

SUPERIOR COURT
BARNSTABLE SS
FILED MAY 18 2005
Scott W. Pecherian Clerk

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

SUPERIOR COURT
OF THE TRIAL COURT

NEW SEABURY PROPERTIES, LLC
Plaintiff,

v.

CAPE COD COMMISSION,
Defendant.

Consolidated Civil Action
Nos. 03-522, 02-92 and
1990 BACV 01552

AGREEMENT FOR JUDGMENT

This Agreement for Judgment (this "Agreement") is entered into this 17th day of May, 2005 by and between New Seabury Properties LLC ("NSP") a Delaware limited liability company registered to do business in Massachusetts, having its principal place of business c/o American Real Estate Holdings Limited Partnership, 100 South Bedford Road, Mt. Kisco, New York 10549 and the Cape Cod Commission (the "Commission"), a body corporate and politic under Chapter 716 of the Acts and Resolves of 1989, as amended (the "Act"), having its principal place of business at 3225 Main Street, Barnstable, Massachusetts 02630.

WHEREAS, NSP owns certain land in the area of Mashpee, Massachusetts known as New Seabury, including without limitation portions of Sections 1, 5, 10, 11, 14, 20, 21, 23, and 24 of New Seabury, on which it proposes certain commercial, residential, recreational, infrastructure and other improvements; and

WHEREAS, NSP owns and operates in New Seabury certain existing lands, resources and improvements, including without limitation two 18-hole championship golf courses and associated practice facilities, a clubhouse, a restaurant and inn, beach and cabana clubs and a beach, a fitness center, a reception and sales office, maintenance and storage facilities, a 300,000 gallon per day wastewater treatment facility and associated piping and appurtenances, roadways, and other resources and improvements; and

WHEREAS, other individuals and entities own and operate in New Seabury certain existing commercial, residential, recreational, and other structures and improvements; and

WHEREAS, the Mashpee Conservation Commission referred to the Commission, and the Commission voted on January 10, 2002 to assert jurisdiction over certain of the improvements initially proposed by NSP as described and analyzed in its Supplemental Final Environmental Impact Report, dated October 2001 and a prior Environmental Notification Form, and Draft and

Final Environmental Impact Reports filed by NSP as EOEI File No. 12074 under G.L. c. 30 §§ 61-62A and the regulations thereunder (collectively, "MEPA") and voted again on July 10, 2003 to assert jurisdiction over these proposed improvements and certain subsequently proposed improvements by NSP, described in its Notice of Project Change, dated January 2003 (the "NPC") filed under MEPA; and

WHEREAS, NSP appealed and otherwise challenged the Commission's jurisdiction in various actions filed in Barnstable County Superior Court (the "Court"), which were consolidated under Barnstable Superior Court Civil Action Nos. 03-522, 02-92 and 1990 BACV 01552; and

WHEREAS, NSP and the Commission wish to enter an agreement settling all claims and counterclaims between them regarding the Commission's assertion of jurisdiction over the work and activities described and analyzed in the SFEIR and the NPC and to have their agreement entered as the Judgment of the Court.

NOW THEREFORE, NSP and the Commission stipulate and agree as follows:

1. Definitions For the purposes of this Agreement only, the following terms shall have the following meanings, and any terms not defined in this Agreement shall have the meanings as set forth in the Act or in the General Laws, or if not defined therein, as set forth in Black's Law Dictionary (7th edition, 1999) or, if not defined therein, in Merriam-Webster's Collegiate Dictionary (10th edition, 1998):

A. "New Seabury" means the area comprised of approximately 1,240 acres in Mashpee, Massachusetts, as shown on a plan consisting of five sheets, entitled "Subdivision Plan of Land in Mashpee, Mass.," filed for registration at the Barnstable County Registry District as Land Court Plan No. 11408-34.

B. The "Project" means development (including, without limitation, as may be changed from time to time regardless of whether requiring a Notice of Project Change or other review document under MEPA, so long as not exceeding the limits set out in subparagraphs (i) and (ii) below) during the Term of the Special Permit, operation, and regular or periodic maintenance:

- (i) in portions of New Seabury other than Section 5, of (a) those commercial and residential improvements described and analyzed in the SFEIR or NPC (and their appurtenances, so long as the appurtenances do not meet or exceed thresholds for Developments of Regional Impact under Section 3(a)-(i) or (k) of the Enabling Regulations Governing Review of Developments of Regional Impact (revised March 2005)), but not to exceed 250 new residential units in the aggregate (consisting of up to 8 in the Spinnaker Cove development area (New Seabury Section 1), 51 in the Popponeset Inn development area (New Seabury Section 10), 14 in the Poppy Place development area (New Seabury Sections 10 & 11), 76 in the Country Club and Vicinity development area (New Seabury Sections 14

and 21), 50 in Sea Quarters (New Seabury Section 20), and 51 in the Flat Pond/Promontory Point development area (New Seabury Sections 23 & 24)), and not to exceed the proposed new commercial space described and analyzed in the SFEIR, so long as located within those proposed development areas as shown on the plan attached as Exhibits A-1 through A-7 as part hereof; and (b) associated supporting improvements of vehicular ways, pedestrian ways and utilities for transmission, distribution and collection in portions of New Seabury other than Section 5 (whether or not described and analyzed in the SFEIR or NPC, and whether or not occurring within those proposed development areas as shown on the plan attached as Exhibits A-1 through A-7 as part hereof), to be located within previously disturbed or developed areas or existing easements to the extent practicable and, under any circumstance, subject to applicable federal, state and municipal law and regulations, including but not limited to:

1. underground natural gas, telephone, potable and irrigation water lines, drainage lines, television cable and fiber optic cables and their appurtenances (including the surface manifestations of these utilities);
2. underground electrical cables and their appurtenances (including the surface manifestations of these utilities);
3. wastewater collection lines and their appurtenances (including, but not necessarily limited to, pump stations, power supplies for pump stations, and manholes);
4. maintenance, replacement and upgrades of existing on-site septic systems;
5. roadway signage and directional signage;
6. sidewalks and bike paths;
7. beach nourishment in Sections 10, 21 and 24 under existing Orders of Conditions DEP File Nos. SE-43-395 (July 8, 1986); SE-43-936 (November 29, 1990) and SE-43-1260 (January 6, 1994, extended through June 6, 2006) and as those Orders may be further extended;
8. golf course maintenance and landscaping and utility improvements (including for purposes of example only, reshaping, relocation of greens and tees, additions or relocations of water features and cart paths, landscaping, modifications of irrigation systems and construction of shelters) within the existing limits of the golf courses; and
9. stormwater improvements without direct discharge to wetlands; and

- (ii) in Section 5, so long as complying with the performance standards attached as Exhibit B as a part hereof, of (a) commercial and residential improvements consisting of up to 200 new residential units, with not more than 506 bedrooms, and up to 10,000 sf of new commercial space,

although the new commercial space may be increased to up to 50,000 sf so long as there are four fewer residential units for each 5,000 sf above 10,000 sf and their appurtenances, so long as occurring within the limits of disturbance as shown on the plans attached as Exhibit B1-B3 as a part hereof; and (b) associated supporting improvements of vehicular ways, pedestrian ways and utilities for transmission, distribution or collection.

C. The "Special Permit" means (i) the vote and the Facts and Decision, Appeal No. 1964-1, the Board of Appeals, Town of Mashpee to Popponeset Corporation, (February 21, 1964); (ii) the restrictions of record in the quitclaim deed from Popponeset Corporation to the Town of Mashpee (July 13, 1964), recorded at the Barnstable County Registry District as Document No. 92606 (the "Quitclaim Deed"), as amended before July 1, 1989 or by the Agreement by and between Christopher Burden, as trustee of certain nominee trusts, New Seabury Company Limited Partnership, and the Town of Mashpee (dated May 22, 1995), recorded at the Barnstable County Registry District as Document No. 816870, or extended under Section 1(D) below; and (iii) Section F.V. of the Zoning Bylaws of the Town of Mashpee, as amended through the 1963 Fall Town Meeting.

D. The "Term of the Special Permit" means the period beginning with the effective date of the Special Permit and continuing through the later of (a) July 10, 2010, plus a period of time equivalent to the period from the Commission's vote to exercise jurisdiction on January 10, 2002 through and including the date of expiration of any appeal period without appeal following entry of this Agreement as the Judgment of the Court in Consolidated Civil Action Nos. 03-522, 02-92 and 1990 BACV 01552; and (b) the date of expiration of the Special Permit after due extension under the process specified in the third paragraph of the Quitclaim Deed or G.L. c.184, §27(b)(1).

E. The "SFEIR" means the Supplemental Final Environmental Impact Report dated October, 2001, and, only to the extent not inconsistent therewith, the Draft and Final Environmental Impact Reports and the Environmental Notification Form filed by NSP in EOEA No. 12074.

2. No Jurisdiction over the Project. (a) The Commission shall not, during the Term of the Special Permit, except with the express written consent of NSP, assert jurisdiction over or otherwise apply any provision of the Act or the Cape Cod Commission Regional Policy Plan to the Project, including without limitation by any effort of any sort to: (i) accept a referral for, initiate, or otherwise review any portion of the Project as a Development of Regional Impact; (ii) designate (whether in response to a nomination, upon its own proposal, or otherwise) any portion of the Project as a District of Critical Planning Concern; or (iii) calculate, assess or otherwise impose impact fees on any portion of the Project.

(b) The Commission shall provide to NSP true and complete copies of any public records, when made or received by the Commission, that might cause or contribute to changes in any regional or local governmental authority (whether by regulation, enforcement, litigation, or otherwise) over the Project or other development within New Seabury, for three years from the execution and delivery of this Agreement.

3. Other Development. If NSP wishes to develop more than the number of residential units or square feet of commercial space within any of the proposed development areas as shown on the plan attached as Exhibit A or to alter any of the area beyond the limits of disturbance as shown on the plans attached as Exhibits A and B, NSP shall provide written notice (including reasonably detailed information concerning the size, location and expected impacts of those units or space or that alteration) to the Commission by certified mail at least 45 days before applying for a development permit from a municipal agency for those units or space or that alteration. Upon receipt of that notice, the Commission shall determine within 10 days whether it reasonably requires additional information and within 30 days of receiving the later of the notice or any reasonably required additional information, whether it wishes to assert jurisdiction over those units or space or that alteration. If the Commission notifies NSP that it wishes to assert jurisdiction, NSP shall not develop those units or space or undertake that alteration unless and until the Commission; (i) determines that it does not wish to assert jurisdiction; (ii) approves or approves with conditions those units or space or that alteration as a development of regional impact; or (iii) a court of competent jurisdiction declares that the Commission does not have jurisdiction over those units or space or that alteration or otherwise allows the development without further review or approval from the Commission.

4. Other Development Separate from the Project. The Commission shall treat the following as separate projects in determining review threshold status under Section 2(a)(iii) of its Enabling Regulations Governing Review of Developments of Regional Impact (revised March 2005), as it may be amended, or otherwise: (a) the Project and (b) other development whether within or outside of New Seabury, whether by NSP or by other entities or individuals not affiliated with NSP.

5. Inspection; As-Built Plans. (a) The Commission may upon reasonable prior notice enter New Seabury at reasonable hours to inspect the Project for compliance with this Agreement.

(b) Within 120 days of issuance of 50% of the certificates of occupancy and, again, within 120 days of issuance of 100% of the certificates of occupancy for the units in any phase of the Project within Section 5 indicated on either the attached New Seabury Section 5 Conceptual Development Plan Phases – Residential Layout, attached hereto as Exhibit B-9-a, or New Seabury Section 5 Conceptual Development Plan Phases – Residential & Commercial Layout, attached hereto as Exhibit B-9-b (collectively “Construction Phasing Plans”), NSP shall provide to the Commission with a set of as-built plans showing all utilities (including without limitation stormwater pipes and structures), residential or commercial buildings, other structures, impervious areas and finished grades (based on a two-foot contour) constructed as of the respective time for that phase of the Project in Section 5. It is acknowledged that the Construction Phasing Plans are only meant to describe approximate areas of anticipated construction phases

6. Reserved Rights. The parties reserve all claims that could be filed (including without limitation under the Agreement for Judgment by and between the Commission and New Seabury Company Limited Partnership (June 28, 1993) entered as the Judgment of the Court in

Civil Action No. 1990 BACV 01552) concerning any development within New Seabury that is not the Project. Notwithstanding the generality of the foregoing:

- (i) NSP reserves its right to cite as persuasive authority the Court's Memorandum of Decision and Order on Defendant's Motion [for] Summary Judgment (Connon, J.) (November 4, 2003), although NSP agrees that that Memorandum and Order shall not constitute the law of the case or establish claim or issue preclusion based on its findings and rulings;
- (ii) the Commission reserves its right to assert that the Special Permit does not include the Agreement by and between Christopher Burden, as trustee of certain nominee trusts, New Seabury Company Limited Partnership, and the Town of Mashpee (dated May 22, 1995), recorded at the Barnstable County Registry District as Document No. 816870 for the purpose of determining exemption under Section 22(b) of the Act for any development within New Seabury that is not the Project, although the Commission hereby waives its right to so assert for the Project and
- (iii) the Commission reserves its right to assert, for any development other than the Project, that the Special Permit is properly extended (previously or in the future) only under a process other than as specified in the third paragraph of the Quitclaim Deed or G.L. c. 184, s. 27(b)(1).

7. Final Judgment The parties shall promptly after the execution and delivery of this Agreement petition the Court to have it entered as the Judgment of the Court in Consolidated Civil Action Nos. 03-552, 02-92 and 1990 BACV 01552, upon which entry this Agreement shall fully and finally resolve and adjudicate all claims and counterclaims filed or that could have been filed by either party concerning the Project. Each party waives all rights of appeal and shall bear its own costs, attorneys' fees, and other expenses. Either party may file this Agreement for registration with the Barnstable County Registry District.

8. Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the parties (including without limitation their officers, employees, consultants, agents and attorneys) and their respective successors and assigns.

9. Waivers Limited. The waiver by either party of a breach or a violation by the other party of any term or condition of this Agreement shall not operate as or be deemed to be a waiver of any subsequent breach or violation.

10. Notice and Opportunity to Cure. If either party believes that the other party has violated any term or condition of this Agreement, it may send a written notice to the other party, by certified mail, stating its belief, citing the term or condition of this Agreement it believes has been violated, specifying in detail the action or omission of the other party it believes constitutes a violation, and specifying the action it requests the other party to take or cease to cure the violation. The party receiving this notice shall within 14 days of receipt prepare and provide to the notifying party a plan and a reasonable schedule for commencing and completing a cure of

the violations stated in the notice. Each party waives its right, as part of any action it might bring upon the other party's violating this Agreement or otherwise, to include a claim for enforcement of judgment alleging contempt of court unless and until it has provided a notice and opportunity to cure, except when: (i) a violation is causing an imminent or actual threat to public health, causing present damage to natural resources, or (ii) immediately and materially interfering with advantageous contractual relations.

11. Invalidation and Revision. If a court of competent jurisdiction declares any provision contained in this Agreement invalid or unenforceable, that declaration shall suspend this Agreement, after which the parties shall negotiate in good faith to revise this Agreement. If they fail to agree on revisions, the parties shall submit their differences to a mediator on the panel of the Massachusetts Real Estate Bar Association. If the parties fail to resolve their differences before the mediator, the parties shall jointly petition the Court for a declaration of the effect of the invalidity or unenforceability of the provision so declared upon the other provisions of this Agreement.

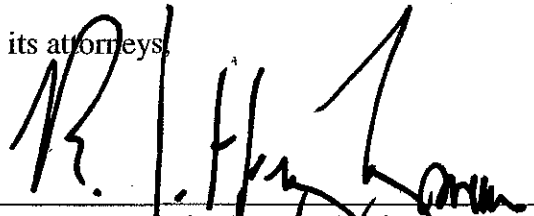
12. Choice of Law. This Agreement shall be governed by the laws of Massachusetts.

13. Captions. The captions provided for each paragraph of this Agreement are for reference only and shall not be deemed to be a part of this Agreement.

14. Entire Agreement. The Exhibits attached hereto are incorporated into this Agreement by reference. This Agreement and the Exhibits set forth the entire agreement between NSP and the Commission concerning the Project. Any amendments to this Agreement or the Exhibits must be in writing, signed by both parties and specifically reference this Agreement.

NEW SEABURY PROPERTIES LLC

By its attorneys,



James C. Rehnquist (BBC# 552602)

R. Jeffrey Lyman (BBO# 566575)

GOODWIN PROCTER LLP

Exchange Place

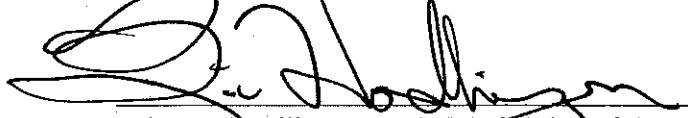
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CAPE COD COMMISSION

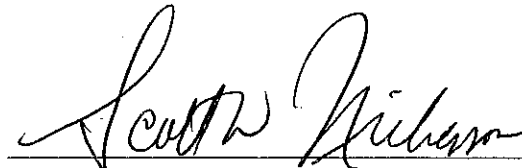
By its attorneys



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Dated: May 11, 2005

Entered this 10th day of May, 2005, as the Judgment of this Court by:



Associate Justice of the Superior Court

Chief Magistrate

Exhibits A1 through A7 - New Seabury Development Areas

Exhibit B: - Performance Standards for Construction and Long-term Maintenance in Section 5,
New Seabury, Mashpee, MA

Exhibit B-1 – Conservation Restriction Area 1

Exhibit B-2 – Conservation Restriction Area 2A

Exhibit B-3 – Conservation Restriction Area 2B

Exhibit B-4 – List of Allowed and Prohibited Uses for Section 5 of New Seabury

Exhibit B-5 – Surface & Groundwater Pollution Prevention Plan (including Figure 1 and
Figure 2)

Exhibit B-5a – RFP for Construction Phase Environmental Compliance monitoring, New
Seabury Section 5

Exhibit B-5b – Process for Selecting a Firm for the Position of Environmental Monitor
for New Seabury Section 5

Exhibit B-6 – Turf Management and Integrated Pest Management Plan

Exhibit B-7 – Matrix of Responsibilities – New Seabury Section 5 Development
Agreement

Exhibit B-8 – Prohibited Recreational Uses for Section 5 of New Seabury

Exhibit B-9-a – New Seabury Section 5 Development Plan – Residential Layout

Exhibit B-9-b – New Seabury Section 5 Development Plan – Residential and Commercial
Layout