

December 11, 2009

Martha's Vineyard Commission
The Stone Building
33 New York Avenue
P.O. Box 1447
Oak Bluffs, Massachusetts 02557

**Re: Martha's Vineyard Commission Jurisdiction over Land and Waters
Seaward of the Low Water Mark**

Dear Commissioners:

You asked for our opinion on whether the Martha's Vineyard Commission (the "Commission") has jurisdiction over the ocean waters, including those surrounding the Elizabeth Islands, and the land seaward of the low water mark under the Commission's enabling statute, St. 1977, c. 831, as amended (the "Vineyard Act" or "Act"). Specifically, you asked whether the Commission can designate a District of Critical Planning Concern ("DCPC") that encompasses these waters and lands.

For the reasons set forth below, our opinion is that the Commission's jurisdiction extends over all of the ocean waters within Dukes County, which includes the ocean waters within the three-mile limit of the Commonwealth's marine jurisdiction; therefore, if the statutory criteria for designation of a DCPC are met, then the Commission can create a DCPC that includes the ocean waters and land seaward of the low water mark in the vicinity of the Elizabeth Islands.

Analysis

I. The Legislative History and Purpose of the Vineyard Act

The purpose of the Vineyard Act is "to import regional—*island-wide and Statewide*—considerations into the protection of the land and water of Martha's Vineyard, considerations which, the Legislature could believe, the towns themselves had not and would not severally bring to bear." *Island Properties, Inc. v. Martha's Vineyard Comm'n*, 372 Mass. 216, 229 (1977). Enacted originally as St. 1974, c. 637, the Vineyard Act was "intended to respond (as the

General Court could believe) to the threat of destruction of the ecological and other special values of the island through steeply increasing commercial developments of its land and water resources which would not be adequately contained or regulated merely by action that could or would be initiated by the individual towns." *Island Properties*, 372 Mass. at 219. The Vineyard Act created the Commission to "preserv[e] and conserv[e] ... the unique natural, historical, ecological, scientific, and cultural values of Martha's Vineyard ... from development and uses which would impair them, and by promoting the enhancement of sound local economies." *Woods Hole, Martha's Vineyard & Nantucket S.S. Auth. v. Martha's Vineyard Comm'n*, 380 Mass. 785, 802 (1980); *Crocker v. Martha's Vineyard Comm'n*, 407 Mass. 77, 79 (1990); Vineyard Act, § 1.

The legislative history and purpose of the Act bear upon issues of statutory interpretation. "[A] statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *Bd. of Educ. v. Assessor of Worcester*, 368 Mass. 511, 513 (1975), quoting *Industrial Fin. Corp. v. State Tax Comm'n*, 367 Mass. 360, 364 (1975). The Vineyard Act is a remedial statute. Remedial statutes must be interpreted liberally to accomplish their purposes. *O'Connell v. Chasdi*, 400 Mass. 686, 694 (1987). See also *Tilton v. Haverhill*, 311 Mass. 572, 577 (1942) ("The abuses which the statute aims to correct ... and the purpose sought to be accomplished are to be considered"); *Interstate Eng'g Corp. v. Fitchburg*, 367 Mass. 751, 757 (1975) ("We construe ... [a statute], as we must, in the light of the legislative objectives which were served by its enactment so as to effectuate the purpose of the framers").

2. Provisions of the Vineyard Act Addressing DCPCs and Jurisdiction.

Section 2 of the Vineyard Act describes the extent of the Commission's geographical jurisdiction as follows:

There is hereby created the Martha's Vineyard Commission, hereinafter referred to as the commission, which shall be a public body corporate and which shall have the responsibilities, duties, and powers established herein over the land and waters in the county of Dukes County with the exception of the Elizabeth Islands and the Indian Common Lands known generally as the Cranberry Bogs, the Clay Cliffs, and Herring Creek, all situated in the town of Gay Head, and to the extent they are excluded from the responsibilities, duties and powers of the towns, all lands owned by

the commonwealth or any of its constituent agencies, boards, departments, commissions or offices.

Section 3 of the Vineyard Act authorizes the Commission to adopt regulations for the control of DCPCs pursuant to §§ 8-11 of the Act. These regulations “may include any type of regulation which may be adopted by any city or town under the following General Laws: section eight C of chapter forty; chapter 40A; ... [and] sections forty and forty A of chapter one hundred and thirty-one, as they pertain to the protection of wetlands.” Vineyard Act, § 3.

Section 8 of the Vineyard Act states, “The commission may, after notice to all municipalities which include within their boundaries any part of the area of a proposed district of critical planning concern and after notice and public hearing ..., designate specific geographical areas on Martha's Vineyard as districts of critical planning concern.” There are three criteria on which the Commission may rest a DCPC designation. If an area meets any one of these criteria, then the DCPC designation is valid. Under the first criterion, the Commission may designate as a DCPC “an area which possesses unique natural, historical, ecological, scientific, or cultural resources of regional or statewide significance.” Vineyard Act, § 8. Section 8 of the Act also states, “Nomination of areas for consideration for designation as districts of critical planning concern may be made by the commission or by a board of selectmen, planning board, board of health, or conservation commission of any of the towns affected by this act for any area within or without its municipal boundaries.” Pursuant to § 8 of the Act, if the Commission designates an area a DCPC, it must specify guidelines for development within the DCPC based on, *inter alia*, considerations “that the development of the district will not result in undue water, air, land or noise pollution.”

3. Jurisdiction over Ocean Waters and Land Seaward of the Low Water Mark

Under § 2 of the Act, the Commission's jurisdiction extends throughout all of Dukes County, subject to certain exceptions. Pursuant to G.L. c. 34, § 1, the seaward boundary of Dukes County coincides with the marine boundary of the Commonwealth, also known as the three-mile limit. Thus, the Commission's jurisdiction extends over the ocean to the limit of the Commonwealth's jurisdiction. There are three exceptions to this jurisdiction. The first two are purely geographical, e.g., the Elizabeth Islands and the Indian Common Lands within the Town of Aquinnah (Gay Head). By their plain language, these exceptions do not purport to withdraw the ocean waters or land seaward of the low water mark from the Commission's jurisdiction. The third exemption is for “lands” owned by the Commonwealth, but only to the extent they are excluded from the responsibilities, duties and powers of the towns. For the reasons discussed below, this exception does not include the ocean waters or the land underneath these waters.

The Commission's jurisdiction over the ocean waters and submerged land underneath is apparent in § 3 of the Vineyard Act. As noted, that section authorizes the Commission to adopt regulations for DCPCs, including "any type of regulation that may be adopted by any city or town" under G.L. c. 40, § 8C and G.L. c. 131, § 40. In *Fafard v. Conservation Comm'n of Barnstable*, 432 Mass. 194, 206 (2000), the Supreme Judicial Court made clear that the authority of cities and towns under these two statutes extends into "submerged lands seaward of the low water mark," *i.e.*, Commonwealth tidelands. Specifically, the Court stated:

The Legislature has granted local conservation commissions the authority to act to prevent alteration of wetlands in order to preserve certain wetlands values. See G. L. c. 40, § 8C; G. L. c. 131, § 40. Conservation commissions acting under G. L. c. 131, § 40, may take regulatory action to protect, *inter alia*, the recreational value of wetlands. *Lovequist v. Conservation Comm'n of Dennis, supra* at 12-13. Coastal wetlands subject to municipal regulation under G. L. c. 131, § 40, include "any bank, marsh, swamp, meadow, flat or other lowland subject to tidal action or coastal storm flowage." Thus, local conservation commissions are authorized by the Legislature to protect recreation values by regulating construction on Commonwealth tidelands.

Fafard, 432 Mass. at 205. In accord is Section 8 of the Vineyard Act. That section authorizes the Commission and certain local boards and commissions to nominate a DCPC for "any area within or without its municipal boundaries." Pursuant to G.L. c. 42, § 1, the seaward boundary of cities and towns bordering on the open sea coincides with the marine boundary of the Commonwealth.

The decision in *Woods Hole, Martha's Vineyard & Nantucket S.S. Auth. v. Martha's Vineyard Comm'n, supra*, confirms what is apparent from §§ 3 and 8 of the Vineyard Act, *i.e.*, that the Commission's jurisdiction and authority extend to the waters and land seaward of the low water mark. In that case, the Court upheld the Commission's authority to designate the plaintiff steamship authority's proposed second ferry slip (extending beyond the low water mark into Vineyard Haven Harbor) and its proposed repairs to the existing ferry ship as a Development of Regional Impact ("DRI") under § 12 of the Vineyard Act.

There are, of course, parts of the Vineyard Act that lack clarity on the scope of the Commission's authority to adopt DCPCs. For instance, § 8 states that the Commission may "designate specific geographical areas on Martha's Vineyard" as DCPCs (emphasis added). Under the principles of statutory construction, however, these general statements cannot

reasonably be construed as limitations on the Commission's authority and jurisdiction. To the extent that two provisions conflict, the general language of one section must yield to the more precise language of another. *Risk Management Found. of Harvard Medical Insts. v. Commissioner of Ins.*, 407 Mass. 498, 505 (1990), *Crocker*, 407 Mass. at 80-81 n.6. A generalized reference to "on Martha's Vineyard" must yield to the more specific statements (i) in § 2 of the Act that the Commission's jurisdiction extends over "the land *and waters* in the county of Dukes County," which includes waters within the three-mile limit (emphasis added); (ii) in § 3 of the Act that the Commission may enact the type of regulations for DCPCs that, pursuant to *Pafard*, may regulate "submerged lands seaward of the low water mark"; and (iii) in § 8 of the Act that the Commission and certain town governmental bodies may nominate as a DCPC any areas "within ... municipal boundaries," which extend to the three-mile limit.

The Vineyard Act must also be read to authorize the designation of areas seaward of the low water mark as DCPCs because it is a remedial statute that must be construed broadly, *O'Connell*, 400 Mass. at 694, and because construing the statute to grant this authority is essential "to effectuate the objectives of its framers." *Interstate Eng'g Corp.*, 367 Mass. at 757 (1975).

The "principal substantive areas of authority of the Commission" are the designation of DCPCs and DRIs, and the regulation of development in these designated areas and of these projects. *Woods Hole, Martha's Vineyard and Nantucket Steamship Auth.*, 380 Mass. at 790. The Act was "intended to respond (as the General Court could believe) to the threat of destruction of the *ecological* and other special values of the island through steeply increasing commercial developments of its land *and water* resources which would not be adequately contained or regulated merely by action that could or would be initiated by the individual towns." *Island Properties*, 372 Mass. at 219 (emphasis added); *see also* Vineyard Act, § 1.¹

¹ Notably, in *Home Builders Assoc. of Cape Cod, Inc. v. Cape Cod Comm'n.*, 443 Mass. 724, 736 (2004), the Court upheld the validity of the town-wide DCPC adopted by the Cape Cod Commission under its enabling act, St. 1989, c. 716, which closely resembles the Vineyard Act. Among the reasons for this DCPC that the Court found convincing was the need "to protect coastal embayments from nitrogen contamination, which threatens to impact adversely local and regional shellfishing in the embayments." The Court relied heavily on the findings in Barnstable's Local Comprehensive Plan ("LCP"):

Turning to coastal embayments, the LCP explains that "[s]hellfish are abundant in the shallow, sheltered coastal embayments in Barnstable. Clams, both soft-shelled and hardshelled, scallops and oysters can be found in the saltwater embayments along the shore. Colit oysters have been cultivated since the mid-19th century [and] are internationally renowned] delicacies. There are approximately 6,178 acres of shellfish beds. Shellfish resources are the basis of a traditional economic pursuit and a recreational pastime, and are special

Clearly, these purposes would be frustrated if a city or town were allowed to extend its regulation beyond the low water mark—as it can under *Fafard* and G.L. c. 42, § 1, which extends the municipal boundaries to the three-mile limit—and yet the Commission could not use one of the principal means of its statutory authority to regulate these same areas. This result is directly contrary to the purpose of preventing damage from actions that “would not be adequately contained or regulated merely by action that could or would be initiated by the individual towns.” *Id.* The Supreme Judicial Court, holding that the designation of a project as a DRI under the Act tolled the 90-day constructive approval period under the Subdivision Control Law, relied on this same common-sense reasoning:

[G]iven the Legislature's conclusion that c. 831 and the commission were needed because “towns themselves had not and would not” bring “regional— island-wide and Statewide— considerations into the protection of the land and water of Martha's Vineyard,” *Island Properties, Inc., supra* at 229, we conclude that the Legislature did not intend to enact a scheme whereby a local board could thwart the commission's rejection of a plan by simply failing to act within ninety days. We are loath to impute to the Legislature a reading that “produces a result that is contrary to common sense and sound reason.” *Blue Cross of Massachusetts, Inc. v. Comm'r of Ins.*, 397 Mass. 674, 677 (1986), citing *van Dresser v. Firlings*, 305 Mass. 51, 53-54 (1940). Under St. 1977, c. 831, the commission's review of all DRI's is central to the comprehensive regional scheme. Any construction of Section 81C that does not toll its time period in some circumstances could render the commission's review a nullity. “An intention to enact a barren and ineffective provision is not lightly to be imputed to the

features of local menus. Shellfish resources require pristine water quality conditions and are the canaries of water quality. In recent years contamination of coastal waters has caused a decline in harvests; in 1991, a total of 1,093 acres of shellfish beds were closed to harvesting because of contamination.” The ICP further explains that “[c]ontamination of ... salt water embayments will have a devastating impact on the capability of the coastal resources to serve as a spawning ground and nursery for both freshwater and saltwater species.”

Home Builders Assoc., 441 Mass. at 736. In upholding the DCPC for the entire Town of Barnstable, the Court made clear that the interests protected by the Cape Cod Commission's enabling act, as well as the Vineyard Act, include the quality of the ocean water that is so important to these regions, as well as the condition of the land underneath this water.

Legislature." *Insurance Rating Bd. v. Commissioner of Ins.*, 356
Mass. 184, 189 (1969), and cases cited.

Crocker, 407 Mass. at 83.

If the Vineyard Act were construed not to authorize the designation of waters and lands below the low water mark as a DCPC, this would result in the same ineffectiveness that the Court excoriated in *Crocker* because a town could "thwart" the Commission's mandate by regulating or not regulating these areas itself, without the Commission's oversight. In our opinion, the Vineyard Act cannot be read to limit the Commission's authority so drastically that the Commission is ill-equipped to satisfy its statutory mandate to protect the natural, historical, ecological, scientific, cultural, and other values of Martha's Vineyard from "being threatened" and "irreversibly damaged by uncoordinated or inappropriate uses of the land." Vineyard Act, § 1.

Conclusion

For the foregoing reasons, it is our opinion that the Commission has authority to adopt a DCPC for an area seaward of the low water mark under the Vineyard Act.

Very truly yours,

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cc: Gareth J. Orsmond, Esq.

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