



RUBIN AND
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October 13, 2011

By Overnight Mail and E-mail

Aquinnah Planning Board Plan Review Committee
65 State Road
Aquinnah, MA 02535

**Re: Special Permit Application Under Zoning By-law Sections 13
and 3.9
Owners: Maria A. Kitras and James J. Decoulos, Trustees
of the Gorda Realty Trust
Property: Off Moshup Trail, Map 12, Parcel 38 (Set-Off Lot 232)**

Dear Members of the Planning Board Plan Review Committee:

Thank you for your time at our public hearing on October 4, 2011. The discussions at the hearing narrowed down to two issues, namely, the bridge and frontage. This letter is submitted on behalf of the Gorda Realty Trust to address those two issues as well as comment on certain other topics that were raised. We will be prepared to discuss this information at the continued hearing on October 18.

1. The proposed bridge is one part of the extension of the existing driveway. As such, it should be considered as an incident of the driveway and not as a separate "structure". This approach is consistent with court decisions in similar cases ruling that tall fences around a tennis court are not a "structure" because they are incidental to the tennis court, and the court is not itself a structure. In addition, the proposed walls supporting the driveway surface and culvert are not over 6 feet high and, therefore, are not considered a "structure" under the Definitions in Section 7.1 of the Zoning By-law.

The proposal to span the wetlands first originated with the Town, and it was later supported by the wetlands experts at the Massachusetts Department of Environmental Protection (DEP), as a way to minimize wetlands impacts. The "Goal" of the Aquinnah District of Critical Planning Concern (DCPC) is "to protect the scenic character of the District from undue visual intrusion." (See Section 5.10 of the 1999 DCPC Designation.) This goal is reflected in the goals and purposes of applicable sections of the Zoning By-

law, which are to minimize visual impact and preserve cultural resources. Clearly, the bridge is consistent with those goals and purposes because it is not visible from Moshup Trail and has no visual impact, it includes stone facing to emulate stone walls in the Town, it will not impact cultural resources, and it protects wetland values. Thus, the Committee should not view the bridge as in conflict with the DCPC or the By-law. However, if this is an intractable issue, the Trust will consider using an arch culvert design, or other similar design favored by DEP, that should be approvable as are all other culverts installed in the Town.

2. The Trust's parcel was created and shown on the partition plan on record with the Dukes County Registry showing the original division of the common lands in 1878. In 1994, the 40-foot wide easement was recorded to confirm access to the parcel. (Because the adjacent property owned by the Millers does not have frontage on a road, a similar access easement was likely utilized for original construction of a home on that property in approximately 1975 as well as in the Committee's permitting of a substantial expansion of the home in 2007.) The Trust's parcel and access way and connection to Moshup Trail existed prior to the designation of the Town-wide DCPC in 1999. Thus, access to the Trust's parcel is protected under Section 13.4.9(D)(2) (and the identical Section 3.8.4.B.), which provides that each lot held in separate ownership as of December 22, 1975 "shall be allowed a single access" to a public road. We also believe that construction of a home on the Trust's parcel is protected as a "Pre-Existing Lot" pursuant to Section 3.4.1.

In addition, based upon an initial review of the Town's permitting records, we understand that the Committee and Town have routinely allowed many new homes to be constructed, and added to, on lots that did not have 200 feet of frontage on a public or private way. The Committee and Town have also allowed the creation of new lots that did not have 200 feet of frontage on a public or private way. Thus, it is clear that the Committee and Town have interpreted the Zoning By-Law and DCPC regulations, including existing Section 3.7-1, in a way to allow the construction of many new homes and creation of new lots without 200 feet of frontage, provided that there is access to a public or private way. The Committee should apply this same interpretation to the Trust's application.

The recently adopted "minimum frontage" provision in Section 13.4-10, which is identical to the existing "minimum frontage" provision in Section 3.7-1 that the Committee and Town have been following, should not be interpreted to affect the Trust's present application. (As the Martha's Vineyard Commission stated in its "conformance" review of the proposed new Section 13.4-10: "This matches the regulation Section 3.7 Minimum Frontage 3.7-1 'All lots shall have a minimum frontage of 200 feet . . .', so is already required for development in Aquinnah." (italics added))

3. The adjacent homeowners, the Millers, questioned whether the Trust had a valid easement to access its property and whether the easement allowed the Trust to construct a bridge or other feature to cross the wetlands to access its property.

As we demonstrated at the October 4 hearing, on November 18, 2008, the Millers executed a legally binding Agreement for Judgment wherein the Millers specifically agreed that the Trust's easement was in existence and valid. (Attached is another copy of the Millers' Agreement for Judgment. See paragraph 1.c.)

In addition, incidental to the Trust's right to use the way for all purposes for which ways are used in the Town is the right to construct and maintain the way as other ways are commonly constructed and maintained in the Town. The general rule of law is that, when an easement or other property right is created, every right necessary for its enjoyment is included by implication. The owner of a right of way has the right to enter upon the burdened land (the servient estate) on which no actual way has been prepared to make such changes and construction as will reasonably adapt it to the purposes of a way. In contrast to Miller's new concern, there is no text in the easement prohibiting the construction or maintenance of the way.

Finally, we agree with the Chairman's comment that the Committee's practice has been to not adjudicate landowners' private property rights. The Committee should continue to follow its practice in this regard, especially where the Trust has demonstrated clear access rights and the Millers have not submitted credible evidence to challenge those rights.

4. The Millers and the Fruchtmans claimed that the proposed wetland crossing would adversely affect the wetlands. However, they fail to provide any credible, scientific information to support their claims. In addition, and as discussed above, the wetland experts at DEP determined that spanning the wetlands with a bridge or similar feature would actually protect wetland values.

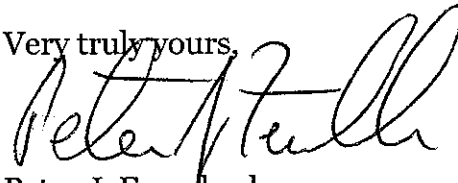
The Trust demonstrated at the October 4 hearing that the DEP and the Superior Court have granted final wetland permits under both the Wetlands Protection Act as well as the Town's Wetlands By-law, so that the Final Order of Conditions issued by DEP governs the project. (On October 7, 2011, DEP extended the Final Order two years, to November 10, 2013.) Thus, with all due respect to the Conservation Commission Chairwoman, the Trust objects to the comments she has made challenging the wetland permits, asserting there are unacceptable environmental impacts, or advocating for denial of the application. Based on her prior decision to deny the project as well as her recent negative comments, it seems clear that she has prejudged the application and is not able to give it a fair hearing. We hope that other members of the Plan Review Committee are not influenced by her comments.

Aquinnah Planning Board Plan Review Committee
October 13, 2011
Page 4

5. As requested, attached is a copy of the letter from the Division of Fisheries and Wildlife, Natural Heritage and Endangered Species Program, dated January 9, 2006. We also attach schematic plans of the possible 26' by 36' building design (see four sheets showing the possible floor plans and elevations). As discussed, these are not intended as the final designs, but instead to give the Committee a sense of the 26 by 36' home. In addition, we will provide confirmatory figures on the footprint of structures as well as the revised plan showing the turn around area for an emergency vehicle at the hearing on October 18.

Thank you for your assistance and consideration. Please contact me if you have any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Peter J. Feuerbach", written over a horizontal line.

Peter J. Feuerbach

PJF/ees

Encl.

cc: Client (w/encl)

RACKEMANN SAWYER & BREWSTER

COUNSELLORS AT LAW

Established 1886

Brian M. Hurley
(617) 951-1129
bhurley@rackemann.com

November 24, 2008

BY HAND

Kathryn Downing
Sessions Clerk to
The Honorable Gordon H. Piper
Land Court Department
226 Causeway Street
Boston, MA 02114

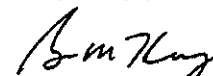
Re: Fruchtman v. Madison
Misc. Case No. 298126 (GHP)

Dear Ms. Downing:

I am happy to report that the case has been settled. I enclose for filing and docketing a Motion to Approve Agreement for Judgment with the signed agreement for judgment attached. Please let us know whether the Court wishes to schedule a hearing in connection with the motion.

Thank you for your cooperation and assistance.

Very truly yours,


Brian M. Hurley

BMH:eab

Enclosure

cc: (w/encls.)

James Decoulos and Maria Kitras
George Brush, Esq.
Kevin Dalton
Mark and Jane Miller

COMMONWEALTH OF MASSACHUSETTS

DUKES, SS.

LAND COURT
C.A. NO. 298126 (GHP)

JACK FRUCHTMAN, JR. and
JOANN FRUCHTMAN,

Plaintiff

v.

JEFFREY L. MADISON, individually
and as Trustee of the Moshup Trust and
the Pegasus Trust, BENJAMIN L. HALL,
as Trustee of the Gossamer Wing Realty
Trust, MARIA A. KITRAS, as Co-Trustee
of Gorda Realty Trust and JAMES J.
DECOULOS, as Co-Trustee of Gorda
Realty Trust, and PETER OCHS,

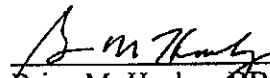
Defendants

MOTION TO APPROVE AGREEMENT FOR JUDGMENT

Jack Fruchtman, Jr. and JoAnn Fruchtman hereby move, pursuant to Land Court Rule 10,
that the Court (i) approve the attached agreement for judgment (signed by all parties) and (ii)
enter judgment accordingly.

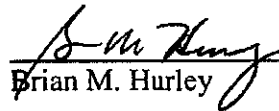
JACK FRUCHTMAN, JR.
and JOANN FRUCHTMAN

By their attorneys,


Brian M. Hurley, BBO #245240
Cara J. Daniels, BBO #647523
Rackemann, Sawyer & Brewster
160 Federal Street
Boston, MA 02110
(617) 542-2300

CERTIFICATE OF SERVICE

I, Brian M. Hurley, certify that I mailed a copy of the foregoing to all parties or their counsel this 2nd day of November, 2008.


Brian M. Hurley

COMMONWEALTH OF MASSACHUSETTS

DUKES, SS.

LAND COURT
C.A. NO. 298126 (GHP)

JACK FRUCHTMAN, JR. and
JOANN FRUCHTMAN,

Plaintiff

v.

JEFFREY L. MADISON, individually
and as Trustee of the Moshup Trust and
the Pegasus Trust, BENJAMIN L. HALL,
as Trustee of the Gossamer Wing Realty
Trust, MARIA A. KITRAS, as Co-Trustee
of Gorda Realty Trust and JAMES J.
DECOULOS, as Co-Trustee of Gorda
Realty Trust. and PETER OCHS,

Defendants

AGREEMENT FOR JUDGMENT

The parties, through their respective counsel, hereby stipulate and agree that the Court enter the following judgment on the docket of the Court:

1. The following easements, granted by Jeffrey L. Madison ("Madison") pursuant to certain rights reserved in deeds by Madison to Jack Fruchtmann, Jr. and JoAnn Fruchtmann (the "Fruchtmans") dated September 7, 1990 and August 11, 1993 and recorded with Dukes Registry of Deeds in Book 545, Page 466 and Book 612, Page 281 (the "Deeds") are valid and enforceable by the grantees or their respective heirs, successors and assigns (the "Easements"). The easements are appurtenant to and for the benefit of the setoff lots described in the instruments (the "Benefited Lots").

- a. Easement dated March 12, 1991 from Jeffrey L. Madison to Peter Ochs recorded with the Registry in Book 555, Page 8 (Set Off Lot 708);
- b. Easement dated January 17, 1992 from Jeffrey L. Madison to Benjamin L. Hall, Trustee of Gossamer Wing Realty Trust recorded with said Registry in Book 571, Page 787 (Set Off Lot 707); and
- c. Easement dated July 28, 1994 from Jeffrey L. Madison to George H. Blackwell and Margaret B. Gubser, co-trustees of the testamentary trust of Alice Stone Blackwell, recorded with said Registry in Book 640, Page 895 (Set Off Lot 232).

2. The parcels described in the Deeds are burdened by the Easements. The

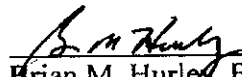
Easements include the right to install, maintain or repair underground utilities in or over the parcels described in the Deeds for the benefit of the Benefited Parcels.

3. As between Madison and the Fruchtmans all claims and counterclaims that have been or could have been asserted in this action are dismissed with prejudice.

4. Each of the parties (i) shall bear its own costs and fees and (ii) waives all rights of appeal.

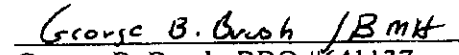
Dated: November 18, 2008

JACK FRUCHTMAN, JR. and
JOANN FRUCHTMAN.
By their attorney,



Brian M. Hurley, BBO #245240
Cara J. Daniels, BBO #647523
RACKEMANN, SAWYER & BREWSTER
160 Federal Street
Boston, MA 02110
(617) 542-2300

JEFFREY MADISON, Individually
and as Trustee of Moshup Trust and
as Trustee of Pegasus Realty Trust
By his attorney,



George B. Brush, BBO #641137
459 State Road
P. O. Box 1317
West Tisbury, MA 02575

Jane B. Miller
Jane B. Miller

James J. Decoulos / BMIT
James J. Decoulos, Co-Trustee of
Gorda Realty Trust

Mark J. Miller
Mark J. Miller

Maria A. Kitras / BMIT
Maria A. Kitras, Co-Trustee of
Gorda Realty Trust

BENJAMIN L. HALL, as Trustee of the
Gossamer Wing Realty Trust

By his attorney,

Kevin Dalton / BMIT
Kevin Dalton, BBO #
Glovsky & Glovsky
8 Washington Street
Beverly, MA 01915
978-922-5000

A0642215.DOC;1



THE COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT
226 CAUSEWAY STREET
BOSTON, MA 02114
PHONE: 617-788-7497

November 25, 2008

NOTICE OF DOCKET ENTRY

Notice is hereby given that the following docket entry has been made in:

Misc. 298126 – Fruchtman v. Madison

November 25, 2008. Agreement for Judgment, filed and APPROVED. The within Agreement for Judgment is Approved by the Court pursuant to Land Court Rule 10.

(Piper, J.)

Very Truly Yours,

Kathryn Downing
Sessions Clerk
617-788-7458

cc: Brian M. Hurley, Esq.
George B. Brush, Esq.
Kevin Dalton, Esq.
Jane B. Miller
Mark J. Miller
James J. Decoulos
Maria A. Kitras
File



MassWildlife

Commonwealth of Massachusetts

Division of Fisheries & Wildlife

Wayne F. MacCallum, *Director*

January 9, 2006

James Decoulos, Decoulos & Company
185 Alewife Brook Parkway
Cambridge, MA 02138

RE: MESA Review, Moshup Trail, Gorda Realty Trust
Proposed house, driveway, septic and 50 ft. bridge
Aquinnah, MA
NHESP Tracking No. 00-7612

Dear Mr. Decoulos:

The Natural Heritage & Endangered Species Program (NHESP) of the Division of Fisheries & Wildlife is in receipt of a letter from Mario DiGregorio (dated 12/5/05, received 12/22/05) describing field surveys for *Arethusa bulbosa* conducted by Mr. DiGregorio at the above-referenced site on May 27 and June 6, 2001. The letter also included a copy of an email from Mr. DiGregorio to you (dated 7/4/01), indicating that Mr. DiGregorio had discussed his findings with NHESP staff back in 2001.

As you are aware, the NHESP project file did not contain written documentation that the plant survey had been carried out as required. Our staff botanist has reviewed Mr. DiGregorio's letter describing his field survey, and has discussed the survey with Mr. DiGregorio by phone.

Based on a review of the information contained in our database, and the information that has been provided, the NHESP has determined that the rare plant survey conducted in 2001 was adequate, and that no further MESA review of the project is required. This evaluation is based on the most recent information available in the NHESP database, which is constantly being expanded and updated through ongoing research and inventory. Should your site plans change, or new rare species information become available, this evaluation may be reconsidered.

Sincerely,

Thomas W. French, Ph.D.
Assistant Director

cc: Aquinnah Conservation Commission
Aquinnah Planning Board
MEPA Office, EOE Number 12248
DEP Southeast Regional Office, Wetlands Program

www.masswildlife.org

Division of Fisheries and Wildlife

Field Headquarters, One Rabbit Hill Road, Westborough, MA 01581 (508) 792-7270 Fax (508) 792-7275

An Agency of the Department of Fisheries, Wildlife & Environmental Law Enforcement

NOTES:

- DO NOT SCALE OFF DRAWING, REFER TO LISTED DIMS ONLY
- ALL DIMS ARE FACE TO FACE OF SHEETROCK OR TO CENTERLINE OF DOORS AND WINDOWS UNLESS OTHERWISE NOTED. ANY DIMENSIONAL DISCREPANCIES SHALL BE BROUGHT TO THE IMMEDIATE ATTENTION OF THE EPOCH DESIGN DEPARTMENT FOR VERIFICATION.
- ROOM AREA CALCULATIONS ARE APPROXIMATE.

PRELIMINARY PLAN
THIS PLAN HAS BEEN DRAWN BASED ON THE SUBMITTED "PRELIM PLAN REQUEST" FORM.
PLEASE REVIEW IT CAREFULLY AND NOTE ANY CHANGES FOR SUBMISSION TO EPOCH CORP. FOR REVISION AND/OR PRICE ADJUSTMENTS.
ALL REQUESTED REVISIONS WILL BE SUBJECT TO REVIEW AND APPROVAL BY THE EPOCH CORP. DESIGN DEPARTMENT. SCALED PRELIM PLANS SHOULD BE RETURNED TO EPOCH CORP. AS SOON AS POSSIBLE TO ENSURE PLACEMENT ON THE PRODUCTION SCHEDULE.

ATTENTION
BUILDER AND END BUYER SHALL SIGN AND DATE THIS PLAN BELOW, BEFORE RETURNING PLANS TO EPOCH CORP. SIGNATURES SHALL INDICATE THAT THE PLAN HAS BEEN THOROUGHLY REVIEWED BY BOTH AND IS ACCEPTABLE AS DRAWN OR AS NOTED.
BUILDER: _____ DATE: _____
END BUYER: _____ DATE: _____

DOOR SCHEDULE						
MANUF.	ID	TYPE	MATERIAL	SIZE	REMARKS	QTY
ARTEK	SF4	6 PANEL	FIBERGLASS	2'-5" x 6'-8"	--	1
ARTEK	SF1	6 PANEL	FIBERGLASS	3'-0" x 6'-8"	--	1
PELLA	7281	SLIDER	ALUM. CLAD	6'-0" x 6'-6 3/4"	W/GRILLES	1

REGRESS IN MA = MIN. 3.3 SF OPENING 20 X 24 IN EITHER DIRECTION

WINDOW SCHEDULE							
MANUF.	ID	TYPE	MATERIAL	RO WIDTH	RO HEIGHT	EGRESS#	REMARKS
PELLA	C214LR	CASEMENT	ALUM. CLAD	3'-7"	3'-6"	NO	--
PELLA	DH2941	DOUBLE HUNG	ALUM. CLAD	2'-6"	3'-6"	NO	--
PELLA	DH3741	DOUBLE HUNG	ALUM. CLAD	3'-2"	3'-6"	NO	--
PELLA	DH3757	DOUBLE HUNG	ALUM. CLAD	3'-2"	4'-10"	YES	--

REVISIONS	NO.	DESCRIPTION	BY	DATE

Epochhomes
fine custom modular homes

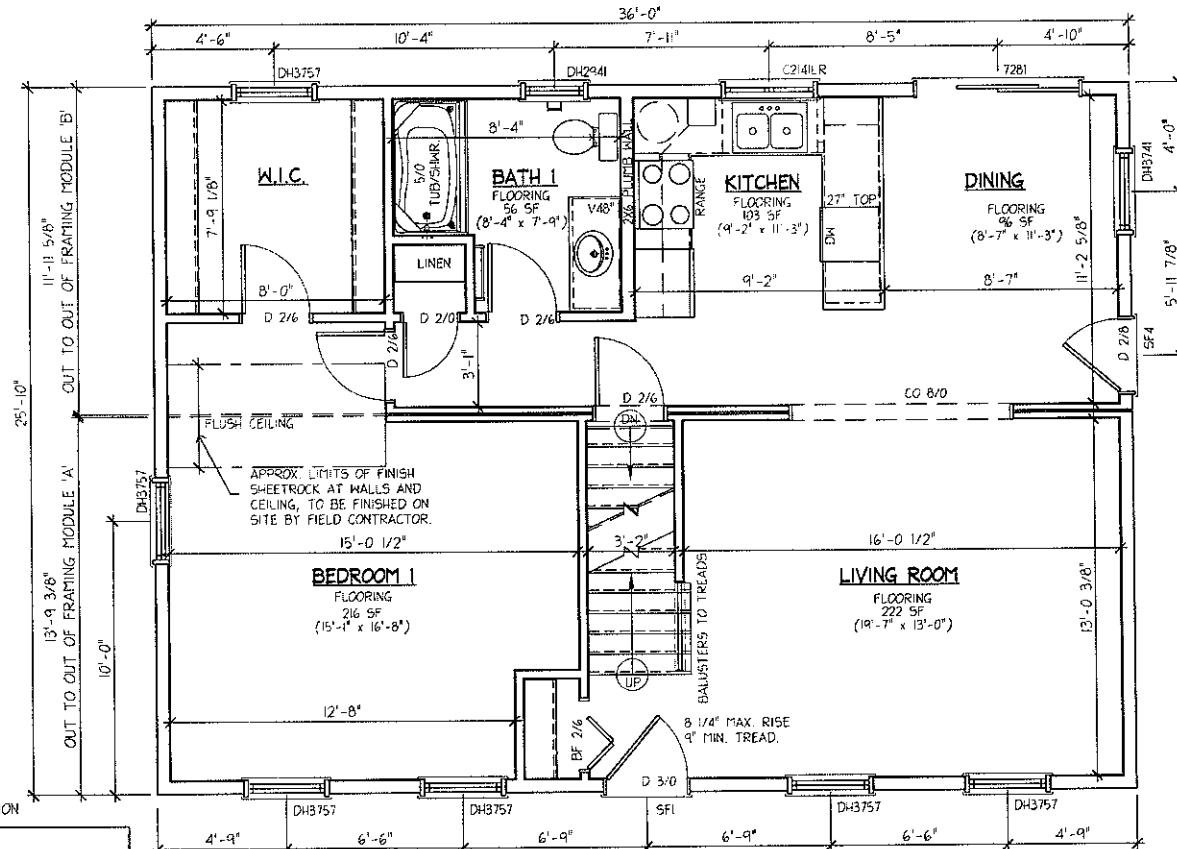
P.O. BOX 235
PEMBROKE, N.H. 03275
1-877-GO-EPOCH
(603) 225-3907
www.epochhomes.com
©2007 Epoch Homes

PROJECT:
26X36 CAPE
BUILDER:

NUMBER:
4066-07
ENDBUYER:

SHEET TITLE:
FIRST LEVEL FLOOR PLAN
DRAWN BY: CAD DATE: 9/25/07
SCALE: AS NOTED

SHEET NUMBER:
A-1



P-1 FIRST LEVEL FLOOR PLAN
SCALE: 1/4" = 1'-0"
CEILING HEIGHT = 8'-0"

SCHEMATIC ONLY - NOT FINAL DESIGN

1. DO NOT SCALE OFF DRAWING, REFER TO LISTED DIMS ONLY!

2. ALL DIMS ARE FACE TO FACE OF SHEETROCK OR TO CENTERLINE OF DOORS AND WINDOWS UNLESS OTHERWISE NOTED. ANY DIMENSIONAL DISCREPANCIES SHALL BE BROUGHT TO THE IMMEDIATE ATTENTION OF THE EPOCH DESIGN DEPARTMENT FOR VERIFICATION.

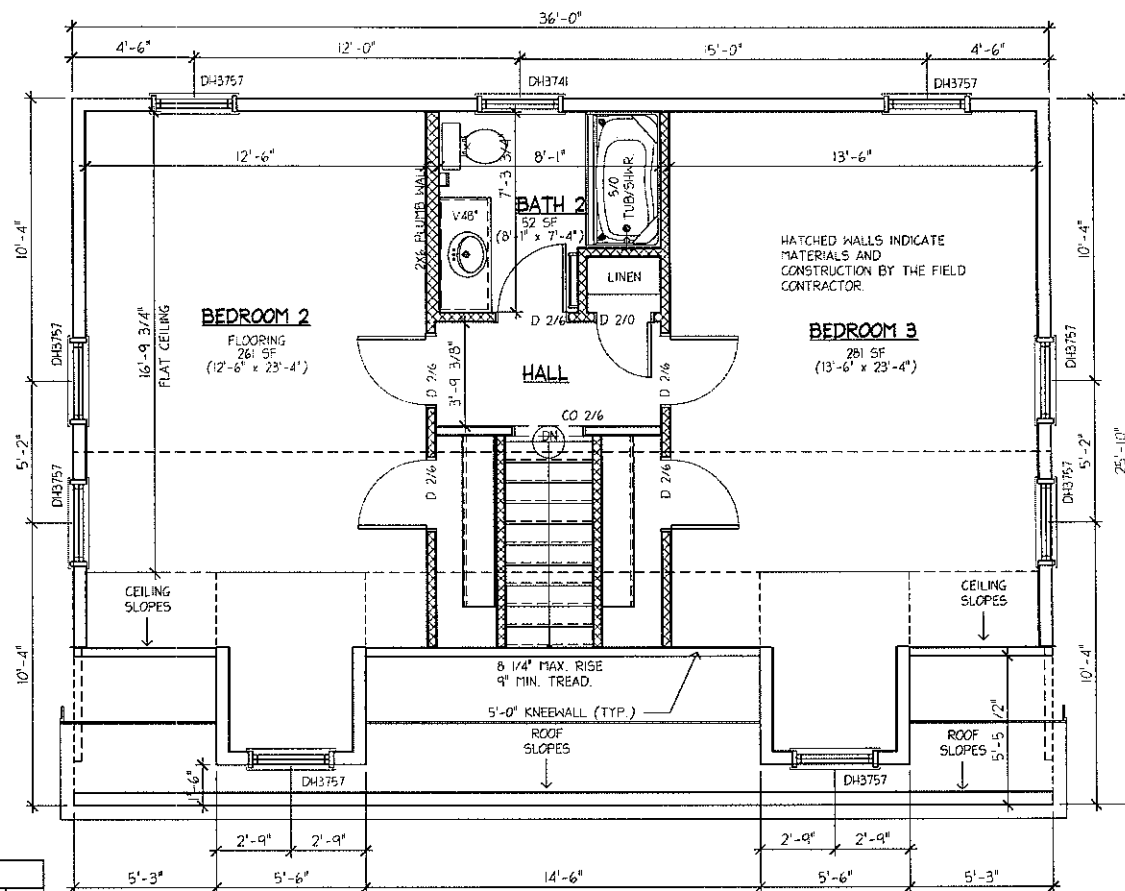
3. ROOM AREA CALCULATIONS ARE APPROXIMATE.

THIS PLAN HAS BEEN DRAWN BASED ON THE SUBMITTED
"PRELIM PLAN REQUEST" FORM.
PLEASE REVIEW IT CAREFULLY. IF YOU WANT ANY CHANGES FOR
SUBMISSION TO EPOCH CORP. FOR REVISION AND/OR
PRICE ADJUSTMENT.
ALL REQUESTED REVISIONS WILL BE SUBJECT TO REVIEW
AND APPROVAL BY THE EPOCH CORP. DESIGN DEPARTMENT.
SIGNED PRELIM PLAN(S) SHOULD BE RETURNED TO
EPOCH CORP. AS SOON AS POSSIBLE TO ENSURE PLACEMENT
ON THE PRODUCTION SCHEDULE.

BUILDER AND END BUYER SHALL SIGN AND DATE THIS PLAN BELOW, BEFORE RETURNING PLANS TO EPOCH CORP. SIGNATURES SHALL INDICATE THAT THE PLAN HAS BEEN THOROUGHLY REVIEWED BY BOTH AND IS ACCEPTABLE AS DRAWN OR AS NOTED.

BUILDER: _____ DATE: _____

END BUYER: _____ DATE: _____



REGRESS IN MA = MIN. 3.3 SF OPENING 20 X 24 IN EITHER DIRECTION

WINDOW SCHEDULE								
MANUF.	ID	TYPE	MATERIAL	RO WIDTH	RO HEIGHT	EGRESS	REMARKS	QTY
PELLA	DH3741	DOUBLE HUNG	ALUM. CLAD	3'-2"	3'-6"	NO	--	1
PELLA	DH3757	DOUBLE HUNG	ALUM. CLAD	3'-2"	4'-0"	YES	--	8

SECOND LEVEL FLOOR PLAN

SCALE: 1/4" = 1'-0"
CEILING HEIGHT = 7'-9"

REVISIONS	NO.	DESCRIPTION	BY	DATE



P.O. BOX 235
PEMBROKE, N.H. 03275
1-877-GO-EPOCH
(603) 225-3907
www.epochhomes.com
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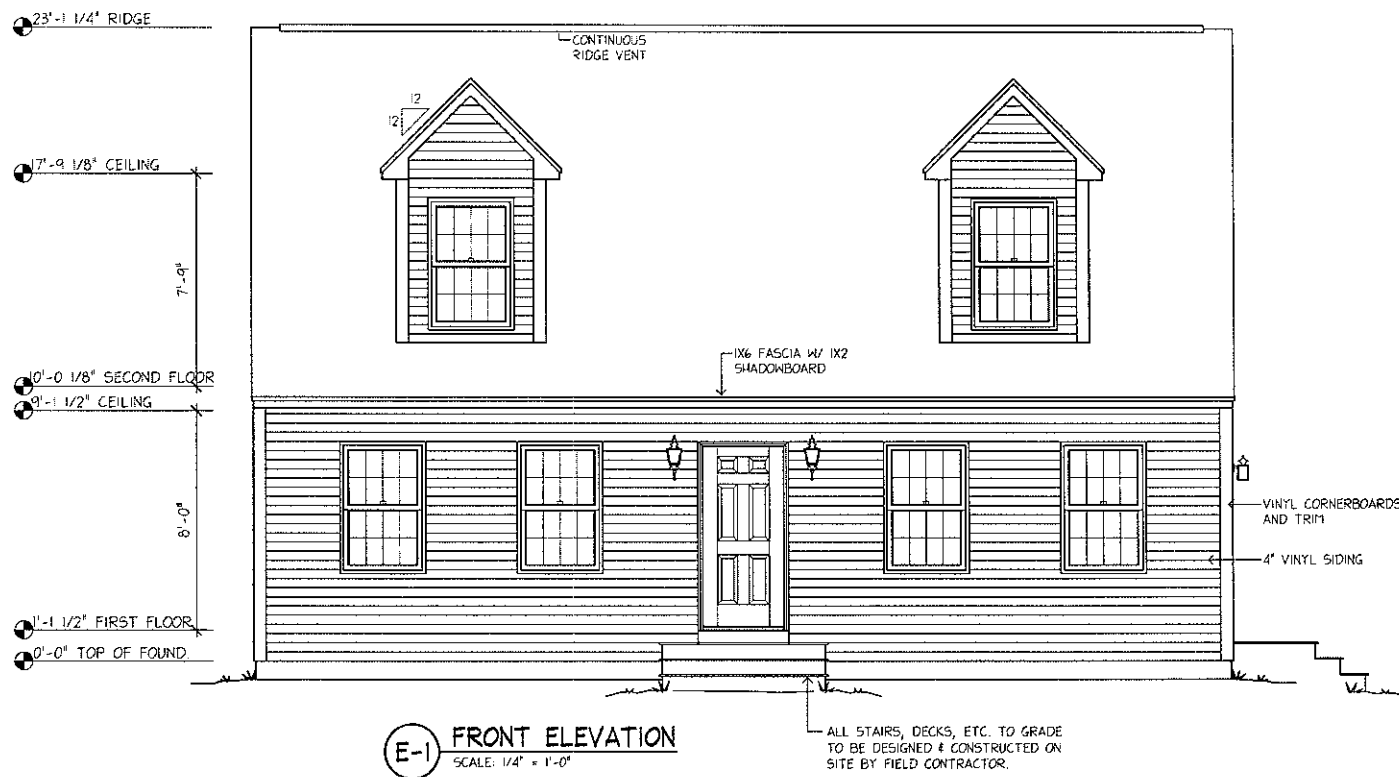
PROJECT:
26X36 CAPE
BUILDER:


NUMBER:
4066-07
ENDBUYER:

SHEET TITLE:	
SECOND LEVEL FLOOR PLAN	
DRAWN BY: CAD	DATE: 9/25/07
SCALE: AS NOTED	

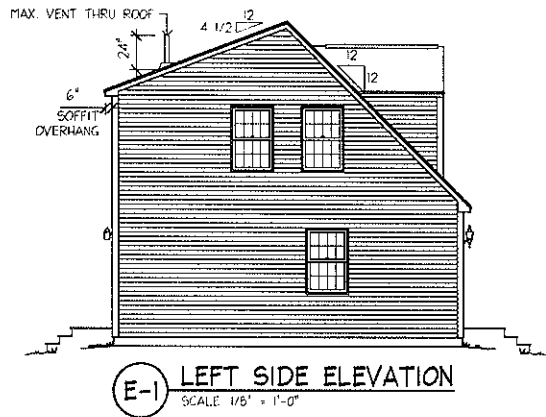
SHEET NUMBER:
A-2



SCHEMATIC ONLY - NOT FINAL DESIGN



REVISIONS	NO.	DESCRIPTION	BY	DATE	 Epochhomes <i>fine custom modular homes</i>	P.O. BOX 235 PEMBROKE, N.H. 03275 1-877-GO-EPOCH (603) 225-3907 www.epochhomes.com ©2007 Epoch Homes	PROJECT: 26X36 CAPE BUILDER:	NUMBER: 4066-07 ENDBUYER:	SHEET TITLE: FRONT ELEVATION DRAWN BY: CAD DATE: 9/25/07 SCALE: AS NOTED	SHEET NUMBER: A-3

SCHEMATIC ONLY - NOT FINAL DESIGN



REVISIONS	NO.	DESCRIPTION	BY	DATE	 Epochhomes <i>fine custom modular homes</i>	P.O. BOX 235 PEMBROKE, N.H. 03275 1-877-GO-EPOCH (603) 225-3907 www.epochhomes.com ©2007 Epoch Homes	PROJECT: 26X36 CAPE BUILDER:	NUMBER: 4066-07 ENDBUYER:	SHEET TITLE: ELEVATIONS	SHEET NUMBER: 
					DRAWN BY: CAD DATE: 9/25/07					
					SCALE: AS NOTED					

SCHEMATIC ONLY - NOT FINAL DESIGN