intent submitted by the Applicant on November 2, 2006 (the "2006 NOI") and August 31, 2005 (the 2005 NOI"). The Applicant first filed an NOI for the site on March 12, 2000 (the "2000 NOI"), as discussed in the ensuing sections.

B. The 2000 NOI and the Superseding Order of Conditions.

3. The 2000 NOI was filed under both the By-law and the State Wetlands Protection Act ("WPA") seeking approvals for similar work. The 2000 NOI did not initially propose a bridge. The 2000 NOI was filed during a "moratorium" on the issuance of development permits in the Town under the Martha's Vineyard Commission Act (St. 1977, c. 831, as amended)(which was not lifted until May 23, 2000)(the "MVC Act"). The 2000 NOI, on its face, proposed a total impact on wetlands resources of 5,917 square feet. Since the MVC moratorium was in place, the ACC did not act on the 2000 NOI within twenty-one days (21) days of its filing. Claiming the ACC did not act within 21 days of the filing, the Applicant sought a superseding order of conditions ("SOC") from the Massachusetts Department of Environmental Protection ("DEP") under the WPA before the MVC Act moratorium had been lifted.

4. On July 25, 2000, after a public hearing at which neither the Applicant nor a representative attended, the ACC denied the 2000 NOI under both the WPA and the By-law (the "2000 decision").¹

5. While Gorda's request for an SOC was pending with DEP, the Executive Office of Environmental Affairs ("EOEA") determined that the Applicant was required to file an environmental impact report because the project proposed to alter more than 5000 square feet of bordering vegetated wetland ("BVW"). In response, Gorda filed several project changes with

¹ Approximately two years later, the applicant appealed the portion of the 2000 decision based on the By-law to the Essex Superior Court (Kitras v. Thulin, Docket No. ESCV2002-01838).

the EOEa. The effect of Gorda's proposed project changes - which included the construction of a bridge supported by concrete retaining walls erected on filled wetlands - was purportedly to reduce the project's total impact on Wetlands. On March 26, 2001, the Secretary of the EOEa determined that Gorda was relieved from filing an environmental impact report because the project, in its latest version, would not alter more than 5000 square feet of BVW.

6. On July 12, 2001, DEP issued an SOC for the project, as the Applicant had revised it with the addition of a bridge and wetlands replication. An abutter and the ACC appealed the SOC by requesting an adjudicatory hearing in the division of administrative law appeals ("DALA")(No. SE 27-237).

C. The Conservation Commission and Gorda enter an Agreement for Judgment issuing a permit under the By-law.

7. On or about December 23, 2002, the ACC and the Applicant entered an Agreement for Judgment in the Essex Superior Court case, which granted a permit under the By-law (the "2001 permit") dated July 12, 2001.²

9. The 2001 permit expired by its terms on July 12, 2004. In July of 2004, the applicant sought a one year extension of the 2001 permit, but failed to appear at a noticed public hearing on that request. The ACC denied the request for the extension for that reason, and Gorda appealed to the Middlesex Superior Court (Kitras v. Thulin, MICV2004-03216). The Middlesex Superior Court dismissed the appeal.

10. In both 2005 and 2006, the Applicant filed motions in the Essex Superior Court case (which had been resolved by the Agreement for Judgment) seeking orders compelling the ACC to recognize the continued validity of the 2001 permit. The Superior Court denied relief on

² The Agreement for Judgment stated that the 2001 permit was being issued nunc pro tunc to July 12, 2001, because the ACC had failed to issue its 2000 Decision in writing within 21 days of the close of the public hearing, as required by the By-law. In addition to entering the Agreement for Judgment, the ACC also withdrew from the administrative appeal of the SOC pending in the DALA.

both occasions. The Massachusetts Appeals Court rejected the Applicant's appeal of the first Superior Court decision,³ and the Applicant did not appeal the second Superior Court decision.

11. On August 23, 2005, a Magistrate in the DALA recommended that the DEP commissioner approve the SOC (under the WPA issued on the 2000 NOI). On November 5, 2005, Commissioner Golledge issued a final decision adopting that recommendation.

D. The 2005 NOI.

12. On August 31, 2005, Gorda submitted an NOI under the By-law. Gorda represented that its application was an "exact replica" of its prior submission to the ACC in 2000. In 2005, only one member of the ACC was a member in 2000 when the Gorda had submitted its 2000 NOI.

13. The ACC denied the 2005 NOI in a written decision issued on October 11, 2005. Among other reasons, the ACC denied the 2005 NOI because Gorda refused: a.) to flag or mark the site and access easement delineating the wetland boundaries; and b.) to allow the ACC to utilize its own expert to evaluate the application and its cumulative impact or effect on the values protected by the By-law. No appeal followed.

E. The 2006 NOI.

14. On November 2, 2006, Gorda submitted an NOI under the By-law.⁴ In his cover letter enclosing the NOI, dated November 2, 2006, Mr. Decoulos stated that:

"Gorda agrees to pay the reasonable costs and expenses for specific expert engineering and consultant services to review this application, as set forth in Section 4 of the Bylaw." Due to the end of the growing season and the upcoming shotgun season, it is requested that any field review by a consultant take place before or at the site

³ See Appeals Court Docket No. 2005-P-1028.

⁴ On November 9, 2006, the applicant caused a notice to be published in the Martha's Vineyard Times announcing that the Commission would hold a public hearing on the applicant's 2006 NOI at 4:15 p.m. on November 21, 2006.

inspection and public hearing.”

15. The ACC opened the public hearing on November 21, 2006, and informed Mr. Decoulos that it would accept Gorda’s offer under the By-law to pay (up to the amount permitted by the By-law) for expert consultant services and that the ACC did wish to hire its own consultant. The ACC noted that it needed additional time to hire a consultant expert and conduct a review. Mr. Decoulos informed the ACC that he would not agree to any condition or continuation of the public hearing which would delay the issuance of a decision on the 2006 NOI.⁵ Accordingly, the ACC voted to close the public hearing, and adjourn to December 5, 2006, to consider a final written decision.

16. On December 5, 2006, the ACC issued a written decision denying the 2006 NOI.

II. PROCEEDINGS UNDER THE PRESENT APPLICATION

A. Hearing/Site Visit Dates.⁶

1. The ACC held an initial public hearing on March 20, 2007.
2. On March 20, 2007, the ACC voted to hire consultants (referred to hereafter as the “ACC Consultants” or the “Commssion’s Consultants”) to review the project.
3. The ACC Consultant conducted an initial site evaluation on May 25, 2007.
4. The ACC Consultant conducted an evaluation of the site on September 28, 2007; October 16, 2007; and October 29, 2007. (Two consultants attended the October visits.)
5. On November 8, 2007, the ACC Consultants submitted a report entitled “Questions and Concerns Regarding The Site Plan Map”.

⁵ The applicant similarly objected to any continuance of the public hearings on the 2005 NOI, and the ACC was, therefore, not able to retain any experts to review the 2005 NOI as well.

⁶ The Applicant, or its representatives, sought, assented to, or gave its consent to all continuations of public hearing dates.

6. On November 13, 2007, the ACC held a continued public hearing on the 2007 NOI.
7. On December 11, 2007, the Applicants submitted a written response, including a Wetland Delineation Plan, dated December 5, 2007, and a report prepared by Mario Digregorio, dated 11/27/07, including Field Data Sheets.
8. On December 26, 2007, the ACC Consultants submitted a "Project Review Comments Report".
9. On January 17, 2008, Gorda's counsel submitted a letter and "Proposed Conditions Plan and Wetlands Delineation Plan".
10. On February 25, 2008, the ACC, its Consultants, the Applicant, and the Applicant's Consultant, Mario Digregorio, convened for a site visit.
11. The ACC Consultants submitted a Project Review Comments Report on February 28, 2008.
12. On March 11, 2008, the Applicant submitted revised site plans, dated March 10, 2008.
13. On March 18, 2008, the ACC Consultants submitted a Project Review Comments Report. On the same date, the ACC held a continued public hearing on the 2007 NOI.
14. On March 31, 2008, the Applicant's counsel submitted a letter, with attachments.
15. The ACC Consultants submitted a Professional Review Comments Report on April 8, 2008.
16. The Applicant's counsel submitted a letter, with attachments, dated April 17, 2008, and requested that the hearing be closed on April 17, 2008.
17. The ACC closed the public hearing on April 17, 2008.

B. Background Summary.

1. The initial site evaluation was conducted by the Commission's Consultants on 5/25/07 utilizing the NOI site plans entitled, Proposed Conditions and Existing Conditions, dated 2/12/02 and 2/7/02 respectively. The NOI site plans were stamped by James J. Decoulos, Professional Engineer. The site evaluation revealed that no wetland flagging was present in the field; therefore field review of the project was not possible. In addition, the NOI contained only an 11" X 17" version of the site plans. Full size 24" X 36" plans were requested.

2. The second site evaluation conducted by the Commission's Consultants on 9/28/07 revealed that the wetland flags W1 through W52 were in place but that the site plans did not show flag numbers beyond flag W15. Review of the wetland delineation was delayed again.

3. The field review resumed on 10/16/07 and 10/29/07 with a full size 24" X 36" Existing Conditions Plan, dated 10/15/07. The Commission's Consultants established a revised wetland boundary within the easement in place of the Applicant's flagging W1 through W15, represented by flagging (Aquinnah Conservation Commission) ACC 1 through ACC 15. An initial review document was prepared by the Commission's Consultants and was submitted to the Commission and the Applicant on 11/08/07 which document presented significant and pertinent questions regarding the parties responsible for the wetland delineation; identified significant differences between the location of the wetland flagging in the field and on the site plan; provided attachments to substantiate the inaccuracies on the site plan; and concluded that further review of the project was not possible until the inaccuracies were corrected or explained. Further review of the project itself could not be completed at that time due to inaccuracies on the Applicant's site plans.

4. The Applicant responded to the Commission's Consultants comment letter with a letter dated 12/11/07 and a Wetland Delineation Plan, dated 12/5/07. This plan was stamped by John J. Decoulos,⁷ Professional Land Surveyor. This plan depicts the surveyed wetland boundary for Parcel 38, but does not include wetland flagging within the easement, does not include the topography shown on the Existing Conditions Plan of 10/15/07, does not show the entire easement, and does not include an overlay of the proposed project. The Wetland Delineation Plan states that the owners of Parcel 38 are Maria A. Kitras and James J. Decoulos, Trustees of Gorda Realty Trust.

5. The original site plans included with the NOI are stamped by James J. Decoulos, Professional Engineer. As stated on the above-referenced Wetland Delineation Plan, James J. Decoulos is an owner/trustee of Parcel 38.

6. The Applicant's 12/11/07 letter concedes that the wetland boundary depicted on the plans submitted with the NOI were inaccurate and the wetland boundary shown on Parcel 38 was not based on a field survey. The Applicant's letter states that, in response to the Commission's questioning, 23 of the 52 wetland flags were relocated in the field.⁸

7. A second review letter, dated 12/26/07, was prepared by the Commission's Consultants in response to the Applicant's submittal of 12/11/07. The Consultant's letter requested a Wetland Delineation Plan depicting Parcel 38 with the easement, contours, ACC flagging, and delineation of Bank associated with the intermittent stream crossing located on the site.

⁷ The ACC understands this individual to be James J. Decoulos's father.

⁸ These were the same plans reviewed by DEP/DALA. Based on these changes, it appears that DEP/DALA acted on inaccurate or misleading plans.

8. The Applicant responded with another revised set of plans including, a revised Wetland Delineation Plan and a revised Proposed Conditions Plan, both dated 01/17/08. These plans were utilized during an onsite meeting held on 02/25/08 attended by the Commission's Consultants, Peter Fletcher and Mark Manganello; the Applicant's Consultant, Mario Digregorio; the Chairman of the Conservation Commission, Sarah Thulin; and the property owner/project engineer, James J. Decoulos.

9. Within the easement area, Mr. Decoulos refused to allow Mr. Digregorio (his own consultant) to engage in discussion to review wetland flags W1 through W9. The ACC wetland delineation in this area significantly expands the wetland boundary within the easement area (see 1/17/08 site plans for ACC boundary location). The field review continued from the easement area to Parcel 38. Several revisions to the wetland boundary on Parcel 38 were agreed to by both parties, as detailed in the Commission's Consultants report of 2/28/08. Based on those agreed changes, it appears DEP/DALA acted on inaccurate or misleading plans.

10. Upon completion of the Parcel 38 review, the Commission's Consultants reviewed the portion of the easement located southwest of flags W1 and ACC1. The review in this area resulted in the discovery of a wetland located within the easement, and within the footprint of work that had not been previously disclosed or identified. In addition, a wetland area was discovered immediately adjacent to the existing driveway. The Commission's Consultants delineated the boundary of these wetland areas with flagging demarcated ACC 32 through ACC 57. Notably, the Applicant's consultant, Mr. Digregorio, agreed that these areas are protected as wetlands and acknowledged that neither he nor DEP had evaluated these areas during the previous DEP onsite evaluation. Again, based on those agreed changes, it appears DEP/DALA acted on inaccurate or misleading plans.

11. The Commission's Consultants returned to the easement area during the 2/25/08 site evaluation to install four groundwater monitoring wells in areas delineated as upland by Mr. Digregorio on the Wetland Delineation Plan. The presence of water at or near the surface in each of the wells prompted the Commission's Consultants to reconsider the location of wetland flags ACC 6 through ACC 10. As a result, these flags were revised and moved further upgradient to the west. The flags are labeled ACC 6R through ACC 10R.

12. A third project review letter, dated 02/28/08, was prepared by the Commission's Consultants, summarizing the outcome of the 02/25/08 onsite meeting. The report also details the changes to the wetland boundary established during the 02/25/08 onsite meeting and requested that the changes be depicted on a revised set of plans. This report also requested that the revised plans show the entire length of the easement. The report points out that the depiction of the driveway in the critical location of the "new" wetland area differs between the Wetland Delineation Plan and the Proposed Condition Plan, both dated 01/17/08. The report requests additional survey data and a biological assessment of the potential vernal pool. The report requests a cross-section for the proposed retaining walls in the vicinity of flags ACC 19 and ACC 20.

13. The 2/28/08 report points out continuing concerns with the accuracy of the site plans, particularly when compared with previous iterations. Ongoing concerns with the accuracy of the plans prompted the Commission's Consultants to request an independent, objective review of the survey and engineering associated with the project. The Applicant refused this request.

14. The Applicant submitted a set of revised site plans and figures with a cover letter dated 03/11/08 in response to the Commission's Consultants third review letter (2/28/08). Following review of the revised plans and cover letter, the Commission's Consultants prepared a

comprehensive review report dated 03/18/08. This document incorporated previous review reports, included field data to document findings provided therein, and comments on the 03/11/08 revised plans. The following Findings are paraphrased from the report and hereby incorporated into this Decision:

- a. Inaccuracies Shown on the Applicant's Site Plan Maps: The Applicant has not revised the plans to correct inaccuracies in depiction of the easement area and the wetland line. These existing conditions are shown differently on the Existing Conditions Plan, Assessor Map 12, Parcel 38, Aquinnah, Massachusetts, October 15, 2007; the Wetland Delineation Plan, Set off Lot 232, Assessors Map 12, Parcel 38, Aquinnah, MA., revised January 17, 2008; and the Wetland Delineation Plan, Set off Lot 232, Assessors Map 12, Parcel 38, Aquinnah, MA., Revised March 10, 2008. These discrepancies have been contested since the beginning of the project. The Applicant has refused to provide an independent engineering survey of the Site.
- b. The Wetland Line within the Easement Area (Wetland Flags W1 through W9): Within the easement area, there are significant differences between the wetland line shown on the Wetland Delineation Plan (W1 through W9) and the wetland line delineated by the Commission's Consultants (ACC 1 through ACC5, ACC#6R through ACC#10R, and ACC#11 through ACC#15). The Applicant refused to review the wetland delineation established by the Commission's Consultants. The Applicant refused to discuss differences between the two wetland lines. On-site investigations conducted within the easement area by the Commission's Consultants verify the accuracy of the ACC wetland delineation and confirm the presence of wetland hydrology, hydric soils, and a dominant wetland plant community, all wetland indicators. The revisions to the wetland boundary in this area are significant in that the proposed driveway extends through this area and will result in significant additional wetland alteration.
- c. The Site Plans Remain Unclear: In some areas the ACC flags have replaced the Applicant's flagging, in other areas the ACC flags *and* the Applicant's flags are both shown together on the plans. Specifically, within the easement (the contested area), the site plans depict both the ACC wetland flags *and* the Applicant's wetland flags. The Commission cannot evaluate the proposed project impacts nor render a decision unless it is clear which wetland delineation the Applicant intends to use.
- d. Previously Unmapped Wetlands: The recently discovered wetlands demarcated by flags ACC 41 through ACC 57 are within the project footprint and will result in significant additional wetland alteration through construction of the proposed driveway. The original site plans submitted with the NOI are misleading. They did not identify this area as a wetland and referenced this area only as an existing driveway. As documented within the 02/28/08

Consultant's report, the driveway was historically rerouted around this area (and outside the easement). The Consultant's analysis revealed that this area meets the definition of a protected wetland. These misleading differences were portrayed on the Proposed Conditions Plan and the Wetland Delineation Plan, each dated 01/17/08 that were submitted by the Applicant. The area is referenced as "Existing Road to be Regraded". The regrading of this "road" will result in additional wetland alteration. There is no reference on the plan or supporting documents quantifying the wetland alteration in this area and no wetland replication is provided for the alteration. The Commission estimates an additional +/-1,300 square feet of wetland alteration would occur in this area. This recently discovered wetland was not depicted on any previous site plans and this area was not investigated by DEP during their review of the site. The existing driveway which extends north of the wetland delineated by flags ACC 41 to ACC 57 extends outside the easement and cannot legally be used as a means of access. Therefore, there is no way to avoid the wetland filling in this area.

e. Performance Standards: Although the current filing has been submitted only under the By-law, performance standards in the WPA, specifically 310 CMR 10.55, must also be met under the By-law. The Applicant has not addressed compliance with these standards for the wetland alteration associated with the newly discovered wetland within the easement area. The NOI is incomplete without this information. The site plans do not accurately depict the extent of wetlands associated with the project or the amount of wetland alteration associated with the proposed project; and do not include adequate wetland replication to comply with the pertinent Performance Standards.

f. The proposed project/construction impacts: The proposed project involves construction of a driveway to access a proposed single family dwelling and an associated Title V septic system (and a well). In order to gain access to the upland location for the dwelling and septic system, the proposed driveway crosses protected wetland resource areas in several locations. Because the Proposed Conditions Plan and Wetland Delineation Plan do not show the full extent of wetlands associated with the project, the applicable Performance Standards cannot be fully analyzed.

The Proposed Conditions Plan understates the amount of wetland alteration as it does not accurately identify or describe the full extent of wetland alteration associated with the project. Temporary *and* permanent wetland alteration must be accounted for on the plans. At a minimum temporary alteration will occur for construction of the proposed bridge crossing the wetland and installation of the force sewer line. If directional drilling is proposed to avoid alteration, details should be shown. Information regarding the full extent of wetland alteration, including temporary alteration, was requested after the first site visit and was not provided to the Commission. The plans do not clearly show each area of temporary alteration and any proposed restoration measures.

g. Since the site plans do not depict the full extent of the wetland alteration associated with the project, the wetland replication area does not comply with the Performance Standards for work involving the filling of wetlands. In addition the Applicant has failed to provide wetland replication at the required 1:1 ratio and the Applicant has failed to demonstrate that the wetland replication area fully complies with the Performance Standards at 310 CMR 10.55 (4) (b). In fact, the wetland replication area does not comply with standards (2) through (5) due to the significant change in elevation between the area lost and the wetland replication area. The wetland replication area is located approximately 10 feet higher in elevation than the existing wetland.

15. The Applicant submitted a package of information dated 03/31/08 in response to the 03/18/08 comprehensive review report prepared by the Commission's Consultants. These materials included revised Wetland Delineation and Proposed Conditions Plans, both dated 03/24/08; a revised Proposed Conditions Plan, dated 03/28/08 depicting an alternative design, amended figures, and a table outlining proposed impacts to wetland areas under various scenarios; Direct Testimony of Daniel Gilmore; Correspondence from Doug Cooper; and a 1994 MassGIS orthophoto of the site.

16. The Commission's Consultants produced a final review report dated 04/8/08.

Unresolved issues were outlined within this report as follows:

a. Review of the NOI and site plans under the By-law has revealed new information. This new information was neither presented during the DEP appeal process nor considered in the DALA decision under the WPA. This new discovery within the easement includes a protected wetland resource area delineated by wetland flags ACC 41 to ACC 57 and the proposed project involves direct alteration of this wetland. It is important to note that the Applicant's consultant, Mr. Digregorio, was present when the Commission's Consultants identified this area and Mr. Digregorio agreed with this determination in the field. Since this new information was not available to DEP/DALA as part of their review, the DALA decision approved work that would alter this wetland without adequate wetland replacement.

b. Furthermore, the Commission's Consultants review has revealed that Mr. Digregorio's delineation within the easement between wetland flags W1 and W15 significantly understated the extent of protected wetlands in that area. The Commission's Consultants provided a detailed package of information dated within the 3/18/08 report to substantiate this position and their delineation in the easement. The 04/08/08 report provided a list of monitoring

well measurements taken within the easement area that further support the ACC boundary. Neither the Direct Testimony of Daniel Gilmore nor Correspondence from Doug Cooper provides any data or information to dispute the data gathered by the Commission's Consultants.

c. In addition, the Applicant's written response, dated 03/31/08, does not address the differences in the wetland lines within the easement area shown on the different site plans (Site Plan Existing Conditions, Assessor Map 12, Parcel 38, Aquinnah, Massachusetts dated October 15, 2007, and the most recent Wetland Delineation Plan revised 03/24/08) submitted by the Applicant. When these plans are overlain on a light table, Mr. Digregorio's wetland lines are shown in different locations. The wetland line shown on the most up-to-date Wetland Delineation Plan revised 03/24/08 delineates less wetland within the easement area than the wetland line shown on the Existing Conditions Plan, Assessor Map 12, Parcel 38, Aquinnah, Massachusetts dated 10/15/07—a plan produced 5 month earlier.

d. The Applicant has documented that the property lines and easement have "shifted slightly" as a result of the survey work. Due to the complexity of the project and the evidence of irregularities in the plans, the Commission continues to question the accuracy of the plans. An independent, objective survey of the property must be conducted in order to resolve these discrepancies and confirm the accuracy of the plans.

e. The Plans do not recognize the area delineated with flags ACC 41 through ACC 57 as a wetland and do not include details describing proposed filling in this area. The Applicant presented "alternative" plans includes an extended pile-supported 14 foot wide bridge three feet above the surface of the wetlands in the easement.

The wetland within this easement is a wet meadow with unique and complex habitat characteristics due to the soil characteristics, plant community and hydrology that drives the system. The plant community in a wet meadow habitat is highly sensitive to changes in light and hydrology. This area is designated as "Core Habitat" by the Natural Heritage and Endangered Species Program (NHESP) BioMap and Living Waters project. The area is cited as Core Habitat BM1493 and includes Maritime Dune Community as one of the Natural Communities listed as "imperiled".

The Applicant has not demonstrated that a span only 3 feet above the surface of the wetland is adequate to maintain this unique wet meadow habitat.

The project also involves additional direct wetland filling within this unique natural community; however, the proposed wetland replacement for this filling is in a forested upland setting adjacent to a forested shrub swamp on the central portion of Parcel 38.

f. The details regarding the design of the retaining wall proposed in the vicinity of wetland flags W21, ACC 19 and ACC 20 are inadequate. The Proposed Conditions Plan does not depict the wall in the location of the

greatest slope. The wall extends from flag W24 and terminates adjacent to flag ACC 19; however the steepest grade is located beyond this point, between flags ACC 19 and W21. The cross section D-D provided to show the construction details associated with the retaining wall is at flag ACC 20; however this is not the steepest grade in this area and the plan does not show any footings associated with the stone retaining wall. The proposed cut into a steep slope and lack of a retaining wall between flags ACC 19 and W21 will likely result in erosion into the adjacent wetlands during construction. Cross-sections for the retaining wall in this area should be presented at flag W21.

g. Wildlife Habitat is a wetland value protected by the By-law. The Applicant was requested to investigate if any of the wetlands function as vernal pools. This investigation was not conducted. Therefore, the Commission cannot determine if the project protects this wetland value.

17. The Applicant submitted a final package of information, dated 04/17/08, including a request to close the public hearing on 04/17/08. The public hearing was closed on 04/17/08.

III. FINDINGS

1. Section 1 of the By-law states, in part, that "the purpose of this by-law is to protect the wetlands, related water resources and adjoining lands in [Aquinnah] by prior review and control of activities deemed by the Conservation Commission likely to have significant cumulative adverse effect upon wetland values." The By-law is more protective of wetlands and related resources than the State WPA including, but not limited to, the following respects:

a. The By-law explicitly states that its purpose is to protect against cumulative adverse impact on various wetland values, including, but not limited to, several that are not mentioned in the State WPA or its regulations, erosion and sedimentation control.

2. Paragraph 3 of Section 6 of the By-law provides:

"The Commission is empowered to deny a permit for failure to submit necessary information and plans requested by the Commission."

3. Section 11 of the By-law provides that:

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

4. For the reasons stated above, the Commission finds that the site plans submitted for this project contain numerous deficiencies and inaccuracies that have not been remedied or explained.

5. The Commission finds that the wetland boundaries established by its Consultants accurately demarcate the extent of protected wetlands on the property.

6. For the reasons stated above, the Commission finds that the existing conditions, site plans, and materials reviewed by the Commission under the By-law are not the same materials review by DEP/DALA decision. While a similar project was reviewed and a decision was issued by DEP/DALA, the Commission is not bound by the DEP/DALA decision under the By-law. In fact, the plans presented to DEP misrepresented the location of the easement and the full extent of wetlands as discovered during review under the By-law.

7. The Commission finds that the evidence submitted in support of the Commission's Consultants wetland boundary within the easement documents the presence of a wetland plant community, hydric soils, and other evidence of hydrology as required in the DEP Handbook, known as "Delineating Bordering Vegetation Wetlands under the Massachusetts Wetlands Protection Act". The Commission finds that the easement area is designated as "Core Habitat" by the Natural Heritage and Endangered Species Program (NHESP) BioMap and Living Waters project. The area is cited as Core Habitat BM1493 and includes Maritime Dune Community as one of the Natural Communities listed as "imperiled".

8. The Commission finds that a new wetland area was discovered within the easement during review of the wetland boundary. The new wetland area was not disclosed or identified during the previous review of the project by the Conservation Commission or DEP/DALA.

9. The Commission finds that the Applicant's Consultant agreed with the identification of the new wetland area and stated that the area was not evaluated by DEP/DALA.

10. The Commission finds that review of this NOI application under the By-law differs significantly from the application reviewed by DEP/DALA because of the new wetland area discovered within the easement, the numerous revisions to the wetland boundaries, and the discovery of significant plan deficiencies.

11. The Commission finds that the site plans have not properly identified the new wetland area as a protected wetland and have not quantified the wetland filling resulting from roadway construction in the new wetland.

12. The Commission finds that the Applicant's assertions regarding wetland hydrology, as contained within the Decoulos letter of 04/17/08, are false and misleading. It is not necessary to monitor groundwater for a full growing season. Free water or weeping in a soil test hole within 12 inches of the surface is a good indicator of wetland hydrology. The data submitted in support of the ACC delineation in the easement documents the presence of groundwater for a significant part of the 2008 growing season.

13. The Commission finds that neither the testimony of DEP nor the DALA decision provides any data or information that refutes the data provided in support of the wetland delineation provided by the Commission's Consultants.

14. The Commission finds that the Applicant's estimates for wetland alteration are not accurate. The Commission finds that the site plans do not accurately describe wetland alteration and the proposed wetland replication is therefore inadequate to protect the interests of the By-law.

15. The Commission finds that the proposed project will alter greater than 5,000 square feet of wetlands and thus requires an Environmental Impact Report submittal to MEPA, as well as review by the Army Corp of Engineers, and a 401 Water Quality Certification from DEP.

16. The Commission finds that plans utilizing a bridge over wetlands in the easement will result in alteration to the underlying wetland due to shading impacts. The plant community in an open wet meadow habitat area is highly sensitive to changes in light and hydrology.

17. The Commission finds that the proposed wetland replication area does not comply with requirements set forth in the WPA Regulations. The wetland replication area does not provide mitigation at a 1:1 ratio. The ground and surface water elevation within the wetland replication area is not equal to that of the lost area. The overall horizontal configuration and location with respect to the bank is not similar to the lost area.

18. The Commission finds that the design of the retaining wall proposed in the vicinity of wetland flags W21, ACC 19 and ACC 20 is inadequate to protect the adjacent wetland resource area.

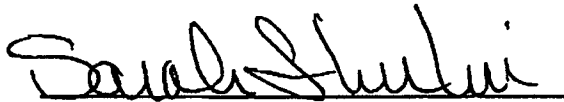
19. The Commission finds that the wetland system contains a potential vernal pool in the vicinity of wetland flags W 19 through W 29. Wildlife Habitat is a wetland value protected by the Bylaw. The Applicant was requested to investigate if any of the wetlands function as vernal

pools. This investigation was not conducted. Therefore, the Commission finds that the project does not protect the interests of wildlife habitat, among other interests.

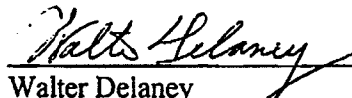
IV. DECISION

For the reasons stated above, the ACC finds that the Applicant's proposal for development of the site and easement does not adequately or accurately describe or depict existing conditions (including wetland resource area boundaries) and proposed conditions (including wetland resource area impacts) nor does it meet the requisite performance standards for work within a wetland. Accordingly, the Commission cannot adequately condition the project to protect the interests and values of the By-law. The Aquinnah Conservation Commission denies the Applicant's proposal for failure to protect the interests of the By-law, as well as all the reasons stated in the body of this decision.

For all of those reasons, the application is DENIED.



Sarah Thulin, Chairperson



Walter Delaney



Kathy Newman

Dated: May 6, 2008

Filed with the Aquinnah Town Clerk:

Filed
MAY 7 2008
Carolyn Felt
Aquinnah Town Clerk