



CAPE COD COMMISSION

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E-mail: frontdesk@capecodcommission.org

Date: July 10, 2003

To: Mashpee Conservation Commission

From: Cape Cod Commission

RE: Development of Regional Impact Jurisdictional Determination
Cape Cod Commission Act, Section 12 (j)

Applicant: Mashpee Conservation Commission
PO Box 208
Mashpee, MA 02649

Project #: JD # 20045

Project: New Seabury Properties LLC - MEPA # 12074
Mashpee, MA 02649

Land Court Certificate Numbers: 149477; Condo Certificate # 271, Units 7001-7043; 149477, 149457, 149470, 144060 (Map 123, parcel 192), 149458, 143485, Registry Book 11588, Page 106 (Map 127-17 only); Book 7703, Page 72; all remaining properties included in MEPA filing SFEIR # 12074.

DECISION OF THE CAPE COD COMMISSION

SUMMARY:

Pursuant to Section 12 (j) of the Cape Cod Commission Act (Act), the Cape Cod Commission (Commission) hereby determines that the proposed New Seabury Properties development (Project) located in seven parcels within New Seabury in the Great Neck area of Mashpee, MA, and described in a Supplemental Final Environmental Impact Report (SFEIR, MEPA #12074) dated October, 2001, and as modified in the Notice of Project Change (NPC) dated January 2003, is a project that qualifies for review as a Development of Regional Impact under Section 3 of the DRI Enabling Regulations Barnstable County Ordinance 90-12 as amended, and Sections 12(i) and 13(b) of the Act, and which is not exempt under Section 22 of the Cape Cod Commission Act (Act), c.716 of the Acts of 1989 as amended. This decision is rendered pursuant to a vote of the Commission on July 10, 2003.



PROJECT DESCRIPTION:

The New Seabury Properties proposed Project includes development on seven parcels of land throughout the New Seabury golf and resort complex on Great Neck in Mashpee, MA, as described in the SFEIR dated October 2001. The SFEIR Project includes:

- Completion of Sea Quarters Condominium – 50 units;
- Completion of the Promontory Point Condominium – 24 units;
- Development of Flat Pond Subdivision – 30 single family homes;
- Development of Spinnaker Cove – 8 single-family homes;
- Redevelopment of Popponesset Inn and associated recreation facilities – refurbishment of the Popponesset Inn (restaurant), new swimming pool, new cabana club, 9-unit townhouse village on the waterfront, 12 townhouses, 30 condominium units and parking;
- Completion of Bluff Lots – 5 single family homes;
- Condominium around the Popponesset Inn – 52 units;
- Poppy Place – 14 single family lots;
- Condominiums around the golf course clubhouse – 87 units;
- New golf course maintenance facility; upgrading golf course (this has been completed)
- Mixed-use development in Section 5 including 37 single family detached homes, 38 single family attached units, hotel up to 150 rooms, 80,000 sf of commercial and retail space, 200 garden apartments, new reception center, new recreation complex including a golf practice range, a fitness center and 50-seat café, pool and tennis courts, all with associated parking and roads;
- Construction of a 300,000 gallon per day (gpd) wastewater treatment facility (WWTF) to service new development, the new clubhouse and the reconstruction of Popponesset Inn.
- The WWTF has been completed and permitted for 300,000 gpd.

In addition, the Project includes a Notice of Project Change (NPC) for Section 5 of the SFEIR, filed with MEPA on January 20, 2003, reducing the number of dwelling units from 425 to 25, and increasing the commercial square footage from 80,000 sf to 145,000 sf.

Procedural History:

New Seabury Properties' (New Seabury) plans were submitted to the Executive Office of Environmental Affairs, MEPA Unit, in a Draft Environmental Impact Report (DEIR) dated October 2000.

The Commission received a request for a Jurisdictional Determination (JD) from the Mashpee Conservation Commission on January 22, 2001. The Commission determined that the New Seabury application was complete on February 7, 2001. The Mashpee Conservation Commission and New Seabury agreed to extensions of the Commission's JD review period several times, first to March 30, 2001, then April 30, 2001, and then May 25, 2001. The review period had a final extension until February 28, 2002, so New Seabury could complete the MEPA process. A duly noticed public hearing pursuant to Section 5 of the Cape Cod Commission Act was held by an authorized subcommittee on May 15, 2001 at the Mashpee Town Hall, Mashpee, MA, to receive public comment concerning the proposed development outlined by New Seabury in their Final

Environmental Impact Report (FEIR) filed with MEPA on April 13, 2001. The Secretary of Environmental Affairs required additional information to address environmental impacts and protections in a SFEIR. The SFEIR was filed on Oct. 24, 2001, and received the Secretary's Certificate on Nov. 30, 2001. A Subcommittee of the Commission held a public meeting on January 2, 2002 for an update on changes to the project that were reflected in the SFEIR. The full Commission held a public hearing on January 10, 2002 in the Assembly of Delegates Chamber in Barnstable Village. At the conclusion of this hearing, the Commission voted unanimously that the proposed project qualifies for review as a Development of Regional Impact under Section 3 of the DRI Enabling Regulations and under Sections 12(i) and 13(b) of the Act, and is not exempt under Section 22 of the Act.

In February 2002 New Seabury LLC appealed the Commission's decision. On October 17, 2002, Superior Court Judge Connon issued a decision denying New Seabury's motion for summary judgement and granting, in part, the Commission's motion for summary judgement. Judge Connon found that the substantial compliance policy should be adopted as a regulation and also directed the Commission to rehear the JD with the substantial compliance regulation. The substantial compliance policy was adopted as a regulation by the Commission and by the Assembly of Delegates in March 2003. A duly noticed public hearing was held by a subcommittee on May 29, 2003 at Town Hall in Mashpee, MA, and the hearing was continued to June 19, 2003, and the record kept open. A subcommittee meeting was held on June 3, 2003. At that time the subcommittee voted to request that New Seabury provide additional documents, and voted five in favor with one abstention, to recommend to the full Commission that it has jurisdiction of the New Seabury SFEIR and NPC as a DRI. On June 19, 2003 the full Commission held a public hearing. The Commission voted to continue the hearing to July 10, 2003. On July 10, 2003 the full Commission voted twelve in favor, with two abstentions, that the Commission has jurisdiction over the Project as proposed in both the SFEIR and as altered in the NPC.

Materials Submitted for the Record by the Applicant:

- Comment letter on SFEIR from Mashpee Conservation Commission – Nov. 23, 2001
- Fax from Division of Fisheries & Wildlife – Aug. 28, 2001
- Rare Animal Observation Form from Natural Heritage & Endangered Species Program – Aug. 21, 2001
- Comment letter on FEIR – March 28, 2001
- 30 day Extension Agreement to May 25, 2001 from Mashpee Conservation Commission
- Letter from the Mashpee Conservation Commission – dated May 15, 2001
- Extension Agreement to Feb. 28, 2002 for JD review – dated May 10, 2001
- Extension Agreement to May 25, 2001 – dated March 28, 2001
- Extension Agreement to April 30, 2001– dated March 15, 2001
- Extension Agreement to March 30, 2001 – dated Feb. 20, 2001
- Letter from Diane Boretos, Mashpee Conservation Commission dated Feb. 1, 2001
- Plan of Land in Mashpee by G.F. Clements, dated March 1926
- Application for Jurisdictional Determination and locus map from R. Sherman, Mashpee Conservation Commission - Dec. 21, 2000

- Letter from D. Boretos, Assistant Conservation Agent, certifying the filing of the JD Application - Dec. 20, 2000
- Comment letter on DEIR – Nov. 17, 2000
- Explanation prepared for Jan. 29, 1990 town meeting article
- Letter from EOE, DEM to Town of Mashpee, dated May 26, 1995
- Copy of Agreement with Mashpee Selectboard, dated May 22, 1995
- Letter of Determination filed by the Town of Mashpee Board of Appeals – May 1994
- Opinion from Elizabeth Lane, dated July 15, 1994
- Letter from Mark C. Gildea, Attorney, to Town of Mashpee Planning Board dated May 5, 1993
- Opinion from Myron J. Fox, Attorney for New Seabury, to the Town of Mashpee Planning Board, dated June 14, 1993
- Opinion from Elizabeth A. Lane, Attorney, to the Town of Mashpee Planning Board, dated June 1, 1993
- Status update on New Seabury development of special permit area from Michael H. Grotzke, Engineer for New Seabury, to town of Mashpee Planning Board, dated July 9, 1991
- Letter of Determination from Mashpee Board of Appeals, dated Dec. 3, 1990
- Mass. Appeals Court decision (New Seabury Corp. v. Board of Appeals of Mashpee, et al, 28 Mass. Appeals Court 946 (1990))
- Town Meeting Article 9 from Jan. 29, 1990
- Deed from Forward Development Co. – July 29, 1988
- Opinion from John Reardon, Mashpee Town Council – Jan. 23, 1980
- MA Superior Court (Equity No. 32799) *New Seabury v. Mashpee Board of Appeals*, Findings and Conclusions, dated Nov. 4, 1975
- Letter from Richard Staff, town counsel, to Building Inspector – Dec. 15, 1972
- Town Meeting Article 15 from Dec. 15, 1971
- Article 18, 1966 Town Meeting
- “Deed of Restrictions” from Popponesset Corporation to the Town of Mashpee, dated July 13, 1964
- Declaration written by Emil Hanslin of easements, covenants, restrictions, agreements and charges affecting Greensward East of New Seabury, dated May 7, 1964, pages 1 – 10
- Article 37 from March 2, 1964 Town Meeting
- Cluster Zoning Bylaw, 1963
- “Facts and Decision” from Mashpee Board of Appeals, dated Feb. 24, 1964
- “Cluster Zoning Plan of a Portion of New Seabury, Mashpee, MA, by George E. Hayes”, dated Jan. 1, 1964
- “Facts about the Mashpee Cluster Zoning District Bylaw versus the Proposed Zoning Bylaw Changes” – undated, but prior to 1963 adoption of cluster bylaw
- Article 61 for 1963 town meeting
- 1963 Zoning Bylaws
- Copy of 1962 Zoning regulations, and more recent revisions to zoning regulations
- 1961 Chapter III – Article II of the Zoning By-laws

Materials submitted by MEPA:

- Secretary’s Certificate on the NPC – February 7, 2003

- Secretary's Certificate on SFEIR – Nov. 30, 2001
- Copy of fax from Robert Brennan, assistant to R.J. Lyman of Goodwin Procter LLP, to the MEPA office dated Nov. 28, 2001 – Dec. 10, 2001
- Secretary's Certificate on FEIR – April 13, 2001
- Secretary's Certificate on DEIR – Dec. 15, 2000
- Secretary's Certificate on the ENF – Jan. 28, 2000

Materials submitted by other Town Officials:

- Illustration of "The Mall" development schematic for Section 5, undated, from Mashpee town archives, submitted by Attorney William Henchy, representing the Mashpee Water District – July 10, 2003
- "New Seabury Master Plan", color photocopy of land uses: open space, low density, moderate density, higher density and commercial uses, undated, from Mashpee town archives, submitted by Attorney William Henchy, representing the Mashpee Water District – July 10, 2003
- Letter from the Mashpee Planning Board in support of Commission jurisdiction – June 19, 2003
- Letter dated June 18, 2003 from Town Administrator Joyce Mason, to the Cape Cod Commission – via fax June 18, 2003
- Photos submitted by Attorney William Henchy, representing the Mashpee Water District, to the subcommittee – June 2, 2003
- Copy of Article 60 from 1963 Town Meeting regarding filled land, submitted by Mr. Henchy, representing the Mashpee Water District, to the subcommittee – June 2, 2003.
- Copy of the 1964 Facts and Decision submitted by Mr. Henchy, representing the Mashpee Water District, to the subcommittee – June 2, 2003.
- Copy of letter from M. Callanan to attorney R.J. Lyman dated April 14, 2003, submitted by Mr. Henchy, representing the Mashpee Water District, to the subcommittee – June 2, 2003
- Fax from Mashpee Town Clerk of June 27, 1988 Town meeting minutes – Feb., 28, 2002
- Memorandum from William Henchy, attorney for the Mashpee Water District, and the Mashpee Water District – Jan. 10, 2002
- Letter from the Mashpee Board of Health – Jan. 8, 2002
- Letter from the Mashpee Planning Board – Jan. 7, 2002
- Fax from Mashpee Conservation Commission containing DPW license #2261 for the bridge at Spinnaker Cove
- Comments on SFEIR from SEA Consultants representing the Mashpee Water District – Nov. 23, 2001
- Letter from William Henchy representing the Mashpee Water District – May 15, 2001
- Comments on FEIR from Mashpee Water District – April 12, 2001
- Letter from the Mashpee Planning Board – April 9, 2001
- Comments on FEIR from Horsley & Witten on behalf of the Peninsula Council – April 3, 2001
- Fax from Town Planner – Jan. 18, 2001
- Comments on DEIR from William Henchy representing Mashpee Water District – Dec. 8, 2000

Materials submitted by New Seabury:

- Copies of a binder containing signed and notarized "Extension of Restriction" forms submitted by

- New Seabury to the Mashpee Board of Appeals, submitted July 10, 2003
- 2' Contour maps (dated Sept. 9, 1963) by George Hayes, Subdivision Plan of Land in Mashpee, MA by George Hayes (dated Jan. 16, 1964), Cluster Zoning Plan of a Portion of New Seabury, Mashpee, MA by George Hayes (dated Jan. 16, 1964) – June 19, 2003
 - Commentary on the staff report – June 19, 2003
 - Letter and materials from R.J. Lyman to M. Callanan – June 6, 2003
 - Letter from R.J. Lyman to M. Twombly – May 28, 2003
 - Letter and materials from R.J. Lyman, of Goodwin Procter LLP – Jan. 10, 2002
 - SFEIR – Oct. 26, 2001
 - Letter from Robert Brennan, Goodwin Procter – Aug. 30, 2001
 - Extension Agreement from Fasanella & Wood to Feb. 28, 2002 for JD – dated May 15, 2001
 - Extension Agreement from Fasanella & Wood to May 25, 2001 for JD – dated April 23, 2001
 - Extension Agreement from Fasanella & Wood to April 30, 2001 for JD – dated March 16, 2001
 - FEIR – March 7, 2001
 - Extension Agreement from Fasanella & Wood to March 30, 2001 for JD– dated Feb. 22, 2001
 - Fax from Glenn Wood, Fasanella & Wood – Jan. 5, 2001
 - DEIR – Oct. 23, 2000
 - ENF for MEPA (EOEA #12074) – Nov. 1999

Materials submitted by interested parties:

- Letter from New Seabury Homeowners Association in support of Commission Jurisdiction – July 9, 2003
- Letter and copy of her memo to Mashpee town boards from Nikki Descoteaux to the Cape Cod Commission – June 19, 2003
- Letter from Nikki Descoteaux to the Cape Cod Commission – May 29, 2003
- Letter from APCC to Cape Cod Commission – May 29, 2003
- Email from David Foley to M. Twombly - March 26, 2003
- Letter from Carlo D'Este to Cape Cod Commission – Feb. 3, 2003
- Email from Tom Moccia, The Moccia Group – Jan. 14, 2002
- Mashpee Enterprise article – Jan. 11, 2002
- Letter from the Association for the Protection of Cape Cod – Jan. 10, 2002
- Letter from Mr. James Whalen – Jan. 10, 2002
- Letter from Jane Coogan – Nov. 20, 2001
- Comments on SFEIR from Massachusetts Historical Commission – Nov. 19, 2001
- Letter from Alice Liebman - Nov. 13, 2001
- Letter from Ruth Vignati – Nov. 5, 2001
- Letter from Steven Croopnick – Nov. 3, 2001
- Letter from Laurence and Arlene Wolk – Oct. 30, 2001
- Letter from Edward Modest – Sept. 17, 2001
- Email from George Wexniak – July 10, 2001
- Letter from Eric Sharton – July 1, 2001
- Cape Cod Times article – May 17, 2001
- Letter from Massachusetts Historical Commission – May 15, 2001
- Boston Sunday Globe article – May 13, 2001

- Comments on FEIR from Sharon Pelosi – April 6, 2001
- Letter from Martin S. and Ellen M. Gordon – April 6, 2001
- Letter from Elisabeth Golub to MEPA – April 6, 2001
- Comments on FEIR from Massachusetts Historical Commission – April 5, 2001
- Comment letter on FEIR from Tom Skinner, Coastal Zone Management – April 3, 2001
- Letter from Jane Coogan – March 21, 2001
- Letter from Barbara Adner – March 18, 2001
- Letter from Keith Bernard – March 12, 2001
- Letter from Peninsula Council – Feb. 28, 2001
- Letter from David F. Foley – Feb. 22, 2001
- Letter from Daniel J. Candura – Feb. 22, 2001
- Copy of a Peninsula Council mailing to members – Feb. 22, 2001
- Comments on DEIR from Horsley & Witten, on behalf of the Peninsula Council – Feb. 21, 2000
- Letter from Cheong Kim – Feb. 21, 2001
- Letter from Rosemary Burns – Feb. 20, 2001
- Letter from Harry N. Wessel – Feb. 14, 2001
- Letter from James T. Whalen – Feb. 13, 2001
- Email from Deith Bernard – Jan. 12, 2001
- Comments on DEIR from Tom Skinner, Coastal Zone Management – Dec. 15, 2000
- Letter from Jane Coogan – Dec. 15, 2000
- Fax from Jane Coogan – Dec, 2000
- Letter from Jane Coogan – Dec. 6, 2000
- Fax from Rebecca O'Donnell – Dec. 4, 2000

From the Cape Cod Commission:

- Letter from Margo Fenn to J. Mason, Mashpee Town Administrator – July 1, 2003
- Letter from M. Callanan to R.J. Lyman – June 3, 2003
- Staff Report – May 22, 2003
- Letter from Eric Wodlinger to Cape Cod Commission – May 21, 2003
- Memorandum of Decision and Order on Parties, Cross-Motions for Summary Judgement, New Seabury Properties, LLC vs. Cape Cod Commission, Barnstable Superior Court, Oct. 17, 2002
- Fax from M. Twombly to Mashpee Town Clerk – Jan. 22, 2002
- Comments on SFEIR - Nov. 21, 2001
- Hearing officer continued hearing Aug. 31, 2001
- Comments on the FEIR – April 5, 2001
- Hearing officer opened and continued hearing to May 15, 2001 – March 23, 2001
- Memo to all parties that the March 22, 2001 hearing is rescheduled for April 24, 2001 – March 16, 2001
- Hearing officer continued hearing to March 22, 2001 – March 6, 2001
- Memo to all parties that Feb. 22, 2001 hearing has been rescheduled to March 22, 2001 – Feb. 16, 2001
- Fax to Mashpee Conservation Commission, that JD application is complete – Feb. 9, 2001
- Memo to Subcommittee from M. Twombly - February 7, 2001
- Letter from Mashpee Conservation Commission – January 3, 2001

- Letter to Mashpee Conservation Commission – Dec. 28, 2000
- Comment letter on DEIR – Nov. 22, 2000

The application and notices of public hearings relative thereto, the Commission's staff notes, exhibits and correspondence, the transcript and minutes of meetings and hearings, the Jurisdictional Determination JD/ TR 20045, and all written submissions received in the course of our proceedings are incorporated into the record by reference.

TESTIMONY:

The following testimony was received at public hearings:

Public hearing # 1 - May 23, 2001:

M. Twombly, Planner, explained that the purpose of the hearing was twofold: to give an update of the MEPA and JD processes taking place simultaneously, and for the Subcommittee to receive comments from the public.

Glenn Wood, representing New Seabury Properties LLC, discussed areas of concern by commenters in the MEPA process, acknowledged the extension of time agreed to by the Mashpee Conservation Commission for jurisdictional review of this project until after the SFEIR is concluded, and voiced his client's desire to address all the concerns that have been raised in the FEIR.

Mr. Carr, project engineer from Earth Tech, described each of the seven development areas as represented in the 1964 Special Permit. He stated that because all of the development will be connected to the WWTF, nitrogen loading within the Zone II will be reduced. Mr. Carr pointed out the major new development planned for Section 5, where two town wells are located, which has raised the most concerns. Mr. Carr noted that commercial space is actually less than would be allowed under the Special Permit.

G. Belfit, hydrologist with Commission staff, presented concerns about water quality in Section 5 where the density of development and use places the Town's wells at great risk from removing forest cover, risks of pollution from stormwater, pesticide and fertilizer runoff, and potential breaks in sewer lines.

Diane Boretos, Assistant Conservation Agent for the Mashpee Conservation Commission, discussed concerns about development on filled tidelands in the Spinnaker Cove area, wetland issues and vernal pools throughout the project, and on eroding coastal banks in the Tidewatch area and wildlife habitat issues.

Public testimony:

George Shapps was concerned about the level of building proposed around the Beach & Cabana Club near the Popponesset Inn. He said it was already very crowded, there was very little parking.

LM Green voiced concerns about over-crowding at "Sandy Beach" and questioned whether residents would have difficulty accessing the beach area.

Dave Foley stated that the original crafters of the plan in 1964 had protected the wells with low density in Section 5.

Betsy Golub, New Seabury resident; Maggie Geist, representing the 5000-member Association for the Protection of Cape Cod; and Andy McGarrity, school teacher and New Seabury resident, all spoke in support of the Commission taking jurisdiction of the development.

Ruth Maney, President of Peninsula Council and resident of New Seabury, wants to insure that the water quality is protected.

Jeff Oppenheim, attorney, represents 7 homeowners in the Seaside area of New Seabury. They support the Commission finding it has jurisdiction due to concerns regarding the increase of density, environmental, and aesthetics issues and asked the Commission to give the proposal a thorough review.

Barbara Adner, New Seabury resident, was concerned about water quality, and about the commercial building proposed at Spinnaker Cove in a residential area.

Jane Coogan, New Seabury resident, expressed concerns about the overall density of development and the overwhelming amount of construction causing devastating damage to all the natural habitats surrounding the golf courses.

Mr. Babcock, Chairman of the Mashpee Water District, stated that the Water District will take all necessary steps to protect the water quality and supply of the wells in Section 5.

Eric Sharton, New Seabury resident, was concerned that what is being proposed is at a level and rate that is much too large for the community and goes against the intention of the original designer.

Hearing #2 – January 10, 2002

Diane Boretos, Assistant Mashpee Conservation Administrator, stated that the Mashpee Conservation Commission believes that the project has changed significantly and has much greater environmental impacts than the original special permit. The Mashpee Conservation Commission urged the Commission to take jurisdiction.

R.J. Lyman, attorney for New Seabury, stated that the applicant believes that the project does not fall under the jurisdiction of the Commission because of a 1964 Special Permit. He also believes that in a settlement agreement with the Commission in 1993 the Commission waived its jurisdiction. Lawrence Carr, engineer/planner for the applicant, described the current development project, and outlined changes that had been made to the project during MEPA review.

M. Twombly explained the jurisdictional determination review process, the MEPA review process, and stated that staff believes the New Seabury Project is not exempt from Commission review.

Public testimony included:

Ms. Taylor read a letter from the Mashpee Board of Health and a letter from the Mashpee Planning Board into the record, both of which supported the Commission taking jurisdiction over the project.

William Henchy, legal counsel to the Mashpee Water District, indicated that the three Water Commissioners and the Water District support the Commission taking jurisdiction.

Beverly Kane representing the Mashpee Planning Board, Glenn Marshall representing the Wampanoag Tribal Council, Stephanie Jones and Michael Talbot representing the Mashpee Conservation Commission, Beverly Kane representing the Mashpee Environmental Coalition, Maggie Geist representing the Association for the Preservation of Cape Cod, and Diane Boretos representing the Mashpee Conservation Commission, all stated their support of the Commission taking jurisdiction over the project.

Hearing # 3- May 29, 2003, Mashpee Town Hall

Margaret Callanan gave an overview of the procedural history leading to this hearing. She explained that the Commission found on Jan. 10, 2002 that it had jurisdiction over the New Seabury project as it was proposed in the SFEIR. She also explained that the issue of the validity of the Special Permit is still unresolved. She discussed New Seabury's appeal of the decision and subsequent summary judgment by the Court, which advised the CCC to adopt the substantial compliance policy as a regulation and to rehear the JD request. She noted the filing of the Notice of Project Change by New Seabury to MEPA for Section 5. She stated that this means both projects are now pending, and the question before the Commission is whether the Commission has jurisdiction over the NS project as proposed in both the SFEIR and the NPC.

Martha Twombly described New Seabury's SFEIR and NPC proposals relative to the jurisdictional determination question and the substantial compliance regulation. She made a staff recommendation that the Commission has jurisdiction of the New Seabury SFEIR project and that while the case is before the court, retain jurisdiction over the NPC for Section 5.

Mr. John Fitzsimmons, Chair, Mashpee Conservation Commission (MCC) and Applicant, stated that because of the scope of the project, and in the public interest, the Conservation Commission believed a thorough review of the project should be done to insure that adequate safeguards would be in place for the community. The MCC voted unanimously to request that the CCC determine they have jurisdiction of the project, and they support review by the CCC.

R.J. Lyman, attorney for Goodwin Procter, stated that there are two projects before the CCC: the SFEIR and the NPC. He said the SFEIR project was referred to the Commission by the Mashpee Conservation Commission, and the NPC was brought forward by CCC staff at their own initiative, following the proceedings described by Ms. Callanan, and not as a referral.

He stated the issue in common in both projects is the validity of the SP, but questioned that CCC staff was asking the Commission to second-guess Mashpee town decisions that the SP is still valid. He claimed the Commission has never questioned a town like this before, and cited the Brookside and Quashnet Valley JD's. He appreciated that staff recognized the NPC is in compliance with the SP. Regarding the SFEIR, he agreed that the project is being constructed consistently with the first criterion for substantial compliance. He believes that the second criterion references future permit modifications, not past modifications. Regarding the third criterion, there is no need to argue as staff found the impacts from the NPC to be similar to the SFEIR, even though the staff found the NPC to be in substantial compliance in the staff report. Mr. Lyman stated that in January 2002 the Commission assumed the SP was valid, and now the staff is saying the SP is not valid. He also cited item number 8 in the 1993 Settlement Agreement with the Commission, and interpreted it to mean the Commission would defer jurisdiction over all future development in New Seabury.

Attorney Jim Rehnquist, from Goodwin Procter, discussed Choate Hall's advice to the CCC, regarding staff's assumption last year that the SP was valid, and now advising the Commission to determine that the SP is

invalid. He stated he believed the CCC would not win in court, and that they are putting a cloud on the titles of hundreds of residences.

Attorney Phil Rollins stated on behalf of the proponent that he believed the challenge to the special permit would call into question the title of over 200 homeowners in New Seabury, and that banks wouldn't issue loans on those properties.

There were no comments from public officials. Comments from the public:

Nikki Descouteaux, resident of New Seabury, stated that full time residents are a growing population of New Seabury. She said the New Seabury Corp. has been acting in its own interests and impacting the lives of the residents. She expressed concerns about water quality, and damage to the infrastructure such as road damage by construction vehicles, and land clearing. She questioned whether New Seabury had followed due process.

Don Keeran from the Association to Preserve Cape Cod, stated that the APCC is concerned about water and natural resource impacts, and supports the CCC jurisdiction.

Jane Coogan, New Seabury resident, expressed concern about wildlife impacts, site disruption, and asked about development proposed for sections 14 and 25, where open space (former golf driving range) is being taken over for construction of condominiums.

Dr. Bernard Maney, resident of Highwood, stated in his own survey, he counted in excess of 6000 vehicle trips per day on Highwood Road, and expressed concern about impacts from all this development on roadways.

Attorney William Henchy, representing the Mashpee Water District (MWD), stated the MWD believes the CCC has jurisdiction of this development. He expressed concerns about the available supply of water and the protection of the two town wells in Section 5, stating that extensive clearing and grading has taken place this spring, in spite of agreements made through the MEPA review, and that promises made by NS have not been honored. He believes the CCC should retain jurisdiction of the NPC until the court resolves the validity of the SP. Mr. Henchy stated he did not agree with staff's assessment that the NPC was in substantial compliance with the SP under criterion 3, noting that nothing in the 1964 SP would authorize such extensive earth moving and land clearing. Regarding the risks to titles that Mr. Rollins raised, Mr. Henchy referenced Chapter 40A, Section 6, and stated that he didn't believe that those risks exist.

Richard Charchanski, NS resident, asked if there was any problem with completing the driving range.

Ms. Twombly submitted an email from David Foley offering copies of circa 1970 and 1980 original maps, and a letter from Carlo D'Este regarding traffic and natural resource impacts of the proposals to the record.

Mr. Lyman stated there is no scientific basis for impacts to the MWD wells from land-clearing, and New Seabury has obtained all necessary regulatory approvals. He restated the risks to all building permits issued within the past six years not protected by the statute of limitations.

Nikki Descouteaux asked why New Seabury would not have waited for court to decide, and eliminate confrontational issues between the CCC and New Seabury.

Mr. Lyman stated that New Seabury has tried to reach agreement through a settlement with the CCC, but there remain certain principles each feel strongly about.

FINDINGS

The Commission has considered the Mashpee Conservation Commission's request for a Jurisdictional Determination for the proposed New Seabury Properties development described in the SFEIR dated October 2001, and in the January 2003 NPC, both prepared by EarthTech. Based on consideration of such application and upon the information presented at the public hearings and submitted for the record, makes the following findings.

SFEIR FINDINGS:

GENERAL FINDINGS

G1. The original 1964 Special Permit granted to the Popponeset Corporation contains three integral parts: a "Facts and Decision", the Town's Cluster Zoning Bylaw and a "Deed of Restrictions" and a Plan of Land. Therefore, when a modification was made to the Deed of Restrictions, a modification was also made to the original Special Permit.

G2. The Deed of Restrictions divided the 1240-acre parcel into twenty-nine sections, limiting the number of dwelling units and square footage of commercial space allotted to each section. In addition, the Deed of Restrictions deeded four parcels of land to the Town of Mashpee in accordance with the cluster zoning bylaw.

G3. The SFEIR project consists of mixed-use and housing developments in seven locations on New Seabury Properties land on Great Neck in Mashpee, based on the Special Permit granted by the Mashpee Board of Appeals on February 21, 1964. The current proposal is summarized in the MEPA Supplemental Final Environmental Impact Report filed in October 2001, and which received the Secretary's Certificate on Nov. 30, 2001.

G4. The SFEIR project qualifies as Development of Regional Impact (DRI) under Sections 12(i) and 13(b) of the Act requiring review of projects required to file an Environmental Impact Report with MEPA. The Project also qualifies as a Development of Regional Impact under several DRI thresholds set out in the DRI Enabling Regulations, including:

Section 3 (d) any development which proposes to divide land into thirty or more residential lots. Any development which proposes to divide land into ten or more businesses, office or industrial lots.

Section 3 (e) any ... proposed ... development which is new construction with a gross floor area greater than 10,000 square feet, addition or auxiliary buildings with a gross floor area greater than 10,000 square feet...

Section 3 (g) any proposed development, including the expansion of existing developments, planned to create or add thirty or more residential dwelling units.

Section 3 (k) mixed use residential and non-residential developments with a total

floor area greater than 20,000 square feet.

G5. Section 22 (b) of the Cape Cod Commission Act exempts from Commission review, “any development which prior to July 1, 1989 has received any one of the following: ...a special permit or variance under chapter 40A... and which development is constructed in substantial compliance therewith.”

G6. The Commission and the Assembly of Delegates adopted a regulation defining substantial compliance in March of 2003, to assist in determining if a project is exempt under Section 22 (b) of the Act. This regulation lists three criteria in making a determination whether a project is in substantial compliance. All three criteria must be met for a project to be deemed to be in substantial compliance. Projects deemed not to be in substantial compliance are subject to DRI review provided a DRI threshold is met.

The project is in substantial compliance if:

- 1) the proposed project and use reflect the nature and purpose of the project and use in the original local approval; and
- 2) the changes do not result in the requirement for additional local development permit review in the form of a new permit, approval or a modification to the original approval; and
- 3) the changes do not result in different or increased impacts, as compared with the original local approval, to the interests protected by the Act and the Regional Policy Plan.

The regulation requires a project proponent to carry the burden of proof to show that a proposed project satisfies these criteria.

G7. The SFEIR project reflects modifications to the original permit made in 1971 and 1990, which resulted in the requirement for additional local development permit review in the form of an approval by the town.

G8. Modifications allowed by the 1990 town meeting, the 1995 agreement with the Board of Selectmen, and proposed in the SFEIR, are major modifications relative to the transfer of density, and represent increased impacts of that density on significant and sensitive resources from those envisioned in the original 1964 special permit.

G9. The second major modification approved at a January 29, 1990 town meeting vote, and followed by an agreement signed by the Board of Selectmen in March 1995, allowed the following transfer of dwelling units and commercial space from other sections into Section 5:

- 400 dwelling units and 160,000 square feet of commercial space were transferred from Combined Sections 20, 23, 24, 25, 26 to Section 5;
- The transfer of this density to Section 5 increased the number of dwelling units from 25 to 425, and increased commercial space from 180,000 to 340,000 sf;
- New Seabury would place 30 acres of land in Section 26 under a conservation

restriction, in perpetuity.

The second modification to the Special Permit, moving the density from the Combined Sections and allowing major construction specifically in Section 5, will result in different and significantly increased impacts such as extensive land clearing and excavation, nitrogen loading from pesticide and fertilizer runoff, destruction of open space and wildlife habitats, threats to archaeological resources, and impacts from stormwater runoff that put two of Mashpee's public water supply wells at risk of contamination. These wells currently supply 55% of Mashpee's water according to the Mashpee Water District. (see more detail in Water, Natural, Coastal, and Archaeological Resource Findings)

G10. The original Deed of Restrictions within the Special Permit had a duration of 30 years. Therefore the Special Permit would have expired in 1994 without an extension of the Deed of Restrictions. In 1988, Mashpee town meeting defeated an article seeking an extension of the Deed of Restrictions. In 1990, New Seabury Corporation collected approvals from the owners of more than fifty percent (50%) of the land subject to the deed restrictions and filed an extension in 1990 without town approval.

G11. Modifications to the original Special Permit that were authorized by the Mashpee town meeting vote in 1990, and executed through an agreement by the Board of Selectmen in 1995, and outlined in the SFEIR development proposal, represent different and greater impacts to the resources protected by the Cape Cod Commission Act. The proposed Project is therefore not in substantial compliance with the 1964 Special Permit and is not exempt from review as a Development of Regional Impact.

WATER RESOURCE FINDINGS

WR1. The proposal for Section 5 described in the SFEIR concentrates a high level of density in close proximity to a major public water supply well. While the area is proposed to be sewerred, this level of development will impact groundwater. The Project would require extensive land clearing and removal of native vegetation in addition to excavation for infrastructure and road construction over three quarters of the land area in Section 5. In addition, contaminants could leach into the groundwater from fertilizers, pesticides, leaking sewer lines and stormwater runoff, and will likely degrade groundwater over the course of time.

WR2. Nitrogen loading impacts from this project, even with wastewater treatment, are significant for both fresh and marine water resources. Nitrogen sources include fertilizers, road runoff and potential sewer pipe exfiltration and leaks.

WR3. The drainage plan includes an infiltration basin that will handle stormwater from the roadways and parking areas for the commercial and single family homes and garden apartment areas. The remaining stormwater will be diverted to subsurface leaching structures or natural kettle holes. The location of the infiltration basin to the south, as submitted in the SFEIR, is within the contributing area and very close to the well. Water table gradients are fairly flat in this area, so the combination

of water table drawdown by the wells and water table mounding under the infiltration basin will divert flow towards the well.

WR4. No provisions to mitigate greater construction impacts, caused by the proposed increase in residential construction in the 1990 modification to the plan from the original permit, have been addressed in any of the MEPA filings.

NATURAL RESOURCE FINDINGS

NR1. Portions of the SFEIR project are located within Significant Natural Resource Areas as defined by the Regional Policy Plan, including Flat Pond Subdivision and Promontory Point, Section 5, and possibly portions of Marketplace and Popponessett Inn. In addition, a coastal area in the vicinity of Great Flat Pond is designated a priority habitat of rare species and an estimated habitat of rare wildlife, according to the Natural Heritage Atlas, 2000 – 2001 edition. Portions of the project site, including Flat and Witch Ponds (and their associated wetlands), and barrier beach are located within the Waquoit Bay Area of Critical Environmental Concern (ACEC). The proponent indicates that development is not proposed within the ACEC.

NR2. The proposed SFEIR poses different and increased impacts as defined by Criterion 3, particularly in Section 5. The 1990 modification from the originally permitted 25 residences to 425, and an increase in the total potential commercial area (the modification allows more than the proponent puts forth in his proposal outlined in the SFEIR) in Section 5 will increase the area of open space and woodland habitat that are impacted by the project. Development in Section 5 does appear to maintain a 100 ft buffer to wetlands, but much of the open space areas that remain within Section 5 (surrounding and adjacent to the Zone I areas to the wells) is comprised of managed turf, which provides extremely little habitat value.

NR3. The proponents provided inadequate information to determine whether the project poses increased impacts to natural resources throughout the project site. The natural resources inventory of the development either did not provide enough information, or provided inadequate or incomplete analysis to determine the scope of impacts to coastal and inland wetlands and wetland buffers, wildlife habitat and corridors, or vernal pools, all resources protected by the Regional Policy Plan. Therefore, the proponents have not shown that the changes to the original project do not result in different or increased impacts to protected interests.

COASTAL RESOURCES FINDINGS

C1. The proponent failed to provide information that would enable an analysis of the SFEIR's consistency with many provisions of the Regional Policy Plan. The proponent provided topographic information, flood zone delineations, and lot lines to depict development in coastal areas. This information is insufficient to enable an analysis of the project's consistency with Regional Policy Plan (RPP) provisions that protect coastal resources by implementing buffer zones to coastal resources, limits on development in dynamic areas, established criteria for development in flood

zones, preserving coastal processes, preserving public access and public trust resources, and protecting barrier beaches.

HERITAGE PRESERVATION FINDINGS

HP1. The Massachusetts Historical Commission has determined that the Sophronia Young Family Homestead site (located in Section 5), is a significant archaeological resource and is eligible for listing in the National and State Registers of Historic Places. The proposed development for this area would impact most or all of the Sophronia Young site and, as such, represents a significantly increased threat to these archaeological resources. The previously proposed (25) dwelling units proposed under the 1964 Special Permit could have been more easily configured to avoid disturbance of the archaeologically sensitive area.

HP2. Cape Cod Commission review of the proposed project would provide greater protection for the significant archaeological resources on site. State review standards may allow for disturbance of such sites to be mitigated by unearthing and cataloging the resources (data recovery) or other means. RPP Minimum Performance Standard 6.1.3 calls for such disturbance to be avoided by redesigning the project and preserving the resources in place.

NOTICE OF PROJECT CHANGE (NPC) FINDINGS:

G1. The Project also includes a Notice of Project Change (NPC) for Section 5 of the SFEIR filed with MEPA January of 2003. The NPC reduces residential density from 425 to 25 units, and increases commercial space from 80,000 sf to 145,000 sf in Section 5 of the SFEIR.

G2. While the NPC change reflects density numbers allowed by the 1964 Special Permit, the site design for Section 5 continues to utilize a land-consumptive layout, which could cause significant disturbance to the undeveloped land in Section 5.

G3. New Seabury refused to clarify the extent to which the natural contours and topography were being altered in the NPC project from the conditions referred to in the special permit decision. New Seabury produced a 1963 topographical plan from the records of their surveyor, George Hayes, showing contours at 2-foot intervals which may have been the plan referred to in the special permit decision, although no town records to clarify this were available. New Seabury refused the Commission's request to provide a topographic plan showing the design or finish contours for the earth moving and other work now going on in Section 5. Photographs of the work, however, show substantial land grading and land clearing in Section 5. Apart from the inability to make a comparison between the finished design grades for the work now going on and the original 1964 topography, the issue is further complicated by a notation in the 1963 topographic plan for Section 5 indicating that 600,000 cubic yards of fill might either be added to or taken from Section 5. New Seabury failed to demonstrate whether the finished design grades for the work currently ongoing will be in substantial compliance with the topography noted and approved by the Mashpee Zoning Board of Appeals in 1964 in the special permit decision.

G4. Even though the NPC project proposes the number of residential units, and the square footage of commercial space in accordance with the 1964 special permit, New Seabury failed to demonstrate that the proposed layout of that space substantially complies with the 1964 permit. The only site plan brought forward by New Seabury relative to the 1964 permit was the topographical plan prepared by its engineer, George Hayes, in 1963. This plan showed 79.5 acres of recreational area in the southern and middle parts of Section 5 in the vicinity of the MWD wells. This 1963 plan also showed 19.8 acres of commercial and professional development in the northern "panhandle" part of Section 5, far removed from the MWD wells. In contrast, the NPC shows a large acreage of disturbed land in the southern and middle portions of Section 5, and no effort to concentrate development in the northern "panhandle". Since New Seabury has not brought forward any other site plan from 1963/1964 and the 1963 topographical plan differs so substantially from the NPC development plan, the Commission cannot find that New Seabury has met its burden to show substantial compliance with the 1964 special permit.

G5. The NPC for Section 5 of the SFEIR qualifies as a Development of Regional Impact (DRI) under Sections 12(i) and 13(b) of the Act requiring review of projects required to file an Environmental Impact Report with MEPA. The Project also qualifies as a Development of Regional Impact under several DRI thresholds, including:

Section 3 (d) any development which proposes to divide land into thirty or more residential lots. Any development which proposes to divide land into ten or more businesses, office or industrial lots.

Section 3 (e) any ... proposed ... development which is new construction with a gross floor area greater than 10,000 square feet, addition or auxiliary buildings with a gross floor area greater than 10,000 square feet....

Section 3 (g) any proposed development, including the expansion of existing developments, planned to create or add thirty or more residential dwelling units.

Section 3 (k) mixed use residential and non-residential developments with a total floor area greater than 20,000 square feet.

G6. New Seabury has not demonstrated that the NPC project substantially complies with the original Special Permit and the associated plans in terms of finished contours and/or location and extent of development in Section 5.

CONCLUSION:

On July 10, 2003 the Commission found that the proposed New Seabury Properties Project represented in the SFEIR and NPC in Mashpee, MA qualifies for review under Section 3 of the Development of Regional Impact Enabling Regulations and under Sections 12 (i) and 13 (b) of the Act, c. 716 of the Acts of 1989, as amended. The Commission also found that the Project was not exempt under Section 22 (b) of the Act for the following reasons:

1) The validity of the extension of the Special Permit is an issue that remains unresolved and is currently pending before the court;

2) the SFEIR is not in substantial compliance with the 1964 Special Permit because the modification that authorized additional density in Section 5 occurred after the effective date of the Act, and as compared with the original 1964 special permit, the SFEIR proposal is substantially different, especially in the number of proposed dwellings, posing different and increased impacts; and

3) the proponent has not demonstrated that the NPC project substantially complies with the original Special Permit and the associated plans in terms of finished contours and/or location and extent of development in Section 5.

Susan Kadar
Susan Kadar, Chair

July 28, 2003
Date

Commonwealth of Massachusetts

Barnstable, ss.

On this 28th day of July, 2003, before me personally appeared Susan Kadar, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that executed the same as her free act and deed.

Katharine L. Peters
Notary Public
Commonwealth of Massachusetts

My Commission expires

Katharine Peters, Clerk

Date