COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION

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In the Matter of

Maria Kitras, Trustee Gorda Realty Trust Docket Nos. 2001-114 and 2001-115 DEP File No. SE 27-237 Aquinnah

APPLICANT'S RESPONSE TO ORDER TO SHOW CAUSE

Now comes Maria Kitras, Trustee of Gorda Realty Trust (the Applicant), and files this Response to the Show Cause Order issued on September 13, 2002 by Administrative Law Judge Francis X. Nee.

The Applicant believes that this Tribunal's intention to stay this proceeding is an unjust proposed action devoid of facts. The harshest assumption shared by parties is that the Applicant has not appealed the decision of the Aquinnah Conservation Commission (ACC) to deny the project under the local Aquinnah Wetlands/Water Resource Protection Bylaw (the Local Bylaw).

The Applicant has never received a denial under the Local Bylaw. <u>See</u> February 1, 2002 Decoulos Aff. ¶ 5. What is the Applicant to appeal? It was only after Judge Nee raised the issue of a possible denial under the Local Bylaw at the prehearing conference on January 9, 2002 did a "decision" magically appear.

In addition to the many flaws in the alleged July 25, 2000 "decision" previously mentioned in pleadings to this Tribunal, the Applicant has identified two other fatal problems.

First, ACC member Steven Yaffe has violated the conflict of interest law, G.L. c. 268A, § 19, by not receiving a written determination prior to his alleged vote on July 25, 2000 that his interest in

an ACC decision would not be "so substantial as to be deemed likely to affect the integrity of the services which the municipality may expect." Yaffe is a direct abutter to the Applicant's property.

Secondly, the ACC improperly invoked the Rule of Necessity at the July 25, 2000 meeting. See <u>Graham v. McGrail</u>, 370 Mass. 133, 138 (1976); <u>Georgetown v. Essex County Retirement</u> <u>Board</u>, 29 Mass. App. Ct. 272 (1990); <u>Moran v. School Committee of Littleton</u>, 317 Mass. 591, 594 (1945).

As a result of these findings, together with previously described flaws in the "decision", the Applicant has filed a complaint in the Essex Superior Court today seeking declaratory relief pursuant to G.L. c. 231A for the alleged denial of the Applicant's wetlands application. <u>See</u> Exhibit I. Additionally, a Motion for a Short Order of Notice was filed in Essex Superior Court and a hearing is scheduled for October 8, 2002 in Salem to address the injustice of a potential stay of this matter.

The related complaint in Middlesex Superior Court challenging the validity of the Local Bylaw is also proceeding forward. <u>See</u> Exhibit II.

The Applicant has therefore taken appropriate measures to deal with a stay, but believes it is an unjust remedy for the facts established.

> Respectfully submitted by Maria Kitras, Trustee, Gorda Realty Trust By her Engineer, James J. Decoulos, PE, LSP Decoulos & Company

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248 Andover Street Peabody, MA 01960 978-532-8154

September 27, 2002

STATEMENT OF SERVICE

Matter of Maria Kitras, Trustee Gorda Realty Trust Docket Nos. 2001-114 and 2001-115

I, James J. Decoulos, do hereby certify that I caused a copy of the APPLICANT'S RESPONSE TO ORDER TO SHOW CAUSE regarding the above referenced matter to be served on the following parties by first class mail:

Deneen Simpson, Docket Clerk DEP Office of Administrative Appeals One Winter Street, 3rd floor Boston, MA 02108

DEPARTMENT

DEP File No. 27-237

Rebecca Cutting, Esq. DEPARTMENT Department of Environmental Protection One Winter Street, 3rd floor Boston, MA 02801

Michael A. Goldsmith, Esq. Reynolds, Rappaport & Kaplan LLP 106 Cooke Street P.O. Box 2540 Edgartown, MA 02539 CONSERVATION COMMISSION

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

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

JACK FRUCHTMAN, JR. JOANN FRUCHTMAN

Signed under the penalties of perjury this 27th day of September, 2002.

James J. Decoulos, PE, LSP Decoulos & Company

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Maria Kitras, Trustee Gorda Realty Trust Docket Nos. 2001-114 and 2001-115 DEP File No. SE 27-237 Aquinnah

AFFIDAVIT OF JAMES J. DECOULOS

My name is James J. Decoulos and the following facts are true to the best of my knowledge, information and belief.

- 1. I am a registered professional engineer and licensed site professional in the Commonwealth of Massachusetts.
- The Aquinnah Conservation Commission (ACC) and Maria Kitras (with others) executed a Stipulation of Agreed upon Facts on September 25, 2000 in the case before the Middlesex Superior Court as Civil Action No. 98-05515. A copy of said Stipulation is attached hereto as Exhibit A.
- 3. I have represented Gorda Realty Trust on all wetlands applications submitted to the ACC.
- 4. The ACC never notified Gorda Realty Trust or myself of the time and place of the public hearing held on July 25, 2000.
- 5. The ACC has never issued a decision to Gorda Realty Trust or myself from the public hearing on July 25, 2000.

Signed under the pains and penalties of perjury this 1st day of February, 2002.

James J. Decoulos