

JURISDICTIONAL ALLOCATIONS IN LAND USE PLANNING:

THE BATTLE FOR CONTROL ON MARTHA'S VINEYARD

by

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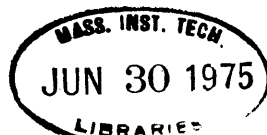
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ABSTRACT

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In April 1972, Senator Kennedy introduced a bill into the Senate which proposed the establishment of an Islands Trust on the Nantucket Sound Islands. These are a small group of largely undeveloped islands, located off the southeastern coast of Massachusetts, with Martha's Vineyard being the largest and most developed. This personal initiative by the Senator was prompted by a series of development threats which were claimed to be destroying the Islands' natural beauty. These forces were also apparent on most undeveloped islands throughout the United States, and were accentuated by lack of effective local tools in the most part to curb the pressures. On Martha's Vineyard, a heated controversy ensued for the next three years when the battle for land by developers was overshadowed by the larger battle for control - on what grounds has the federal government the right to intervene in the planning of the Island? The fiercely independent, autonomous local towns on the Island asserted there were no such grounds.

This thesis is written around this jurisdictional issue. The validity of the arguments used by Senator Kennedy for federal involvement in the Islands are analysed. This is followed by a discussion of the tests and mechanisms which these arguments and the provisions of the bill were subjected to by all levels of government and interests. The tests include constitutional, legal, political, institutional, legislative, interpersonal and traditional ones. The mechanisms, on the other hand, include the process of public hearings and meetings; the actions of citizen groups; public opinion polls and referenda; state and county actions; pressures from other Senators, Congressmen and other federal officials; and the actions of Congressional Committees. The conclusion from these processes sheds further light on the continuing discussion of the practicalities of jurisdictional allocation in land use planning in the United States.

ABSTRACT
(continued)

Other conclusions from this thesis add to the continuing debate of the role, scope and definition of land use planning controls (especially with regard to the federal role in these controls) including Island Trusts, public land acquisition, limits to public access and beaches, subsidisation of resident home sites and property taxation, as applied to the protection of islands.

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TABLE OF CONTENTS

ABSTRACT.....2-3

CHAPTER 1 : THE BATTLE FOR LAND AND CONTROL ON ISLANDS IN
THE UNITED STATES : THE POSITION ON MARTHA'S
VINEYARD TO 1972.....5-19

CHAPTER II : THE STORY OF THE BATTLE FOR CONTROL ON
MARTHA'S VINEYARD AS PLAYED BY SENATOR
EDWARD KENNEDY.....20-33

CHAPTER III : THE ARGUMENTS USED BY SENATOR KENNEDY
FOR FEDERAL INVOLVEMENT IN THE NANTUCKET
SOUND ISLANDS.....34-63

CHAPTER IV : THE FEDERAL INSTRUMENT OF CONTROL : THE
NANTUCKET SOUND ISLANDS TRUST BILL.....64-104

 A. Introduction.....64-65

 B. The Nantucket Sound Islands Trust Bill:
 S.3485 (April 11,1972).....66-101

 C. Conclusion: The Federal Role.....102-104

CHAPTER V : THE MECHANISMS AND PROCESS OF AMENDMENT OF
THE FEDERAL ROLE ON MARTHA'S VINEYARD.....105-146

 I. Local Discussion - The Process by which
 the Kennedy bill became the "People's"
 bill.....106-128

 II. Influences of the State Act.....129-132

 III. The Response from Federal Congressmen.....132-136

 IV. Congressional Committee Hearings -
 Strong Opposition from the Department of
 the Interior emerged.....137-146

CONCLUSION : A RE-EVALUATION OF THE FEDERAL ROLE.....147-150

APPENDICES.....151-221

APPENDIX 1(a) : THE LOCATION OF THE NANTUCKET SOUND
ISLANDS, MASSACHUSETTS.....152

APPENDIX 1(b) : DEVELOPMENTS UNDER WAY ON MARTHA'S
VINEYARD, JUNE 1972.....153

APPENDIX 1(c) : THE BUILDING BOOM ON MARTHA'S
VINEYARD 1965-1974.....154

APPENDIX 2(a) : THE NATIONAL ISLAND TRUSTS ACT, AS
DRAFTED BY THE DEPARTMENT OF THE
INTERIOR IN 1970.....155-156

TABLE OF CONTENTS
(continued)

APPENDIX 2(b) : A REPORT TO THE PEOPLE OF MARTHA'S
VINEYARD ON THE DEVELOPMENT OF THE
ISLAND.....157-161

APPENDIX 2(c) : THE COUNTY BILL.....162-165

APPENDIX 2(d) : THE NANTUCKET SOUND ISLANDS TRUST
BILL, AS OF JANUARY 15, 1975 : S.67.....166-203

APPENDIX 2(e) : AN ACT PROTECTING LAND AND WATER ON
MARTHA'S VINEYARD. CHAPTER 637 OF
THE ACTS OF 1974.....204-221

BIBLIOGRAPHY.....222

CHAPTER I

THE BATTLE FOR LAND AND CONTROL ON ISLANDS IN THE UNITED STATES: THE POSITION ON MARTHA'S VINEYARD TO 1972

To most people, islands are held as special places. They are lands of promise...promise of escape from the mundane to high adventure or unknown delights. The reasons are partly historical. Sir Thomas More located Utopia on an island in mythical seas. Yet, the real islands of the world are as compelling and romantic as the utopian dreamlands. The Isles of Greece cradled Western civilization, and the islands in the Bering Sea now mark the one-time bridge of land across which, ages ago, man probably made his first journey from Asia to the American continent. Newfoundland and the Calendar Islands of Maine may have been discovered by Norsemen half a millenium before Christopher Columbus set foot on the Island of Hispanola. The first England colonies were established on the Parris and Roanoke Islands off the coasts of the Carolinas, and islands of the St. Lawrence, the Gulf of Mexico, Ohio, Missouri and Platte Rivers were significant in the exploration of the United States.

Yet, of even greater significance to the image of islands nowadays are their unique natural resources. America's twenty-six thousand islands possess some unusual natural features, more varied in scope than continental United States itself. As

described in a Department of Interior Study:

They contain bedrock shorelines where the water has sculptured intricate caves and caverns; barrier islands of shifting sands, flanked on one side by roaring surf and on the other by quiet lagoons; eroded sea stacks - former segments of the shoreline carved by millennial wave action - jutting sharply up from the sea; bay islands, where multiple natural life forms survive in the midst of heavily populated urban areas; and man-made islands where rising reservoir waters isolated high knolls, ridges and peaks.¹

Other natural contrasts include the range of scenery from verdant semi-tropical isles bathed by warm currents of the Gulf Streams, to barren rocky masses in the Arctic Seas and North Atlantic. Many islands are still in their natural wilderness state, where a walk on a lonely shore reveals rare wildlife, plant and land forms.

Until recently, islands have been able to retain these unique features based on considerate and limited usage by man. However, in an era of accelerating pressures on the individual, a time of speed-up, tension and rapid urbanization, the demands on islands as places of escape and sanctuary for recreation and renewal, have escalated on an unprecedented scale. For contemporary Americans, the greatest attraction of

¹ U.S. Department of Interior, Bureau of Outdoor Recreation. Islands of America. Washington, D.C. 1970. p. 2.

the Nation's islands is their detachment, both from the mainland and from mainland routine. Crossing water to reach land becomes a symbolic act of leaving behind too-familiar activities and unsolved problems. Increasing numbers of visitors bring their inevitable litter and clutter, as well as encouraging commercialization. But visitors are particularly destructive by their sheer impact through numbers alone, on the delicate island ecosystems. Personal affluence has led to greater demand for second homes, and because of transportation advances, growing numbers are seeking locations on islands, which until recently were often undeveloped.

The pressures on islands do not only arise from recreation and second homes demands, but also from large-scale development pressures. The water surrounding islands, once bastions of their insularity, now are more easily breached and cannot hold back the tide of urban expansion. Industrial development and subdivisions constantly reach out from metropolitan centers, easily traversing the intervening waters to virtually combine islands with the mainland. New bridges and expanded ferries bring streams of motor cars to islands. As these development pressures have escalated, islands have increasingly entered the real estate market, with realtors and developers speculating with islands' precious land

resources. Islands are one of the few areas where large areas of ocean frontage can still be bought by the private sector.

Most islands cannot stand up to these forces - they are fragile resources, vulnerable to large-scale destructive and inconsiderate actions of man. Few islands have sophisticated planning tools to make any impression on the flood of development, and many undeveloped or partially developed islands do not even have basic subdivision or zoning controls. Few also have the necessary financial, technical, legal and man-power resources to combat these forces. Many islands are endangered of losing the unique qualities and becoming 'Any-place, U.S.A.'.

Yet, with increasing public recognition of the important role of islands in modern society as places of escape and public recreation, there has been mounting concern to offset these development pressures which are destroying the recreational values of islands. The dilemma can be stated as, how can islands retain their unique qualities and help fulfill the need as a place of refuge and renewal from burgeoning urbanization without being overwhelmed by the kind of development that makes public recreation impossible. Yet, on the other side of the coin, it is important to

realize that many island economies are dependent on tourism with few other sources of income. It is therefore necessary to consider the economic base of islands when evaluating how conservation and preservation may protect islands natural resources from destruction. Associated questions that are being asked include what levels of government should be involved in the solution of the dilemma. It may be argued that islands are a national resource; therefore the destructive forces to them are a national problem; and so it is in the national interest to protect them, especially as the localities are so unprepared to do so. This is a moot point, and the arguments for federal involvement will be discussed in Chapter 3, but it is sufficient to note at this point that there is a jurisdictional battle for control as well as a battle for land on America's islands.

Martha's Vineyard is one of the islands which is facing these development pressures and forces and the subsequent dilemmas of control. The island, of a hundred square miles, is located seven miles (or a 45 minute ferry ride) off the southeast coast of Massachusetts. It is a part of a larger collection of islands, known as the Nantucket Sound Islands, including the islands of Nantucket, Tuckernuck, Muskeget, Noman's Land and the Elizabeths. Martha's

Vineyard is the largest and most developed of these islands, estimated at fifteen percent developed in 1970.² The island is divided between the six towns of Tisbury (also known as Vineyard Haven), Oak Bluffs, Edgartown, West Tisbury, Chilmark and Gay Head, the first three of which contain 85 percent of the registered voters of Martha's Vineyard. Nantucket, the next largest island and half the size of Martha's Vineyard, was three percent developed in 1970.³ The other islands are largely uninhabited. (Appendix 1(a) shows the location of the islands)

Twenty miles from the city of New Bedford, 80 miles from Boston and 150 miles from New York, Martha's Vineyard plays a major recreational role in the region. Thirty million people live within a day's drive of the islands. A winter population of 6,000⁴ residents on Martha's Vineyard climbs to a staggering 40,000⁵ during the summer months. This is swollen further by tourists and day-trippers, with the result that the population on a peak summer weekend rises to over 50,000.⁵

² Islands of America. supra note 1 at 75.

³ Ibid.

⁴ According to: U.S. Department of Commerce, Bureau of Census. 1970 Census of Population. Massachusetts 23-17 (1973).

⁵ According to: Dukes County Planning and Economic Development Commission. Summary of the Comprehensive Plan for Dukes County. 1971.

The long list of prestigious summer residents, including Senators, Congressmen, business tycoons and intellectuals, has raised the island to national fame and accentuated the rush for a second home on the island.

Yet, with little agriculture or fishing, the island's economy is severely dependent on this summer income. The dilemma is expressed in the following statement:

As with all island people, Vineyarders have always been a breed apart...suspicious of one another, and even more so of outsiders, even though in most instances poignantly in need of the revenue from summer residents and tourists. One can find a Vineyarder selling property to an off-islander in the Spring and cursing that man's new fence and no-trespassing signs the following fall.⁶

According to a recent survey⁷ of Martha's Vineyard economy, the resort industry accounts for 51 percent of the island's economic base, which totaled 33 million dollars in 1973. Construction accounts for another 41 percent, divided between second home construction at 26 percent and construction services and supplies at 15 percent. The remaining 8 percent is spread among agriculture, fishing and general services. The survey concluded:

⁶ New York Times. April 23, 1972. p. 11.

⁷ Dukes County Planning and Economic Development Commission. Survey of the Economy of Martha's Vineyard. 1973.

The bulk of the...economy is dependent on...the attractiveness...as a resort community.... It appears prudent to work toward economic growth and expansion in directions other than the resort orientation.... Any economic expansion...must be undertaken with considerable care so as not to damage the natural resources on which the life style and economy are dependent.

The island has great unspoiled natural beauty. This is especially rare within the densely urbanized North East. Beaches, moors, gently rolling uplands with kettlebottom ponds give way to flat glacial outwash plains streaked with great ponds, superb harbors and estuaries rich with marine and bird life. The natural beauty of the Vineyard lies in small-scale intimate and subtle diversity which is particularly vulnerable.

Yet since the late sixties, the island has showed that it clearly has not escaped the intense suburbanized development pressures and second home boom characteristic of other islands elsewhere. Large suburban tract development has been promoted by large-scale off-island developers. This type of development scatters houses haphazardly across the rolling moors; sits them down on fragile dunes and in coastal marshes without regard for delicate natural balances. In 1972 housing starts on the Vineyard were running at about two

a day, while in 1971 it was one a day, and one every two days in 1970. (Appendix 1(b) shows developments under way in June 1972) One simple subdivision plan filed on the Vineyard in November 1973 would in and of itself add more new houses (867 houses on 507 acres) than are now located in two of the island's towns.⁸

One of the results of this growth explosion was overloaded sewage systems. During the summer of 1972, Vineyard Haven's town dump became overloaded with raw sewage being trucked from restaurant cesspools: the result was raw sewage flowing down State Road. Other effects included severe congestion on the narrow winding roads of the Vineyard during the summer months, and overcrowding of public facilities. Increased demand for municipal services was pushing up taxes. Similarly, development pressures resulted in fierce land speculation which was driving the price of land higher and higher, increasingly out of the reach of island families. Typical observations on the land rush to the island included:

Our big concern is that the island not be covered by summer homes that destroy our clean air, clean water, a relatively uncongested atmosphere.⁹

Alexander Fittinghoff, Dukes County Planner
May 1972

⁸ Vineyard Gazette. November 2, 1973. p. 1.

⁹ Christian Science Monitor. May 1, 1972.

There is not one inch of available land on the island that is not being eyed by developers today.¹⁰

Governor Francis Sargent,
Massachusetts,
January 1973

Last year, Harrison Street Corporation, a large Lexington developer bought 93 acres on Martha's Vineyard for \$35,000. On-site development now is expected to yield some \$1,400,000 for summer homes plus revenues for a condominium. William Brine, a summer resident which last August bought 232 acres for \$15,000 sold the land to a developer seven months later for 15 times that amount....⁹

As aptly expressed:

Today Martha's Vineyard stands on the brink. Soaring land values and celebrated clientele are luring thousands of land-starved Americans to the Island.⁹

Over the period of the late sixties and early seventies, passenger and vehicle traffic to the Vineyard increased rapidly. In 1972 there was proposed state legislation to construct a bridge to the Island. The Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, which operates the car and passenger ferry from the mainland, was also planning to build large capacity boats. Since 1960 the number of seasonal

¹⁰ Vineyard Gazette. January 12, 1973. p. 6.

passengers arriving by water has more than tripled. Jet planes were allowed to land at the Martha's Vineyard airport in the sixties hence increasing the passenger capacity carried. The Edgartown Road (between Vineyard Haven and Edgartown) became a federal secondary highway ten years ago. This required the cutting of great swaths of trees and bulldozing land to meet the federal highway standards. In the words of a local author:

Now cars whiz along the short, improbable federal highway from one sister town to the other, speeding on its smooth wide surface, skidding around its shoulders...and people begin to forget what a quiet island road looks like.¹¹

These forces have to be juxtaposed with the fact that the six towns on the Island in 1971 had the barest of land controls with which to control these forces. Only half of the Island was covered with zoning (weak at the best), and zoning of the town of Oak Bluffs, although in existence since 1948, had no minimum lot size requirement. Only Edgartown had subdivision control, and a similar law had been turned down in Tisbury. This lack of controls was, and still is, compounded further by the strongly independent nature

¹¹ Simon, Anne. No Island is an Island. Doubleday Inc., New York. 1973. p. 75.

of the island towns, the lack of cooperation between them, and their consistent refusal to consider island-wide issues. As expressed by Anne Simon, a writer and summer resident:

The six towns on this hundred-square-mile island are fiercely independent. Town-tied islanders consistently turn down recommendations for an all-island health department, police department, fire department. They are not in the habit of thinking of the Vineyard as one place, have not adopted a regional plan.... Individual immediate needs reign supreme.¹²

All the towns on the Vineyard are governed by the town meeting form of government. The voters are overwhelming Republican in both national and Massachusetts elections. They have supported Republican candidates for President, Governor, U.S. Senator and Representative in every election but one since World War II.¹³

The county level was similarly weak. Dukes County, composed of the six towns of Martha's Vineyard, and the chain of the nearby Elizabeth Islands known as the town of Gosnold, established a Planning and Economic Development Commission in 1966, which until its dissolution in 1974,

¹² Boston Globe. June 5, 1972.

¹³ See the biennial editions of Commonwealth of Massachusetts, Secretary of the Commonwealth. Election Statistics. Years 1946-1974. The 1964 presidential election was the sole exception.

gathered data and coordinated plans for regional economic studies. Its role was severely limited by the fact that it had only advisory powers, yet it was the closest unit at the time to an all-island government.

It was to this scene that Senator Edward Kennedy (D-Mass) arrived in September 1971 armed with a personal initiative in the form of a study bill. This bill called for a federal study to determine whether the Nantucket Sound Islands should be made part of the Cape Cod National Seashore, in order to protect them from the overwhelming unplanned development forces. By April 1972 this was changed to a proposal to create an Islands Trust for the Islands, whereby lands would be zoned for a range of conservation and preservation measures including large-scale land acquisition. A Commission consisting mainly of local membership was to administer this Trust. As a result, a very full three years ensued of public controversy centering on the appropriate role (if at all) of the federal government in protection of the Islands and particularly the Vineyard, and the appropriate controls necessary. All levels of government and all sectors of interests were present in the vigorous discussions of these questions.

It is my belief that the story of the fate of the Kennedy proposals for preservation and conservation of Martha's Vineyard present the following features which have a significance beyond that of the Island concerned:

(i) arguments for federal involvement in the protection of several islands from the pressures of unplanned development; the precedents and limits of these arguments;

(ii) further light on the continuing debate of the role, scope and definition of land use planning controls (especially with regard to the federal role in these controls) including public land acquisition, the taking issue, limits to public access, subsidization of resident home sites, public beach access, property taxation;

(iii) the constitutional, legal, political, institutional, legislative, interpersonal, and traditional limits to one Senator's proposals for federal action; the mechanisms of compromise through which these limitations were surfaced (including public hearings and meetings, the actions of citizen groups, public opinion polls and referenda, state and county actions, pressures from other Senators, Congressmen and federal officials, and the actions of Congressional Committees); and the substantive results of such mechanisms with regard to the definition of the bill;

(iv) from this, statements can be made as to the appropriate federal role on Martha's Vineyard and on the issues presented by the case study.

This thesis is organized around these conclusions. This chapter has set out the changing attitudes towards and role of islands in the United States; their present development versus public recreation dilemma; and the position of Martha's Vineyard in this perspective and the situation on the Island to 1970. Chapter II tells the story of Senator Kennedy's involvement in the Islands, the development of the Islands Trust bill and the various forces and action in the controversy. This is followed by Chapter III which discusses the nature and validity of the arguments for federal involvement in the protection of the Nantucket Sound Islands, which Senator Kennedy made. Chapter IV discusses the various provisions of the first version of the Islands Trust bill, and includes a critical analysis of the planning issues and controls contained therein. Chapter V discusses the mechanisms and results of three years public discussion of the bill and the effective limitations that resulted to Senator Kennedy's initial ideas. The thesis concludes with a brief discussion of the appropriate federal role on Martha's Vineyard in the light of the limitations that surfaced, including a re-evaluation of the arguments for federal involvement.

CHAPTER II

THE STORY OF THE BATTLE FOR CONTROL ON MARTHA'S VINEYARD AS PLAYED
BY SENATOR EDWARD KENNEDY

The story commences in 1967 when Senator Edward Kennedy, a Massachusetts Democrat set his staff members to work researching alternative methods for protecting the Nantucket Sound Islands, with an eye to proposing legislation. This personal initiative can be related to the deep-seated interest of the Kennedy family. As expressed by the Senator at a public meeting on the Vineyard, January 1973:

....this legislation comes as result of a personal, and I suppose family, experience, that we've seen over on the mainland, down on Cape Cod, where my family's lived for a period of some 40 years.... I remember what a glorious lovely, and beautiful part of the state the Cape used to be. But during the period of recent times I've seen its beauty contaminated and destroyed in so many ways by those who were not interested in the future, nor interested in preservation.¹⁴

His concern for the "ravages of unplanned, uncontrolled development and commercialization" of the Islands was genuine:

I have become convinced that without an immediate and carefully planned preservation and conservation program, all that is unique about the Nantucket Sound Islands will very soon be irretrievably lost. Today, Nantucket and Martha's Vineyard stand on the brink.¹⁴

¹⁴ Vineyard Gazette. January 19, 1973.

The research was deferred when it became apparent that the Department of the Interior's major islands survey, then underway, would preempt any attempt to legislate protective measures while it was in progress. The study was published in 1970 entitled "Islands of America."¹⁵ The most significant recommendation of that report was to create a National System of Island Trusts, similar in status to such bodies as the National Trails System and the National Wilderness Preservation System. Island Trusts would be composed on an island or group of islands with outstanding scenic, historic or recreational values. Island Trusts were conceived of as a cooperative venture of all levels of government and the private sector, whereby certain areas of land, water and interests would be acquired and held in trust. The report went further:

It is recommended that...the Elizabeth Islands ..., Martha's Vineyard and Nantucket Islands of Massachusetts...be further studied for possible National Seashore, National Island Trust, or other protective status.¹⁶

By summer 1971 it had become apparent that the Department of Interior would not act on the "Islands of America" study, and the Senator reactivated his research work.

¹⁵ Islands of America. supra note 1.

¹⁶ Ibid at 48.

The need for thorough study had grown increasingly urgent, and on September 29, 1971, Senator Kennedy introduced S.2605, "a bill to authorize the Secretary of the Interior to conduct a study with respect to certain islands in the State of Massachusetts...."¹⁷ The Secretary was to report to Congress in six months on "whether any or all of the [Nantucket Sound Islands] should be made a part of the Cape Cod National Seashore." The bill was introduced after "secret" meetings with selected public officials and residents during the summer. The call for the Department of Interior to institute the study gave the agency the opportunity to carry out its own recommendations, and put the burden of the decision of the appropriate method of action on that Department. Senator Kennedy made no attempt at that point to judge the appropriate solution - he was treading carefully.

Despite the wording of the bill, Senator Kennedy made it plain that he sought consideration of more than simply the Cape Cod National Seashore approach. However, his brother John had been instrumental in the establishment of the Seashore¹⁸ at Cape Cod and had desired to see it applied to the Nantucket Sound Islands. At its tenth

¹⁷ S.2605, 92nd Cong., 1st Sess. (1971), in 117 Cong. Rec. 33903 (1971).

¹⁸ Signed into law August 7, 1961, as Cape Cod National Seashore Act, 16 U.S.C.A. 459(b).

anniversary, the Seashore had shown its undeniable success in saving the Cape from total destruction. As Senator Kennedy argued:

The very success of that legislation has pointed out the urgent lack of similar legislation for the islands.¹⁹

Through the fall of 1971, vigorous discussions and public meetings were held on the study bill between federal and local officials, citizens and private groups. The islands' newspapers gave the study bill front page discussion and printed scores of letters on the subject. There was widespread opposition to any intrusion into island affairs by the federal government, especially from public officials and commercial interests.

As the prospects for swift passage of S.2605 began to dwindle, one last hope for a federal study came on January 22, 1972 when National Park Service Director, George Hartzog, Jr., suggested that the Park Service had the resources to conduct a study such as that called for in S.2605 without specific enabling legislation. Senators Kennedy and Brooke, Representative Keith, and Massachusetts Governor Sargent sent a joint letter to Mr. Hartzog formally

¹⁹ 117 Cong. Rec. 33903. September 29, 1971.

requesting Park Service assistance in developing data and recommendations on the alternative methods of assisting Islanders in preserving the character of the Nantucket Sound Islands. Two months later Associate Park Director Stanley Hulett responded by letter stating that the Park Service "plans to begin a study of the Atlantic Coastal natural region... (including) Nantucket and Martha's Vineyard, and their satellite islands." In the interim, Mr. Hulett concluded: "Local initiatives to include land use planning and zoning might be implemented."²⁰ By making no specific commitment to study the Nantucket Sound Islands in any specificity, Mr. Hulett had effectively rebuffed the four Massachusetts officials. As commented by K. Dun Gifford, Senator Kennedy's right-hand man:

Thus ended the ill-fated attempt to obtain one final, narrowly focused, legitimating federal study.²¹

Since the fall of 1971, a small discussion group, led by Alexander Fittinghoff, the County Planner, consisting of interested islanders, met frequently with Dun Gifford to discuss ways in which federal resources could help Martha's Vineyard. Representative Keith (R-West Bridgewater) and

²⁰ 118 Congressional Record, 12038 (1972). Letter from Stanley Hulett to Senator Kennedy, March 23, 1972.

²¹ Gifford, K. Dun, "An Islands Trust: Leading Edges in Land Use Laws," in Harvard Journal on Legislation, April 1974, p. 429.

Senator Brooke (R-Mass) were working on other bills in response to local calls for alternatives to the Kennedy study bill. In October 1971, Kennedy asked Professor Charles Haar and three students from the Harvard Law School to analyse various island protection measures. The resulting memo gave further weight to the use of the Island Trust concept in the Nantucket Sound Islands, and allowed the Senator to move faster and further than anyone anticipated. It provided the foundation stones used by Senator Kennedy in drafting a bill for the Islands.

By this time, Senator Kennedy came to the realisation that the Cape Cod National Seashore approach was not appropriate for the the needs of the Nantucket Sound Islands. The Seashore approach was most appropriate for largely undeveloped areas, and wholesale land acquisition was not appropriate in partially developed islands where the approach needed to be more sensitive. Added to this, the National Park Service, who would administer the Seashore, would not not respect the wishes of the Islands. Fuel was added to this conclusion by the Harvard Law School Memo, when it stated, in relation to the appropriateness of the Cape Cod National Seashore approach to the Islands:

"...no single, heavy-handed approach to the island's preservation is either desirable or practical. The reason, simply stated, is that the very uniqueness which must be preserved is the product of a diversity

of land uses, topography and ownership. Thus whatever legislation is contemplated to encourage preservation must of itself be flexible; it must use a variety of legal concepts; and it must recognize the different land uses which are now in existence on the islands. 22

Since late 1971 and during early 1972, Senator Kennedy, in conjunction with the Island discussion group, drafted a bill for the Islands based on the Island Trust concept. By March 1972, the draft was ready and certain islanders saw it but were sworn to secrecy. On April 11, 1972, Senator Kennedy introduced the Nantucket Islands Trust bill, S.3485 into Congress. Despite the lapse of more than six months since the introduction of S.2605 and despite all the discussion and publicity over Senator Kennedy's stated intentions to legislate protective measures for the Nantucket Sound Islands, the actual fact of S.3485 stunned the Islands and there was was nothing less than violent reaction. Comments ranged from "inhuman, arrogant and high-handed" to "turning (the Island) into an Indian Reservation"²³ Local public officials and the real estate interests reacted most extremely. On Martha's Vineyard, the

²²Congressional Record. November 12, 1971. p.40886.

²³The Grapevine. April 19, 1972. p.2.

Dukes County Commissioners and the All Island Selectmen's Association held emergency meetings and called for the immediate withdrawal of the bill. They felt their right to make local decisions was being infringed upon. Kennedy wired the Board of Selectmen in each town asking for comments and suggested amendments to the bill. Right from the start he made it clear that the bill should be seen as a "working document." Selectmen in Oak Bluffs, Tisbury and Edgartown refused to speak to him and one Board of Selectmen explained its refusal in a letter to Senator Kennedy: "your invitation is indeed a cunning manoeuver...we also know a few tricks of the trapper - a mouse doesn't have but a nibble before he is dead." ²⁴ The Island Action Committee was set up to act as a central coordinating agency to defeat the bill. Senator Brooke and Representative Keith who showed they were against the bill, were called in to help fight the proposal.

By mid-May, things were quieting down and support for the bill strengthened. Kennedy refused to withdraw his bill. Vineyarders to Amend and Support the Bill group was formed, which prepared and personally delivered to Senator Kennedy extensive suggestions for amendment. Senator Kennedy also circulated his own suggestions for amendment to the Islanders. During May, June and July, Kennedy and his representatives

²⁴ New Bedford Standard Times. May 10, 1972. p. 29.

attended over 30 separate meetings with public officials and various groups on the islands. One significant barometer of public sentiment came on May 23, 1972, when Tisbury town meeting, by a vote of 422 to 35, refused to approve an article in the town warrant inserted by the town selectmen, empowering them to oppose the trust bill.²⁵ On the same night, the town meeting in West Tisbury voted 44 to 16 to authorize its selectmen "to pursue negotiations" with Senator Kennedy.²⁶ Official support for the bill was given by various local groups including Concerned Citizens of Martha's Vineyard, the Conservation Society, the Vineyard Open Land Foundation and the Garden Club. The Dukes County Planning and Economic Development Commission formed a Study Subcommittee to formulate a program of island-wide planning control and economic development. This came as a result of a public opinion poll they took which showed strong local opposition to the Kennedy bill. Fairly early on, Nantucket supported the Kennedy bill while Martha's Vineyard was the battleground.

As a result of these meetings and comments, Senator Kennedy introduced Senate Amendment 1372 to S.3485 on July 27, 1972.²⁷ It incorporated a great number of suggested amendments.

²⁵ New Bedford Standard Times. May 24, 1972. p. 7.

²⁶ Vineyard Gazette. May 26, 1972. p. 1.

²⁷ 118 Cong. Rec. S11,950-65. July 27, 1972.

Representative Keith confirmed his decision not to sponsor the Kennedy bill and so Representative Edward Boland (D-Springfield) introduced the revised Trust bill in the House before Congress adjourned. A non-binding referendum question in the November elections of Dukas County showed Vineyarders were against the Kennedy Bill. The question of the referendum referred to a bill presented by Representative Terrence McCarthy (Oak Bluffs) to seek the General Court of Massachusetts to memorialize Congress to oppose the proposed Nantucket Sound Island Trust. At the same time, a mail poll of non-voting taxpayers launched by a committee of summer residents showed overwhelming support for the Kennedy Bill on Martha's Vineyard.

Congressmen Boland and Gerry Studds (D-Cohasset) reintroduced the revised Kennedy bill in the House, and during February, Studds held public meetings on the island. In January, Senator Kennedy visited Martha's Vineyard for public hearings and meetings with island officials and groups. The recommendations for revisions that came out of these meetings and from a great deal of mail, were incorporated into the third version of the Island Trusts bill issued on March 16, 1973. The Concerned Citizens of Martha's Vineyard expressed total support for the new version. Studds meanwhile was planning to submit his own legislation in the House. Two months later, on May 31, the fourth version of the Trust

bill was submitted as S.1929 after incorporating the intervening comments. Representatives Gerry Studds and Edward Boland simultaneously introduced H.R.8318, an identical measure.

Through winter and spring of 1973, the Dukes County Planning and Economic Development Commission sponsored a series of eight meetings which brought together major proponents and opponents of the federal legislation in a structured fashion to seek out the common ground between them. The work product was a consensus paper, published on June 7, 1973 which set out nine principles which any protective legislation should embody. This document became the basis of much of the later negotiations.

In July 1973, the Senate Interior Subcommittee on Parks and Recreation held a formal public hearing on the Islands with regard to S.1929. The testimony received in Nantucket was largely supportive of the bill, but on the Vineyard it was mixed. Senator Brooke made a strong statement in opposition to the Kennedy bill. During the fall 1973 and early 1974, Kennedy, Brooke and Studds worked on a compromise bill and issued proposed amendments. At the end of May '74 the fifth version of the Island Trust bill was submitted jointly by Kennedy and Brooke. In July the major points of the latest version were supported at a meeting with Selectmen and County Commissioners on the Vineyard. In August, a second

public hearing was held on the Vineyard by the Senate Interior Subcommittee. The bill failed to be reported favorably out of committee for a full Senate vote at the end of 1974. On January 15, 1975, the sixth version of the bill was introduced by Kennedy and Brooke. By May 1975, when this thesis is being written, the bill has made little progress towards enactment and it is especially doubtful that the appropriations called for in the bill will be forthcoming.

A very important side story of the Kennedy bill is that of the State Act. As a reaction to the federal presence, in November 1972, Vineyard officials invited Governor Sargent to visit the Island to discuss its problems, the most pressing of which was "too much growth." Local officials especially saw the need for state help in creating tools with which the Island itself could control the forces of unplanned development. In a letter to the Governor:

It has occurred to us that an opportunity to share some thoughts with you personally and to gain a better understanding of the possible role of the Commonwealth in our efforts as a community to participate in determining our²⁸ destiny would be of immeasurable value to us.

In January 1973, Sargent visited the Island with his

²⁸ Letter to Governor Sargent from Everett Rogers, Chairman of the Dukes County Commissioners et al., October 12, 1972.

assistant, Lewis Crampton, Commissioner of the Department of Community Affairs. In order to resolve the political dilemma of state involvement, Sargent told local officials that he was neither a proponent nor an opponent of the federal bill. His involvement was promoted by an awareness of a series of development threats to the islands. Governor Sargent promised to work with local officials on the development of state legislation to expand local planning powers and authority to deal with the threat.

After eighteen months of hundreds of meetings and fourteen rough drafts of a bill, on July 27, 1974 Governor Sargent signed his bill into law at Tisbury Town Hall as Chapter 637 of the Acts of 1974. Through this act, the Vineyard has a regional commission which regulates the planning of developments of regional impact and in districts of critical planning concern. The details of the State Act will be considered in Chapter V and Appendix 2(e).

The State Act has had important effects on the federal bill. One crucial aspect is the relative need for the federal legislation now that the Vineyard has the State Act. The formulation of the state act strongly influenced revisions of the Kennedy Bill. This was particularly accentuated as a result of joint state/federal meetings starting October 1973

for the purpose of coordinating the bills. By early 1974 the discussion culminated in general agreement on principles for a combined federal/state legislative program to assist the Island governments in preservation and conservation of the Islands. These and other features will be discussed in Chapter IV.

This chapter has therefore attempted to give the broad outlines of the story on Martha's Vineyard. Chapter III, which follows, explores and critiques the specific reasons used by Senator Kennedy for federal involvement in the Nantucket Sound Islands.

CHAPTER III

THE ARGUMENTS USED BY SENATOR KENNEDY FOR FEDERAL INVOLVEMENT IN
THE NANTUCKET SOUND ISLANDS

When Senator Kennedy presented the first and later versions of the Nantucket Sound Islands bill, he put forward various arguments for federal involvement in these islands. The arguments commence with the statement that the Nantucket Sound Islands possess unique natural, scenic, ecological, scientific, cultural, historic and 'other' values. From this, it is claimed that there is a national interest in preserving and conserving these values for the present and future well-being of the Nation and for present and future generations. But, it was argued, these values are being irretrievably damaged and lost through ill-planned development. As the present state and local institutional arrangements for planning and regulating land and water uses to preserve and conserve these values are inadequate, then the Nantucket Sound Islands Trust provides the key to more effective preservation and conservation of the unique values. This is backed by a serious belief that via a program of coordinate action between Federal, State and local governments in partnership with private individuals, groups, organizations and associations, sound policies and guidelines for regulating ill-planned development well be devised.

These arguments are intricately interwoven and dependent on each other. Yet, for analysis, the various pieces of the arguments will be taken and discussed individually below. Discussion will focus on the use of precedents, substantiation and the degree of validity of the arguments.

1. "The Congress finds that the Nantucket Sound Islands possess unique natural, scenic, ecological, scientific, cultural, historic, and other values."³⁰

A Congressional finding that the Islands possess unique values can hardly be disputed, and Senator Kennedy makes little attempt to substantiate the claim. He states simply:

There is much about the Nantucket Sound Islands which makes them distinctive - not only because they are islands, but because even among islands their geology, their architecture, their history and their current life style sets them apart....³¹

In the statement Senator Kennedy made at the introduction of the first bill in April 1972 he made the following remarks about the unique qualities of the Islands:

³⁰ See Findings and Statement of Policy of March 16, 1973 bills and after.

³¹ 118 Cong. Rec. 12034.

[(a) geological uniqueness:]

The islands as they appear geologically today are the product of the great Ice Age glaciers. The beaches, the moraines, the outwash plains, the kettle-bottom ponds, the run-off ponds - these are all products of the glaciers which millions of years ago advanced and retreated over southeastern New England.

The noted geologist G. F. Wright said of the islands:

In the hills of Nantucket and Martha's Vineyard, we have one of the most remarkable true terminal moraines anywhere to be found in the world.

Another geologist, B. B. Chamberlain, says:

In its [Martha's Vineyard] past we can read the pasts of Cape Cod and Nantucket; and its clear history reflects the hidden history of New England, indeed, that of the entire eastern seaboard, during the past million centuries.

And the Gay Head Cliffs, on Martha's Vineyard, were designated a national landmark in 1966 because of their geological significance.

[(b) biological/natural uniqueness:]

The islands are unique in other ways relating to their physical features. On Naushon Island grows the only proven oak and beech forest surviving in New England. In the town of West Tisbury, on Martha's Vineyard, every type of wild flower found in Massachusetts grows wild. It has been said that Nantucket has a larger assortment of plant life than any other U.S. locality. The salt marshes of the islands are among the most unspoiled of any along the entire eastern coastline.

Other naturalists have recognized the distinctiveness of the islands. In Moby Dick, Melville said of Nantucket:

Take out your map and look at it. See what a real corner of the world it occupies; how it stands there, away off shore, more lonely than the Eddystone Lighthouse. Look at it - a mere hillock, and elbow of sand; all beach, without a background.

[(c) historical uniqueness:]

Further along in his classic novel, Melville discusses the whaling activity which in the mid-19th century made Nantucket the whaling capital of the world:

They pushed off in boats . . . launching a navy of great ships on the sea, explored this watery world; put an incessant belt of circumnavigations round it. And thus have these Nantucketers overrun and conquered the watery world like so many Alexanders; parcelling out among them the Atlantic, Pacific and Indian Oceans. Two thirds of this terraqueous globe are the Nantucketer's. For the sea is his; he owns it.

This affinity of the islands, down through history, with the world's oceans is reflected in much of the architecture. The early 19th century houses of the shipowners, the ship captains, and the more prosperous of the ship's crews still stand, much as they stood then, in the towns of Nantucket and Edgartown. There were no pressures brought on by the industrial revolution to raze them, as there were in so many of our other early settlements, for factories or commerce. Unspoiled, they offer a rare and living picture of what life in seacoast towns was like a century and a half ago.³²

It appears that the statements above, in no way portend to offer definitive arguments for the uniqueness of the Nantucket Sound Islands. Geologically, the national, even world-wide significance of the Islands is undeniable. But with regard to

³² 118 Cong. Rec. 12034.

other values it is questionable whether they are of national significance. Most places are unique in the sense that their history, ecology or natural features makes them distinctive from other areas. It is therefore necessary to work out a continuum of significance and then using defined criteria, draw a line somewhere. This is a subjective exercise but in deciding this cut-off point it will be necessary to ask "unique for whom?" Senator Kennedy states that the uniqueness of the Nantucket Sound Islands is of national concern, but in a statement in the Congressional Record on May 31, 1973, he said:

They [Nantucket Sound Islands] are unique islands. They combine an unusual history, a fragile ecology, a natural beauty, and other values unmatched anywhere on the east coast of the United States.

This is probably nearer the truth, but the east coast of the United States is not the whole nation. Uniqueness to the eastern region is not necessarily of national interest.

Yet the Kennedy argument seems to come from another source. The Department of Interior Islands study claimed that all islands are unique because they are islands:

America's island heritage is large and rich, with thousands of islands in coastal and inland waterways that reflect our history or contain exceptional natural beauty.... America's Islands also possess some of our most unusual natural resources...."³³

³³ Islands of America. supra note 1 at 2.

From this, it is not too difficult to see the next step, which is to say that as all islands are unique then the Nantucket Sound Islands are unique because they are islands. However, this does not necessarily imply the need for federal protection. Overall it would seem that Senator Kennedy made this uniqueness statement as a prefix and springboard for other arguments. As a result, it does not of itself bear well under close examination.

2. It is in the national interest to protect the Nantucket Sound Islands for the present and future well-being of the Nation.

Building on the statement that the Nantucket Sound Islands possess unique values it is argued that these values contribute to public enjoyment, public recreation, and the present and future well-being of the Nation. As a result it is argued that it is in the national interest to preserve and conserve these values. In the first draft of the bill, S.3485, April 11, 1972, the Congressional intent and statement of policy was presented as:

The Congress finds that the Nantucket Sound Islands in the Commonwealth of Massachusetts ... possess unique scenic, ecological, scientific, historic, recreational and other values contributing to public enjoyment, inspiration and scientific study. The Congress further finds that it is in the best interests

of the citizens of the United States for the United States to take action to preserve and conserve such values for the enjoyment of present and future generations, to preserve and conserve the natural ecological environment and improve the recreational potential of the area,....

In the third version of the bill (March 16, 1973) and thereafter the statement of policy was expanded, and certain of the above language was significantly altered to state:

The Congress finds that there is a national interest in preserving and conserving these values for the present and future well-being of the Nation and for present and future generations....

The first version of the statement implies that the values are particularly significant due to their prime contribution to public recreation. Consequently after discussion of the bill on the Islands it became apparent that such an intent necessitated large-scale recreational development of the Islands, including public beaches and public access to the shore. Due to the outcry, the Congressional intent was changed to the second version where no mention is made of the public recreation role of the Islands. The amended intent just states simply that it is the national interest to preserve and conserve the values for the future well-being of the Nation. The purposes of this conservation and preservation action are omitted, hence weakening the argument. Under the later versions of the bill, beaches are not

opened up to the public and provision for public recreation is limited. Yet it is doubtful whether Congress will be willing to provide the large appropriation called for in the bill (25 million dollars) when beaches are not to be open and other land acquired with federal monies will not necessarily be open to the public and used for public purposes. (The details of the beaches and public acquisition provisions of the bill will be discussed later in Chapter IV)

For Congressmen outside Massachusetts, the ideas that their constituents should pay Federal taxes without having guaranteed access to the property these taxes support is quite revolutionary. But increasingly statewide land use laws have overridden local zoning powers to restrict the uses of private lands in areas of environmental concern and developments of regional impact. Precedents for public expenditure without public access also exists in parks where private holdings have been allowed to remain under certain conditions and in cases where parts of national parks have been closed or restricted to protect their ecology. However, it is in question, whether these arguments apply to the Nantucket Sound Island Trust. It is also important to remember that while much more than half of the population in America lives east of the Mississippi, only seven of the 38 National Parks are in that part of the country. The problem of controlling open

lands, privately held in most of the East, is vastly different from preserving federally held open lands in the West.

There are two major notions involved in the consideration of federal assistance to protect populated areas from overdevelopment. The first is that unless there is a large wilderness area which can be acquired and set aside by the government for preservation, the problems of dealing with local government and local concerns in a populated area are overwhelming. This is untrue. Preserving and protecting the values of areas where generations have made their homes simply requires a more tailored solution designed to take into account the unique resources of the area.

Senator Kennedy states:

There is no place in this country in greater need of preservation areas than the East where the greatest numbers of families live, where the largest cities preclude adequate open space, where urban life without relief can be stifling. And without the expertise and experience of those in the federal government who have dealt with all of these problems, we cannot expect to be successful in saving any part of the East Coast from becoming one long megalopolis.³⁴

A second notion suggests that there is no national interest in orderly growth for communities across this nation which happen to be situated in areas of dwindling and fragile resources.

The Senator states:

³⁴ Release from the Office of Senator Kennedy, January 15, 1975.

The residents of these special areas have been the caretakers of these resources for generations and they face overwhelming development from interests who care little about the future of the area or the direction or pace of its growth. There is a national interest in halting the kinds of disorderly and unchecked growth that strangles communities who do not have the legal or statutory tools to plan their own destiny. There is a national interest in providing that those areas of this nation which possess rare historical, cultural, and natural resources will not be propelled into the same senseless overdevelopment which plagues so many towns and cities across this country. There is a national interest in preserving the notion that local communities should be able to decide their own futures.³⁵

Also, in the initial statement of policy, Senator Kennedy states that conservation and preservation of the island's values are "in the best interests of the citizens of the United States." This was later amended to the much stronger statement that "there is a national interest" in the preservation and conservation of the values and this was essential for the present and future well-being of the Nation ." There is a considerable jump from saying that conservation is in the "best interests" of the Nation to that of the "well-being." The latter wording implies that certain negative consequences will ensue without conservation and preservation, while the former indicates a more paternalistic attitude - 'I think it best that you [the Nation] do as I suggest.'

35 Ibid.

In both versions of the statement of policy there is a schism between the two statements that certain values are unique and then that the nation has to protect these values. There is however, evidence that the protection of islands in general is of national interest. This relates particularly to a number of surveys and studies which have highlighted the seriousness of conservation problems confronting the Nation's islands and the need for concerted action to preserve them. The studies have consistently articulated the national interest in the conservation of islands but this has been primarily in relation to the preservation of the shorelines for public recreation and access.

The President's Council on Recreation and Natural Beauty submitted a report in 1968 to President Johnson entitled "From Sea to Shining Sea." The report stated:

Unfortunately, opportunities to know and enjoy shorelines and islands are steadily diminishing. Natural shorelines increasingly are being fenced, bulldozed, paved and built upon. Increasingly, scenic stretches of tidelines, beaches, dunes and seacliffs are covered with shacks and chalets, hamburger emporiums and parking lots, highways and billboards, power plants, and even oil derricks. It is time to proclaim the principle that...ocean and lake shorelines with high-quality scenery and recreation values are natural resources to be conserved and not destroyed.

This study was followed in 1969 by a report entitled "Our Nation and the Sea" by the National Commission on Marine Science, Engineering and Resources" (Julius Stratton, President), which stated:

Outdoor recreation increasingly is becoming a massive rush to the water.... Marine recreation...has become big business and is certain to grow rapidly in the future. Therefore, preservation and development of seashore lands for recreational purposes are matters of National interest and concern.

The Department of Interior's inventory of the Nation's islands pushed these conclusions further:

From these facts and others uncovered in the study, it is apparent that America's islands are a major untapped national resource with valuable recreation potential.³⁶

A major island bill that gave further weight to the need for a national policy to protect and manage the islands of the Nation, was introduced on February 14, 1972 by Senator Jackson. S.3164, the National Islands Conservation and Recreation Act was designed as "a proposal much wider in scope than the Trust Act suggested in the Islands report."³⁷ Hearings on that bill were cancelled in order to expedite other business at the close of the 92nd Congress. On October 30, 1973, Jackson introduced the

³⁶ Islands of America. supra note 1 at 6.

³⁷ 119 Cong. Rec. S.19609.

proposal again, jointly with Senator Haskell, as S.2622.³⁸ The very nature of the bill gave added fuel to the sentiment of the unique and very precious resources of the Nation's islands, the threat and need for immediate federal action:

Our Nation's islands represent an untapped opportunity to add to our recreational resources and to enhance the quality of our environment. Yet, if strong measures are not soon taken the very wealth and technological achievement which would allow us to enjoy the natural beauty of our islands may impair, if not destroy, our chance to do so.³⁹

It was the Department of Interior islands study though that gave Senator Kennedy the solid base for his argument that it is in the national interest to preserve the Nantucket Sound Islands. It stated:

Many islands mentioned in this report are primarily of national significance; some are possibilities for State or joint action; all merit attention and protection as remarkable treasures. Apart from the land preserved in our national wilderness system, islands undoubtedly constitute our finest reservoir of unspoiled land.⁴⁰

It then went on to state:

The Elizabeth Islands, Martha's Vineyard and Nantucket...form a vast recreation area where several

³⁸ 119 Cong. Rec. S.19608-19628.

³⁹ Ibid. supra note 37.

⁴⁰ Ibid. supra note 1 at 38.

stretches of undeveloped beach still remain. This region merits consideration for preservation....⁴¹

This was followed by:

It is recommended that the following islands be further studies for possible National Seashore, National Island Trust, or other protective status (1).... (2) Elizabeth Islands of Massachusetts; (3) Martha's Vineyard and Nantucket Island of Massachusetts;....

These island groups appear to be of national significance that would warrant some type of Federal action for their protection. Further investigation is required, however, to determine the status that would best protect and enhance their unique values.⁴²

The Harvard Law School Memo also added extra fuel to these conclusions:

The need for Federal legislation should by now be clear if [the] goals [preserving of open lands and providing avenues for recreational uses and other development] are to be achieved. The islands are a natural resource of national significance, and this resource is presently endangered by haphazard and uncontrolled development activity. Experience elsewhere in the Nation has shown that carefully devised Federal legislation can serve as the medium for successfully halting this uncontrolled development, substituting in its place planned, controlled development coupled with preservation of that which most needs preservation. Of the many legal vehicles available through Federal legislation, the ones which are recommended seek to complement the preservation and conservation activities already underway, while concurrently leaving ample room for expansion where necessary and desirable.⁴³

⁴¹ Ibid at 20.

⁴² Ibid at 48.

⁴³ 117 Cong. Rec. 40887 (November 12, 1971).

These clear and authoritative statements of the call for federal action in the Nantucket Sound Islands provide an umbrella under which Senator Kennedy's arguemnts can rest.

3. The threat of unplanned development on the Nantucket Sound Islands requires immediate (federal) action.

Senator Kennedy argues the need for federal protection due to the overwhelming threat of unplanned development which could imminently destroy the unique values of the islands. The Senator presented the forces discussed in Chapter I including statistics of housing starts. In the later versions of the bill, a Congressional finding was included:

The Congress finds that these values [natural, scenic, ecological, scientific, cultural, historic and others] are being irretrievably damaged and lost through ill-planned development.⁴⁴

This policy statement was expanded further:

The islands stand, today, on the brink of a subdivision development explosion, from which , if it is not controlled there will be no turning back.the threat is not from internal pressures for natural expansion. Instead, it grows out of external pressures: off-island land developers marketing large-scale subdivisions of a kind entirely foreign to residential land-use patterns now existing on the islands.⁴⁵

⁴⁴ See 119 Cong. Rec. S.10,017.

⁴⁵ 118 Cong. Rec. 25624.

The threat to the islands is a very real one.⁴⁶

Today, Nantucket and Martha's Vineyard stand on the brink. If unchecked development continues its current course, then there will be no turning back, and the generations which follow us will find these offshore islands...little different from today's sprawling suburbs...and heavily developed and suburbanized parts of Cape Cod or of Long Island or of New Jersey shore. This is not an overstatement.⁴⁷

The statements of this threat are further qualified by the need for immediate action:

...we do not have years to study the problem, we have months - and we do not have years to reverse the trend [urbanization and commercialization]; we have months. So let us not waste this precious time.⁴⁸

Time for the islands is of the essence. The urgency is plain for all to see, in the angular grids slashed through the moors and woods for subdivision roads; in the steepening curve of housing starts; in the Steamship Authority's boats filled to capacity on spring and fall weekends; and the steady ongoing destruction of dunes, beaches and wetlands.⁴⁹

⁴⁶ Ibid.

⁴⁷ 118 Cong. Rec. 12034.

⁴⁸ 117 Cong. Rec. 33904.

⁴⁹ 119 Cong. Rec. S.10,013.

In justifying the existence of the threat and the need for immediate action, Senator Kennedy refers to local surveys and nationwide public response. He states:

The years for the future of the Islands, held by so many concerned citizens, are based on factual analysis and projections, not on hypothetical or irrational suppositions.

There have been a number of specific studies of the Nantucket Sound Islands which have documented the unique and fragile nature of the Islands.⁵⁰ They go on to argue that without prompt, aggressive, and successful protective actions the Islands will fall victim to second-home development pressures and irrevocably lose these qualities which make them worthy of consideration for federal protective status in the first place. Despite local sentiment to the contrary⁵¹, national, state and island conservation and planning agencies have consistently recognized the need for federal protective action. This is important to remember when

⁵⁰ Massachusetts Water Resources Commission. Geophysical Investigations of Nantucket Island, Massachusetts. 1966; Cooperative Extension Service, University of Massachusetts. Selected Resources of the Island of Nantucket. Publ. No. 4. 1966; Dukes County Planning and Economic Development Commission. Alternative Arrangements for the Regionalization of Selected Municipal Services in Martha's Vineyard. 1972; Vineyard Conservation Society. Important Wildlife Habitats on Martha's Vineyard. 1972; Nantucket Sound Islands Evaluation Task Force, National Park Service. An Ecological Evaluation of the Islands of Nantucket Sound. 1972; Vineyard Open Land Foundation. Looking at the Vineyard - A Visual Study for a Changing Island. 1973; U.S. Corps of Engineers, Dept. of the Army. Beach Erosion Control Study on Gayhead Cliffs. 1973; U.S. Corps of Engineers, Dept. of the Army. Study and Report on Closing Breach on Barrier Beach, Madaket Harbour. 1973.

⁵¹ Mainly from local selectmen, private landowners and business interests.

the fierce battle on the Vineyard commenced with regard to Kennedy's proposals.

Of greatest significance to the Vineyard was the study and comprehensive plan prepared by Metcalf and Eddy, a Boston engineering and planning firm for Dukes County Planning and Economic Development Commission between 1969 and 1971.⁵² The final report contained the following challenge to the Island:

Can you be the exception and not protect the rural environment of your country from the ravages caused by unrestricted development or will your failure to act decisively and rapidly result in the undeterminate destruction of natural resources as has happened elsewhere? (Martha's Vineyard) and Nantucket are the bastions of hope for warm water islands lying off the Eastern Coastline of the United States.

The Summary Report contained the following warning:

By 1990 the County, particularly the Vineyard, could have destroyed its rural environment at economic disadvantage to itself and the developers will move on to the next unspoiled area. However, the next five years are critical. If a definite and well-ordered program of preventive and prescriptive medicine is not undertaken almost immediately or within the next two years, by 1975 the Vineyard undoubtedly will have contracted environmental terminal cancer.

The status of the Islands was recognised by other parties. The New York Times editorialized in October 1971:

⁵² Dukes County Planning and Economic Development Commission. A Comprehensive Plan for Dukes County. Technical Reports 1-6. Summary Report. Prepared by Metcalf and Eddy, Inc. 1969-1971.

Of the Atlantic Islands, perhaps the most desparately in need of protection...is Martha's Vineyard... now teetering on the edge of an uncontrolled speculative explosion that could destroy in a decade the delicate balance between man and nature that has evolved there in the course of three centuries.

In October 1972, Dr. Norton Nickerson, a Tufts University biologist and ecologist submitted a report to the National Park Service⁵³, warning the federal government that the preservation of natural areas on the Nantucket Sound Islands may involve nothing less than human survival. From his observations, the Islands' ecosystems were in danger of being over-run and destroyed, and he recommended that the natural communities of the Islands be preserved as a laboratory.

A mass of letters to Senator Kennedy and public pleas further substantiated the nature of the threat and the immediate necessity of federal action. On November 12, 1971, Senator Kennedy wrote:

....I have, in these few weeks, received considerable mail [indicating] how severe is the need for immediate action to preserve the unique characteristics of these islands, before it is too late, and how widespread is the recognition of this need to move swiftly.⁵⁴

⁵³ "An Ecological Evaluation of the Islands of Nantucket Sound" submitted to James C. Killian, Chief of Environmental Planning in the National Park Service Office at the Cape Cod National Seashore. October 1972.

⁵⁴ 117 Cong. Rec. 40886.

Many islanders, other citizens, private and public agencies appealed directly and urgently to Senator Kennedy and others for federal action to protect the Islands from the overwhelming development threats. Anne Simon, a winter and summer resident on Martha's Vineyard published an article in the New York Times on September 24, 1971. The article repeated the "environmental cancer" warning of the Metcalf and Eddy Report, and called for Senators Kennedy and Brooke, and Representative Hastings Keith to sponsor an appropriate federal solution for the endangered island.

This widespread public sentiment expressed in articles and letters gave important impetus to federal action.

4. Federal intervention is necessary due to the lack of local planning tools and resources, necessary to cope with the threat.

The argument for the need of federal legislation seems to have been seriously affected by the lack of local planning tools and resources to cope with the threat. This is in fact included as a Congressional finding in later versions of the bill:

The Congress finds that present local institutional arrangements for planning and regulating land and water uses to preserve and conserve these values are inadequate. ⁵⁵

⁵⁵ Ibid., supra note 36.

Senator Kennedy explains this finding:

The forces and pressures of development are far stronger than local governments and local private organizations can successfully withstand. This is a sad fact, but it is true; and it is true because for years local efforts have been hampered by both a lack of sufficient authority and a lack of ample funds.⁵⁶

Senator Kennedy illustrated these sentiments by reference to the effort made by the town of West Tisbury on Martha's Vineyard to establish a moratorium on building permits in order to protect fresh water sources, but then had to withdraw it under threat of lawsuits from large-scale developers. At a public meeting on the Vineyard in January 1973, Senator Kennedy stated:

I'm convinced...[of] the ineffectiveness of local ordinances - of local zoning rules, or health statutes - in serving as any barrier to the almighty developer. I see this time and time and time again.⁵⁷

From this base, the Senator concluded: "...local efforts, if they are to succeed, need augmentation from the Federal Government."⁵⁸

This statement is then tempered, in order to avoid constitutional home-rule questions, and dispel notions of a federal take-over:

The entry of a Federal presence, then, as

⁵⁶ 118 Cong. Rec. 12,033 (1972.)

⁵⁷ Ibid.

⁵⁸ Ibid.

envisioned by this legislation, is designed to be a stimulus, a challenge, an assist to local efforts. It can and should be a complement to the work already under way, and should become a primary step only when and where local efforts fail.⁵⁹

The resources which Senator Kennedy believed the federal government could offer to the Islands, were authority to control the threat of unplanned development, and secondly, the necessary funds to accomplish preservation and conservation. With regard to the latter role, the federal government has a well-established role as a redistribution center of planning aid to lower levels of government. Since the sixties, however, this aid has become increasingly conditional on the execution of certain national objectives, execution of planning processes and standards. There is therefore a legitimate funding role for the federal government, but the objectives of the funding have to meet a reasonable public purpose test. The Nantucket Sound Islands bills call for an appropriation of twenty-five million dollars in the first three years of the operation of the Trust. Twenty million dollars is to be used for land acquisition. Senator Kennedy believes that large scale land acquisition is necessary for the protection of the Islands and the money for such acquisition is a federal resource which the localities need. Is the Nation prepared to foot this bill for a few islands off the coast of Massachusetts, especially when

⁵⁹ Ibid.

the beaches are not to be opened to public use and funds are not being used to expand greatly public recreation on the Islands? This question is in the process of being answered and it is probably 'no.'

Local island public officials, realizing that Senator Kennedy was using this argument of their own inabilities as an excuse for federal involvement, then challenged him:

What would you recommend if we showed you that we had all the facilities, but not the money to aid the island?⁶⁰

Gifford, Senator Kennedy's aide, replied:

I think that if you made that demonstration, it would substantially alter the bill....⁶¹

but he didn't go any further.

Since the introduction of the first bill in April 1972, the towns on Martha's Vineyard had been stimulated into action and a flurry of zoning, subdivision and other local planning measures had been proposed and some passed. Therefore, in June 1972 the local selectmen challenged Dun Gifford again:

Are you aware of the efforts being made on the Island itself to improve things? Would the Senator be willing to let the care of the

⁶⁰ Meeting between Gifford and All-Island Selectmen's Association on Martha's Vineyard. Vineyard Gazette. April 28, 1972.

⁶¹ Ibid.

Island revert back to home-rule if it could be proved that we could handle things?

Mr. Rebello, Oak Bluffs, Selectman

Mr. Gifford replied there was a question in his mind as to whether a land-use program exists with the authority to carry out what you want to do.⁶²

In the introduction of May 1973 draft of the bill, Senator Kennedy acknowledged local efforts but claimed they were not adequate:

Much has already been accomplished on the islands, both to set aside large areas for conservation, and to adopt local land use controls. But it is now a race against the clock, and local conservation groups simply cannot raise adequate funds privately to preserve all which should be preserved. Furthermore, even if all the towns adopted the full range of measures available to them under State law - zoning, subdivision controls, building codes, and historic district measures - they would not have enough powers to control the burgeoning growth effectively.⁶³

From these statements it seems pretty clear that the Senator had a basic conviction of the inability of the localities to act and would not shift from this position. One wonders if the localities had basic zoning and subdivision controls by 1970 whether the Senator would have taken the same stance. Naturally this would probably have been determined by the effectiveness of

⁶² Vineyard Gazette. June 23, 1972. Meeting between the Selectmen and Gifford on the Island.

⁶³ 119 Cong. Rec. S.10,013 (1973.)

of local controls, but it is fair to say that local subdivision controls in effect would probably have offset the density of the giant subdivisions proposed in 1970-1972.

Expertise must not be confused with authority. They are two different things. The Federal government may have the expertise with which to aid localities but it does not necessarily follow that they have the right to extend their authority over localities. The controversy which lies at the heart of this issue is 'who controls the land'? - the federal government or the local people? The key to answering the question in the past has invariably been money. Lower levels of government would be willing to execute federally imposed conditions in order to receive federal aid. However, environmental considerations have been confusing the issue and it is unclear now how much federal authority localities have to accept along with federal funding.

It is one thing to say that localities do not have adequate resources and tools to act with, but to extend this statement to the state of Massachusetts (see Congressional finding earlier on page 34) is high-handed and erroneous. Senator Kennedy states:

The tools to control these subdivisions...simply do not exist, either because not all the towns have all the tools available under state law in force, and effect, or because, even if they did, the State laws themselves do not authorize extensive enough controls.⁶⁴

⁶⁴ 118 Cong. Rec. 25624.

He goes even further when he states:

...even new State legislation will not suffice to create the tools to do the job because of the limitations of the police⁶⁵ powers under the State Constitution and State laws.

This statement is simply wrong. It is clear that potential laws within the arsenal of weapons currently available to localities in Massachusetts - primarily zoning - are inadequate. But there is no obvious and compelling reason, legal or practical, why the state could not legislatively provide for virtually everything the federal Trust bill seeks to provide. Although the State did not take the initiative in promoting a mechanism to help the Islands, the fact that the State could protect lands within its borders is no argument for federal involvement. Yet the "ace" card which the federal government argues it has over the State, is the former's ability to spend large sums of money for outright acquisition of public lands and private rights. This acquisition, it is argued, is the only way to serve the Islands - regulation is not enough, and the State simply does not have this kind of money.

Yet within the definition of the federal role, there are two challenges which have to be met. Constitutionally, the federal government has only certain enumerated powers, and States have the major planning powers which they have enabled to the localities. The constitutional boundaries of federal jurisdiction must not be exceeded. Secondly, any federal land acquisition has to meet the 'taking' test, in the same way as lower levels of government. "Just compensation" must be paid by the

⁶⁵ 119 Cong. Rec. S10,013.

federal government. (See pp. 73-79 for discussion of these two points)

Paradoxically, despite these arguments used by Senator Kennedy, it was the State which stepped in to help the localities and effectively defined an acceptable mechanism with which they could control growth on Martha's Vineyard.

5. Nantucket Sound Islands Trust as a model of a National System of Island Trusts?

The Department of Interior's landmark study entitled "Islands of America"⁶⁶ proposed that a National System of Island Trusts be established. When Senator Kennedy proposed the formation of a Nantucket Sound Islands Trust his argument for national interest and federal involvement in these islands would have been greatly strengthened if the Nantucket Trust was proposed as a test or model of a National System of Island Trusts. The National System of Island Trusts was conceived to be of similar status as the National Wild and Scenic Rivers System, and the National Scenic Trails Systems. Under such circumstances, it would have been fairly easy to argue for the use of federal funds to protect the Nantucket Sound Islands if they were part of a larger National System.

However, Senator Kennedy used this argument sparingly, due to the lack of application and success elsewhere. The concept

⁶⁶ Ibid., supra note 1.

was only mentioned several times. At a public meeting on the island in April 1972 Gifford stated that the Trust bill was not a precedent for islands like Manhattan but "...for other islands, if it proves successful, just as Cape Cod National Seashore was the model for the twelve National Seashores."⁶⁷ Senator Kennedy stated that "the island trust concept will provide a model for legislation to preserve threatened areas elsewhere in the country."⁶⁸ This belief found similar expression in a New York Times editorial:

Only through the kind of cooperative federal, state and local action-public and private-envisioned in the broad outlines of the 'trust' idea can the nation's island heritage be saved from man-made disaster that now threatens.⁶⁹

However, in the report "Islands of America," where the the National System of Island Trusts was recommended, it also stated:

The Casco Bay Islands Trust, Maine, is recommended for immediate establishment as the first trust to demonstrate this new concept.⁷⁰

⁶⁷ Vineyard Gazette, April 28, 1972.

⁶⁸ 119 Cong. Rec. 10,017 (May 3, 1973).

⁶⁹ New York Times, July 26, 1972. p. 36.

⁷⁰ Ibid. supra note 1 at 8.

The report therefore pointedly noted that the Casco Bay Islands be the first test and model for the concept. The proposal however met with stiff resistance in Maine and consequently no action has been taken. One significant action occurred when Senator Ribicoff (D-Conn) introduced a bill to establish the Housatonic River Valley which develops the trust idea in the context of a river valley.⁷¹ There is at present interest in British Columbia to establish an Island Trust for the Gulf Islands in the Strait of Georgia.⁷² The lack of success of the proposal elsewhere, poses a stronger challenge to the Nantucket Sounds Trust to stand up as a model.

Yet, Senator Kennedy argued that the Nantucket Sound Islands would be a model in a broader sense. He argued that the pressures being felt on the Islands are similar to those that threaten "the Berkshires in the western Massachusetts area, the northern New England mountains, the Shenandoahs, the Upper Midwest, and both the coastline and mountains of California."⁷³ He alluded to efforts being made throughout the country at all levels, to institute new land use controls. New land use laws and controls adopted in Maine, Vermont, New York, Oregon, Hawaii and Florida "are important models for other States [and] laws on which key parts and

⁷¹ S.3633, 92nd Congress, 2nd Sess. (1972).

⁷² Proposal presented in a report to the legislature, see Votes and Proceedings of the Legislative Assembly of British Columbia. Sept. 24, 1973. p. 2-4.

⁷³ 119 Cong. Rec. S.10,013.

concepts of the Islands Trust Bill have been modelled." From this he argued that the island trust concept will similarly provide "a model for legislation to preserve threatened areas elsewhere in the country."⁷⁴

All these arguments are backed by a strong personal conviction by Senator Kennedy that the bill and the concepts contained within it provide the appropriate mechanisms to solve the Islands' dilemmas. However, the lack of progress of the bill towards enactment illustrates the lack of similar conviction by other public officials. Besides the doubts and questions with regard to the arguments Senator Kennedy used for strong federal involvement in the Islands, there are also serious questions about the provisions of the bill. Chapter IV, which follows, discusses the evolution of the concepts within the bill and their potential practical ramifications.

⁷⁴ Ibid.

CHAPTER IV

THE FEDERAL INSTRUMENT OF CONTROL: THE NANTUCKET SOUND ISLANDS TRUST
BILL

A. INTRODUCTION

When Senator Kennedy introduced the various versions of the Nantucket Sound Islands Trust bill, he put forward certain objectives of the legislation.

He stated that this bill is a comprehensive legislative effort designed specifically to blunt the threat now confronting the Islands, by providing an overall scheme for preservation and conservation. The legislation does not aim to make the Islands into a Federal reserve, but seeks to harness and channel local efforts, of both a public and private nature, to plan and implement the new controls. Senator Kennedy states that the bill is an innovation in Federal conservation and preservation, despite precedents for many of the bill's provisions. It is an innovation, he argues, because it makes a serious and concerted attempt to confront directly one of the most difficult problems facing the Nation today: the necessity of containing the spread of suburban tract development, and the commercial strip development which follows to areas of unique National value.

The aim of this chapter is to analyse the specific provisions of the Island Trust bill, as first put forward on April 11, 1972, as

S.3485⁷⁵ (Chapter V discusses the major revisions that were made in later drafts). In this chapter, the provisions of the original bill will be taken in turn and discussed, with analysis of their precedents and the legal and constitutional issues raised. This analysis is only partial, as later versions of the bill brought forward other issues, and these will be discussed in the later chapter. The chapter concludes with a discussion of the overall federally defined role in the original bill and the precedents for the position.

The discussion of the precedents and antecedents of the various provisions aids understanding the validity and relevance of these provisions. It also sheds further light on the feasibility and use of various planning issues and tools. The Islands Trust bill finds its direct precedent in the 1970 Department of Interior Study, "Islands of America". (Appendix 2(a) contains a copy of the draft Island Trust bill presented in that study.) The Harvard Law School Memo backed up the use of the model bill in the Nantucket Sound Islands. Senator Kennedy himself states that certain land use controls used in the states of New York, Vermont, and Maine influenced the formulation of the Trust Bill. In addition, existing Federal laws dealing with the preservation and conservation of natural areas were a major source of many of the bill's provisions. The provisions of the Trust Bill are discussed in turn below. All references of sections refer to S.3485.

⁷⁵ 117 Cong. Rec. 12038-12044.

B. THE NANTUCKET SOUND ISLANDS TRUST BILL: S.3485 (APRIL 11, 1972)

The major provisions of the bill are taken below, each with a statement of the provision, a discussion of the provision and then analysis of precedents and constitutional and other issues.

I. NANTUCKET SOUND ISLANDS TRUST (SECTION 2)

(i) PROVISIONS

In order to provide for the preservation and conservation of unique values in the national interest of the Islands, a Nantucket Sound Islands Trust is established. The Trust area initially includes the area generally known as the Nantucket Sound Islands (see page 9 , Chapter 1). The bill provides that the Secretary of the Interior may revise the boundaries of the Trust with approval of a majority of the Trust Commission.

(ii) PRECEDENTS

The precedent for this provision comes from the "Islands of America" report. However, in that report, Trusts were to be established by agreement between the Secretary of the Interior and the States involved. This recommendation was not followed and in S.3485, the Secretary of the Interior, backed by Congress will establish the Trust.

II. NANTUCKET SOUND ISLANDS TRUST COMMISSION (SECTION 3)

(1) PROVISIONS

1. A National Sound Islands Trust Commission is to be established to administer the Trust (Section 3(a)).
2. The twenty-one members of the Commission are to be appointed by the Secretary of the Interior for a three year term, as follows:

	<u>Members</u>
*one member from the Commonwealth of Massachusetts (appointment by recommendation from the Governor);	1 state
*one member from each of the counties of Barnstable, Nantucket and Dukes (appointments by recommendation of the governing bodies of such counties);	3 county
*one member appointed to represent each of the towns in Dukes County, and four from the town in Nantucket County (appointments by recommendation of the Boards of Selectmen of each town);	11 local (selectmen)
*four members representing private non-profit preservation or conservation groups or associations active in the Nantucket Sound Islands (appointments by recommendation of members of the Senate and House of Representatives from Massachusetts);	4 local conservation agencies
*a member designated by the Secretary of the Interior;	1 (?) (federal)
*a member designated by the Administrator of the Environmental Protection Agency or such other federal agency with the same responsibilities;	1 federal
	<hr/>
Total:	21 members

(section 3(b))

3. All members, except in the last two categories shall be either voting residents of Trust lands or taxpaying residents of such lands for at least five years (section 3(c)).
4. The Chairman of the Commission is to be elected by the membership, for a term of eighteen months (section 3(c)).
5. All members of the Commission shall serve without compensation, although the Secretary of the Interior is authorized to pay reasonable expenses (section 3(d)).
6. The Secretary or his delegate shall consult regularly with the Commission regarding the actions and duties of the Commission, including the acquisition of lands, the issuance of regulations specifying standards for zoning ordinances, and the administration of the Trust (section 3(e)).
7. The Commission shall make public an annual report relating to its activities, policies, standards, administration and recommendations (section 3(f)).

(ii) DISCUSSION

The principal mechanism of the bill is the establishment of an Island Trust Commission which will administer the Trust. The Commission, created by Federal Statute, is to a large extent made up of Island people. Senator Kennedy argues that because of the national interest in the Islands and because of the Federal funds involved, it is necessary that there is a Federal representative on the Commission. He argues the need for a State representative "because of the State interests and potential State funds involved in a comprehensive attempt to preserve the Islands."⁷⁶ The predicted availability of State funds is contradictory to the

⁷⁶ 119 Cong. Rec. S10,013.

earlier statement of the lack of state resources to cope with the threat on the Islands. The presence of State and Federal representatives, the Senator argues, assures representation of the public interest in the broadest sense. Although it is argued that all but three of the members are local people, this is counteracted by the fact that all these local members are to be appointed by the Secretary of the Interior, hence greatly reducing local control over membership.

It is expected that the Commission will work with the Secretary of the Interior on one hand, and with the local government and the State on the other, in combing out the preservation and conservation purposes of the bill. There was much controversy as to representation of non-resident taxpayers on the Commission (see Chapter V).

(iii) PRECEDENTS

The report "Islands of America" suggested that the Island Trusts be administered by a Trust Commission, whose membership would include federal, state, county and local officials. Specifically the bill (see Appendix 2(a)) proposed one federal member appointed by the Secretary of the Interior; a member appointed by the Governor of each participating State; and a member appointed by each local government body involved. The Kennedy bill follows this recommendation for broadest possible involvement in the Commissions. The report also

suggested that members should serve a six year term, except the member appointed by the Secretary, who shall serve at his pleasure. This recommendation was not followed.

III. CLASSIFICATION OF TRUST LANDS (SECTION 5)

(i) PROVISIONS

All land within the boundaries of the Trust shall be assigned to one of the four classifications of land. The Secretary of the Interior may alter the assignments within ninety days upon recommendation of the majority of the Commission (section 5(a)). In this version the assignments are described verbally (section 6). The classifications are as follows (section 5(b)):

Class A: Lands Forever Wild

These lands are to remain forever free of development or improvements. The Secretary of the Interior shall permit a right of use and occupancy to owners and their successors or assigns of existing development or improvements at the date of enactment. This right cannot last longer than a period of twenty-five years. Access to such lands is to be free and open and subject only to the regulations of the Commission approved by the Secretary.

Class B: Scenic Preservation Lands

These lands shall not be developed beyond their present intensity of use. Owners of such lands or improvements may transfer, sell, assign, or demise them on the date of enactment but may not construct further improvements on these lands. Reasonable replacement, repair and extension is permitted, subject to Commission regulations.

Class C: County Planned Lands

These lands are to remain within the jurisdiction of the County under zoning and land use planning ordinances provided that such ordinances are approved by the Commission and Secretary.

Class D: Town Planned Lands

These lands are to remain within the jurisdiction of the town in which they are located under land use planning and local ordinances provided such ordinances are approved by the Commission and Secretary.

(ii) DISCUSSION

Senator Kennedy argues that the land classifications follow logically from a study of existing land use patterns, and a comparison of those patterns with the natural features of the Islands.

Forever Wild lands are to be left wild. They include dunes, marshes, hilltops, promontories and watersheds, and these lands should never be built upon. Yet the bill allows a maximum twenty-five year right of use and occupancy period for existing developments or improvements. Scenic Preservation Lands, on the other hand, are those lands which are currently most threatened by the rush of suburbanized tract development. Generally, they are lands which lie between the built-up village centers and the dunes, marshes and hilltops. In Kennedy's words: "thousands of acres of these 'middle lands' have been subdivided into 1, 2, and 3 acre lots in the last five years (1968-1973)"⁷⁷ and it is argued that without the bill, they will ultimately be covered by houses. In 1973, the Vineyard Conservation Society estimated that there could be as many as 49,000 new houses built on the

⁷⁷ 119 Cong. Rec. S10,013.

Vineyard under the then existing local ordinances. Owners of such lands have greater flexibility to use their lands but no further improvements are permitted.

The County Planned Lands class relates specially to the lands in Dukes County under County control. Senator Kennedy seems to have inserted this provision in order to strengthen the County role which in the past had existed as a fact but had limited powers. Town Planned Lands, on the other hand, are the village centers and contiguous areas. These lands are to be managed under the jurisdiction of local zoning and planning ordinances, provided these are approved by the Secretary of the Interior and the Commission. These are the only areas under some form of direct local control.

Despite definition of the boundaries in the text of the bill, Senator Kennedy saw the description and lines as illustrative and to be the basis of refinement. As he emphasized and reemphasized:

The boundary lines of each of the classifications ... are not intended to be final or dispositive. They are instead intended to be illustrative. I hope they stimulate a careful and reasoned discussion, of all parties of interest, and these provide a useful framework for the future investigation which is necessary before the exact legal description of the boundary lines is made final.⁷⁸

⁷⁸ Ibid.

He saw an important role of local discussion whereby the boundaries would be refined. The boundaries as defined in the initial version reduced the town boundaries to the currently well-developed centers, and did not acknowledge the town of Chilmark.

(iii) PRECEDENTS - THE FEDERAL REGULATION OF PRIVATE LANDS

The division of Island lands into categories controlling density of development has been attacked by critics of the Trust bill as Federal zoning and therefore, since the Federal government possesses no power to zone on private lands, as unconstitutional. In the 1970 Sleeping Bear Dunes National Lakeshore Act,⁷⁹ Congress required that public and private land be divided into three quite distinct categories. In category I, public use and development areas, the Secretary of the Interior was authorized to acquire fee or less-than-fee title to all or any part of the land.⁸⁰ In category II, environmental conservation areas, the Secretary could acquire a fee title only in these parcels he so designated within 150 days of the bill's enactment. Thereafter, he could only acquire a less-than-fee title "to insure the continued conservation and preservation of the environmental quality of the lakeshore" if the owners of the

⁷⁹ 16 U.S.C. § 460x -1 to -14 (1970).

⁸⁰ Ibid § 460x-2(b).

parcels would not agree to abide by use and development regulations established by the Secretary for their parcels.⁸¹

In category III, private use and development areas, the Secretary was restricted in a manner similar to category II, except that his acquisition of less-than-fee interests was limited to the purpose of "protecting lands designated for acquisition."⁸²

Legislative precedent for federal regulation of private land similarly exists. In the Cape Cod National Seashore Act,⁸³ the Secretary's power to acquire property by eminent domain was suspended "with respect to all improved property" within the Seashore so long as the property was subject to "a duly adopted, valid zoning bylaw approved by the Secretary."⁸⁴ The legislation directed the Secretary to "issue regulations specifying standards for approval by him of zoning bylaws."⁸⁵ The 1965 Whiskeytown-Shasta-Trinity (California) National Recreation Area Act elaborated the Cape Cod formula by specifying that the Secretary's regulations should

81 Ibid § 460x - 2(f).

82 Ibid § 460x - 2(e).

83 Ibid § 459b.

84 Ibid § 459b - 3(b).

85 Ibid § 459 - 4(a).

have the object of (1) prohibiting new commercial or industrial uses...; (2) promoting the protection and development of properties...by means of use, acreage, frontage, setback, density, height, or other requirements; and (3) providing that the... Secretary shall receive notice of any variance granted under, or any exception made to, the application of the zoning ordinance.⁸⁶

In the 1970 King Range (California) Conservation Area Act, it required the Secretary to prepare a "comprehensive, balanced and coordinated plan of land use, development and management of the Area" pursuant to a detailed set of guidelines and "to issue such regulations and to do such other things as the Secretary deems necessary and desirable to carry out" the Act.⁸⁷ Nowhere in the Act is the word zoning mentioned, and private owners of improved property are exempt from the Secretary's eminent domain powers so long as he finds the uses of the property consistent with the Act's purposes. These provisions were pushed further in the 1972 Sawtooth (Idaho) National Recreation Area Act, where

The Secretary shall make and publish regulations setting standards for the use, subdivision and development of privately owned property within the boundaries of the recreation area. Such regulations... shall have the object of assuring... the highest and best private use [and]... shall be as detailed and specific as is reasonably required.⁸⁸

⁸⁶Ibid § 460q - 1(e).

⁸⁷Ibid § 460y - 1(b).

⁸⁸Ibid § 460aa - 3(a) (Supp. II, 1972).

In the Cape Cod formula, the Secretary set standards for zoning ordinances, which the towns then adopted. A gradual evolution led to the Sawtooth formula, in which the Secretary himself drew up the regulations. The Nantucket Sound Islands bill goes one step further by utilizing compensable land use regulations.

(iv) PRECEDENTS - THE BASIS OF FEDERAL POWERS AND INTERESTS TO ESTABLISH NATIONAL PARKS USING EMINENT DOMAIN

Nowhere in Article 1, Section 8 of the U.S. Constitution, which enumerates the powers of the national government, is there any mention of a federal role in parklands or mention of a federal power of eminent domain. Yet the federal government is indisputably in the land use business - it now owns one-third of the nation's land, acquires and disposes of land regularly and often uses the power of eminent domain in its acquisition. Despite the lack of explicit constitutional authority, there is a large body of Supreme Court case law upholding a federal power of eminent domain.

Most of the early cases considered special circumstances and did not reach the root constitutional issue. A statute permitting establishment of Rock Creek Park in the District of Columbia, for example, was upheld on the grounds of federal municipal jurisdiction over the District.⁸⁹ Another federal

⁸⁹ Shoemaker v. United States, 147 U.S. 282 (1893).

statute, establishing the park at the Gettysburg battlefield, was upheld on the basis of the war powers and the power "granted Congress by the Constitution for the purpose of protecting and preserving the whole country."⁹⁰

In 1916 Congress enacted the enabling legislation of the National Park Service. It was declared that the purpose of the Park Service is to "promote and regulate the use of the Federal areas known as national parks, monuments, and reservations..."⁹¹ The legislation collected all existing park laws into one locus for administrative purposes. Most of the earlier parks were gifts or reclassifications of other federal lands. In the 1930's other forms of park acquisition came into use and questions were raised as to the basis of such authority but many courts considered that the authority was pretty clear. One court in upholding federal condemnation of land for a park said: "The right of Government to maintain a system of national parks has never been challenged..."⁹² In a case involving Yosemite National Park, a lower court declared that the federal government "could tax to raise money to buy parks under the 'general welfare' clause. Parks and recreation facilities clearly provide for the general welfare." The Supreme Court involved in this case said that "[n]o question is raised as to the authority to

⁹⁰ United States v. Gettysburg Elec. Ry., 160 U.S. 668-682 (1896).

⁹¹ 16 U.S.C. § 1 (1970).

⁹² United States V. Dieckmann, 101 F.2d 421, 424 (7th cir. 1939).

acquire land or provide for national parks."⁹³

The application of the general welfare clause to the federal government was conclusively decided in 1936 in United States v. Butler.⁹⁴ The Court declared that when the Constitution said "the Congress shall have the Power to lay and collect taxes...to...provide for the...general welfare,"⁹⁵ it meant that this power "is not limited by the direct grants of legislative power found in the Constitution."⁹⁶ It was thus proper for Congress to raise taxes and to appropriate them, under the general welfare clause, for a nonenumerated national purpose. The general welfare clause is therefore flexible to changing times.

The employment of eminent domain for park acquisition was held valid under the public use doctrine in Rindge Co. v. County of Los Angeles.⁹⁷ The Supreme Court upheld a county eminent domain taking for a scenic coastal highway, and stated:

Public uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment.... Air, exercise and recreation are important to the general health and welfare.⁹⁸

⁹³ Yosemite Park & Curry Co. v. Collins, 20F. Supp. 1009, 1013 (N.D. Cal. 1937).

⁹⁴ 297 U.S. 1 (1936).

⁹⁵ U.S. Constitution article I § 8.

⁹⁶ 297 U.S. at 66.

⁹⁷ 262 U.S. 700 (1923).

⁹⁸ Ibid at 707-708.

The Court cited the Rock Creek Park (Shoemaker) case as authority for the proposition that parks are legitimate public purposes.⁹⁹ Since then both Shoemaker and Rindge have been repeatedly cited in cases challenging the use of eminent domain for park purposes. In upholding federal condemnation of lands for Cape Hatteras National Seashore, one lower federal court, concluded that "it is nevertheless well settled that the condemnation of property for park purposes is a taking for a public use and is constitutional."¹⁰⁰

The Supreme Court has thus woven a tight fabric which now clothes federal park activities. It is now a solid part of the legal heritage that the federal government has ample powers to acquire and maintain parks, independent of the states. This power has as its necessary corollary the power of eminent domain, and the source of power is the general welfare clause.

(v) PRECEDENTS - THE SPECIFIC LAND CLASSIFICATIONS USED

The Harvard Law School Memo was the direct precedent of the Kennedy Bill classifications.

One of the recommendations of the Harvard Law School Memo was that certain unique topographical features, such as

⁹⁹ Ibid at 708.

¹⁰⁰ United States v. Southerly Portion of Bodie Island, N.C.
114 F. Supp. 427, 428 (E.D.N.C. 1953).

bluffs, moors, wetlands, hillocks, ponds, dunes, and promontories should be preserved in a forever wild or natural state. It continued: "while this would be the most severe of the provisions, as it would prohibit any development in the designated areas, it is essential to the Islands' preservation."¹⁰¹ The memo added that as most of these areas are currently without development of any kind, hardship would be minimal. This recommendation was directly incorporated into Class A: Lands Forever Wild.

The memo went on to recommend that public enjoyment of these areas should be ensured by providing for hiking trails and other access. With regard to land acquisition in these areas, the memo stated: "The extent of public control necessary to administer these areas would make it desirable that they be acquired in full fee."¹⁰² The cost of acquisition of development rights would approach the cost of full fee acquisition, and the extent of contemplated public restrictions would make it unsuitable for private ownership, the memo continued. Any existing residential use in these areas should be guaranteed to the present owner for either a

¹⁰¹ 117 Cong. Rec. 40886 (1972).

¹⁰² Ibid at 40887.

specified term of years, or his life or the life of a survivor, and at the expiration of this term, the residential use would end. These recommendations were directly incorporated into the first version of the bill.

The Memo also recommended that some expansion of residential and commercial uses in certain areas should be allowed but restricted to certain centers of gravity. Development in these areas should be in accordance with comprehensive planning, and zoning would be at the discretion and under the control of local authorities. This proposal was incorporated in Class C: Town Planned Lands.

The Harvard Memo recommended that those areas not designated for residential or commercial development (Class C: Town Planned Lands), or for preservation in a forever wild or natural state (Class A: Forever Wild Lands) should provide for continuing uses but further development should be restricted. "This allows for preservation of much of the Island's character, keeps down densities, and maintains the integrity of local control."¹⁰³ This latter category became known as Class B: Scenic Preservation Lands. The memo recommended that restrictions should be to the extent necessary to complement the overall purposes of conservation and public access, and full fee

¹⁰³ Ibid at 40886.

acquisition was unnecessary in these areas. These recommendations were included in the Kennedy bill.

IV. ACQUISITION OF LANDS (SECTIONS 7,8)

(i) PROVISIONS

1. Within the Trust, the Secretary may acquire without the owner's consent, private land, waters or interests at fair market value which he designates as being necessary for the purposes of the Act provided that these are cases where the Secretary determines that acquisition of lesser-than-fee would not be possible to carry out the purposes of the Act (section 7(a)).
2. The remaining privately owned property not so designated cannot be acquired by the Secretary without the consent of owners for one year, or for so long as the appropriate local agency has adopted a valid planning ordinance, which has been approved by the Secretary.
3. In order to execute the above, the Secretary will issue regulations specifying standards to be approved by the majority of the Commission before issuance (section 7(b)). The standards will have the object of regulating new commercial, industrial and other uses of such property, and secondly, promoting the preservation and conservation of the property, via design requirements including setback and frontage controls and removing soil.
4. Following the issuance of such regulations, the Secretary and Commission shall approve any planning or zoning ordinance and amendments to them submitted to them to assure compliance with the standards (section 7(c)).
5. The Secretary requires to receive notice of any variance or exception granted under the approved ordinances (section 7(d)).
6. Where the Secretary's authority to acquire a property by condemnation is suspended, and then the property becomes an exception of an ordinance or is subject to any variance, exception or use that fails to conform in any standard or regulations, then the Secretary's authority to acquire such property by condemnation is terminated (section 7(e)). This is provided that the owner has ninety days notice (section 7(f)) and the Secretary shall furnish upon request a certificate to the effect that the Secretary's power to acquire by

- condemnation is terminated.
7. The Secretary is also authorized to acquire lands, waters and interests by donation, negotiated purchase with donated or appropriated or borrowed funds, transfer, exchange (section 8(a)).
 8. Except for the lands the Secretary determines are needed to carry out the purposes of the Act, any owner of improved property on the date of its designation for acquisition may elect, as a condition of such acquisition, to retain a right of use and occupancy of the improved property for non-commercial residential and agricultural purposes, for a period of twenty-five years or at the death of the owner or his spouse, whichever occurs later. The Secretary shall then pay to the owner the fair market value of the property on the date of its acquisition less the fair market value on such date of any right retained by the owner. Any retained right of use and occupancy may be transferred or assigned subject to the provisions above. When the Secretary determines that the property, or any part of it, has ceased to be used for noncommercial residential purposes, he may terminate the right of use and occupancy, upon tendering to the holder the amount of fair market value unexpired (section 8(b)).
 9. "Improved property" shall mean the construction of a one-family dwelling, begun before April 11, 1972, together with surrounding land and structures reasonably necessary for the enjoyment of the property (section 8(c)).
 10. Any property or interests within the Trust, which are owned by a State or any political subdivision may be acquired only by donation (section 8(d)).
 11. Any Federal property located within the Trust may upon agreement with the appropriate agencies be transferred to the Secretary for administration.

(ii) DISCUSSIONS

The central concept behind the Island Trust is that there be a body created to hold lands "in trust" for future generations. It is not necessary that this body own the lands outright; nor is it necessary that the body own all

the lands. It is sufficient that the body has the authority to purchase or otherwise obtain easements and other restrictions on these lands threatened by the type of development which would destroy the unique island values.

Senator Kennedy argues that the Trust bill approach will minimize the amount of land to be acquired by eminent domain. He argues that Lands Forever Wild are only five percent of the Trust area and most of these lands have already been acquired by conservation societies. As a result the extent of direct fee acquisition is expected to be small.

The bill states that full and fair market value must be paid for any purchase of the whole or a lesser interest on any land. Since 1970, all agencies of the Federal Government have been subject to the provisions of the Relocation Assistance and Real Property Acquisition Policies Act. This law, without qualification, requires prompt appraisals and payments, and mandates fair market valuations.

(iii) PRECEDENTS

A series of national surveys and studies have consistently recommended public land acquisition of seashore and island areas, in order to protect public recreation.¹⁰⁴ The Harvard Law School Memo considered that in the case of the Islands, the

¹⁰⁴ See Outdoor Recreation Resources Review Commission, Department of Interior. Outdoor Recreation for America. 1962; and National Commission on Marine Science, Engineering and Resources. Our Nation and the Sea. 1969.

National Seashore scale of land acquisition was not appropriate.¹⁰⁵
The Memo suggested that land owned by state or local government should not be purchased or restricted without consent of the governmental body. It also recommended that structures already completed or under construction on the date of enactment, should be considered "existing uses." These recommendations were included in the Trust bill. "Islands of America" recommended that land acquisition should be limited largely to undeveloped areas. Whenever less than fee acquisition, such as scenic easements, can provide adequate protection then such action is preferred. The report also recommended that federal lands in the trust area be transferred to the Commission where possible. However, the report restricted the use of the Commission's regulatory or acquisition authority until it had been demonstrated that the local government would not follow the comprehensive plan or that they lack the powers to do ^{so} under State and local law (See Appendix 2(a)).

In the Department of Interior report the Commissions would develop and maintain comprehensive plans for the islands with the objectives of preserving the unique character of the islands establishing public recreation and providing for orderly development. The local governments would then be

¹⁰⁵ 117 Cong. Rec. 40886.

encouraged to adopt local plans and ordinances to execute the Commission's plan. Under this report, therefore, the state and local governments have the major action role. It is only when they fail to take the action recommended, would the Commissions have the authority to adopt and "enforce adequate master plans or zoning ordinances, acquire land and facilities, develop and administer the Island Trusts, and take all action necessary to fulfill the purposes of the Island Trusts." In this respect States will effectively grant zoning powers to the Commission. The report recommends a major role for the State in developing recreation plans, acquiring lands and instituting statewide zones. In contrast to S. 3485, state and local governments were defined to play a major role in acquiring privately owned property.

Senator Kennedy therefore adopted a bolder approach than that recommended in the Department of Interior study, vesting full responsibility for carrying out the resource protection mandate directly in the Commission. The bill does ensure that local ordinances do promote the objectives of the Commission.

V. PRIVATE NONPROFIT ORGANIZATIONS (SECTION 13)

(i) PROVISIONS

1. The Secretary's authority to acquire lands by condemnation shall be suspended when:
 - (i) lands or interests are in the ownership of private nonprofit conservation, preservation, historic or other organizations or associations, and the restrictions against development meet the Secretary's standards,
 - (ii) twenty-four months after enactment, the lands or interests are irrevocably committed to be sold, donated, demised or otherwise transferred to such organizations or associations (section 13(a)).
2. The Secretary is authorized to provide technical assistance to State and local governments, private organizations and associations, and individuals with respect to the preservation and conservation of Trust lands (section 13(b)).
3. Only bona-fide and general-purpose organizations will be included in these provisions (section 13(c)).

(ii) DISCUSSION

These are important provisions concerning private nonprofit organizations and associations. The main purpose of these provisions is to encourage preservation and conservation by voluntary private action, where at all possible. Lands owned or committed to conservation organizations are exempt from acquisition by the Secretary of the Interior. The bill therefore recognizes the important preservation and conservation work of local, private organizations and associations. Senator Kennedy believes that the future plans of these organizations are carefully tailored to a realistic appraisal of the Islands'

real needs, and so consequently the bill contains a mechanism by which their role is greatly amplified.

(iii) PRECEDENTS

The provisions to stimulate private stewardship of land areas find direct antecedents in existing federal legislation. The suspension of acquisition authority over lands for a specified time to permit their donation to nonprofit organizations is derived from the legislation establishing the Cumberland Island National Seashore in Georgia.¹⁰⁶ It also has historical precedent in Massachusetts, for example, the Sudbury River in Lexington and Concord.

The Harvard Law School Memo stated that it was essential to any approach to the preservation of the unique characteristics of the Nantucket Sound Islands that the existing areas of preservation and conservation held by private nonprofit organizations should not be disturbed or restricted further. The Department of the Interior study also recognized the vital role of these agencies and recommended that private nonprofit groups take a major role in the acquisition of Island lands.

¹⁰⁶ U.S.C. § 459i - 3(d)(1)(Supp. II, 1972).

VI. FREEZE DATE (SECTION 16)

(1) PROVISIONS

1. Beginning on April 11, 1972, no construction of any improvement, for whatever purpose, shall be permitted to commence on Forever Wild lands (section 16(a)).
2. Construction of improvements shall be permitted on County (Town) (Scenic Preservation Lands) Planned Lands only upon the granting of specific approval by the covering body of the County (town) (appropriate body) after a showing of need (section 16(a)).
3. In a showing of hardship, the Commission shall on the basis of rules and regulations developed and approved by the Secretary, award fair recompense (section 16(b)).

(ii) DISCUSSIONS

When Senator Kennedy introduced the bill, he stated:

To prevent the uncontrolled land speculation which inevitably occurs when an undertaking as this is under consideration by Congress, a freeze on all building is an inherent and vital part of the bill¹⁰⁷

No improvement or construction of any kind is allowed on Forever Wild lands. It is the intent of the bill, that if construction of new improvement occurs after enactment then the Secretary of the Interior and the Commission may require removal of the improvements at the owners expense. Construction of new improvements are permitted on the other lands, but only after the demonstration of need.

¹⁰⁷ 118 Cong. Rec. 12037.

Although the freeze extends to all new construction of any kind, the Senator states that it will prove no burden for needed public projects such as schools and hospitals - the need for which is self-evident and approval would be readily forthcoming. The importance of this section of the bill is that it will shift the burden of proof to those seeking to build, where it belongs, instead of placing it upon those who seek to limit unchecked building, construction and subdivision.

The provision authorizing the appropriate governing body to institute a procedure to slow down the runaway rate of growth, based upon a showing of "need" for the construction of improvement, is an interim measure. It is designed to assist the towns and other local governing bodies during the first introduction of the bill on April 11, 1972 and its eventual enactment. However it was left to the discretion of the body to institute such a procedure, but it was designed to offset the building boom that would result from the introduction of the bill.

All construction actually underway or contracted for on April 11, 1972, however, may be completed without appearance before an approval board. In situations in which permission to build or develop is denied the Secretary and the Commission will be authorized to compensate those to whom such permission has been denied. Compensation will be an amount equal to the

value of the development rights in the property in question, plus a reasonable amount for interest to the time of final enactment of the legislation.

(iii) PRECEDENTS

Dun Gifford¹⁰⁸ referred to the Cape Cod National Seashore as a precedent for the freeze provision. He said it has been usual in such projects to require that, after filing or publishing of such a bill, the one who proceeds in violation of its terms does so at his own risk. If the bill then becomes law, he must remove the violation at his own expense. The cut-off date, he remarked, fulfills the requirement of due process. He remarked the Kennedy bill was "a fairer way to do it" where there is a provision for establishing need. This places the onus on public officials to act in good faith. The freeze is also similar to moratoriums imposed when zoning codes are first published and subject their final enactment.

The Harvard Law School Memo however recommended that "it is unrealistic to freeze, at a given point in time, all development in all parts of the Islands."¹⁰⁹ This is moderated

¹⁰⁸ Vineyard Gazette. April 28, 1972.

¹⁰⁹ 117 Cong. Rec. 40886.

in the bill by requiring a showing of need in certain areas.

(iv) CONSTITUTIONALITY OF THE FREEZE PROVISION

When the bill was made public there were questions raised as to the legality of the freeze. Nine days after the bill was introduced, Mr. Erickson, Assistant Attorney General in the Justice Department's Office of Legal Counsel, issued a statement on the constitutionality of the freeze provision in the Nantucket Sound Islands bill. It concluded¹¹⁰ that the construction freeze would be a taking without compensation in violation of the "just compensation" clause of the Fifth Amendment if it required property owners to remove improvements constructed after April 11, 1972 without compensating them for the loss incurred. However Mr. Erickson's opinion was only a preliminary finding and not binding. Mr. Dun Gifford who drafted the bill, replied: "There is no intent anywhere in the bill to take anything from anyone without compensation."

(v) EDGARTOWN'S REACTION TO THE FREEZE

On June 9, 1972, after the issuance of the first bill, it was reported¹¹¹ that building permits in the town of Edgartown

¹¹⁰ Vineyard Gazette, April 21, 1972. p. 1.

¹¹¹ Vineyard Gazette, June 9, 1972. p. 15.

were to be issued to anyone meeting local and state health and zoning laws, despite the freeze. This was in keeping with the ruling of the town counsel, Richard J. McCarron, that the "freeze" imposed on building by the Islands Trust bill will have no bearing on the procedure used by the Board of Selectmen. Mr. McCarron recommended that in order for the Board to require a demonstration of need from an applicant before issuing him a permit, a change in the existing town by-laws would be necessary. In part, the ruling which the Selectmen would abide by, is as follows:

It is...my opinion that after April 11, 1972, that if a proper application for a building permit, conforming with the existing zoning by-laws is submitted to the selectmen, and the necessary health and sanitation permits have been obtained, the selectmen must issue a permit... "freeze dates" can have no binding effect unless the legislation is enacted. Therefore, in view of the possibility of this bill being enacted and the possibility that the "freeze dates" may thereafter have retroactive effect on the land, I think it is advisable, but not mandatory, that you inform each applicant to make himself aware of the provisions of Section 16 A, and make his own determination thereon...

For the selectmen to adopt rules defining need and making it a requirement that an applicant show compliance with these rules prior to the granting of a building permit would be, I believe, a change in the existing zoning by-law and a clear violation of the Zoning Enabling Act which states, "The zoning by-laws may be adopted and from time to time be changed by amendment, addition, and repeal, but only in the manner hereinafter provided." Mass. Gen. Laws Ch. 40A, No. 6.

As you know, the manner provided in that section calls for notice and hearing by the

planning board, and a favorable two-thirds vote at a town meeting. A zoning by-law may not be changed or more strict requirements adopted in any other manner.¹¹²

(vi) ONE EFFECT OF DISREGARDING THE FREEZE ON THE VINEYARD -
A BUILDING BOOM

The other towns on the Vineyard, like Edgartown, disregarded this freeze provision and did not institute restrictions on the granting of building permits. As a result by mid-June 1972, a building boom on the Island erupted. Appendix 1(c) shows building permit figures for the down-island towns through to 1974. 1972 and 1973 were the peak years of the building boom - thereafter, the introduction of zoning, subdivision and other planning controls by the Island towns offset this boom. Typical comments at the time included:

The bill has precipitated wild building. We've never had construction like this. Every developer is rushing to do something else... If this situation continues for another six years, there won't be anything left to protect. Nothing will happen but development, development, development.¹¹³

Mr. Lewis King, Chilmark Selectman
June 1972

¹¹² Ibid.

¹¹³ Vineyard Gazette, June 23, 1972.

On Martha's Vineyard, announcement of the legislation in April has led to an Island-wide building boom, despite a freeze date of April 11, 1972 that will carry over if the bill is refiled in the coming years. This has not been true on Nantucket where there is only one board of Selectmen and one set of county commissioners who have refused building permits on wild lands and have limited permits on Scenic Preservation Lands since May. Similar restrictions were approved by Selectmen of West Tisbury last week and may catch on elsewhere as residents of Martha's Vineyard realize that the legislation is designed to preserve a way of life they love and cannot defend on their own.¹¹⁴

VII. NEW EMPLOYMENT OPPORTUNITIES (SECTION 15)

(1) PROVISIONS

1. The Secretary is directed to examine the Trust area for opportunities to experiment with, and to encourage development of agriculture of all kinds. Funds appropriated to the Department of Interior may be used for this purpose (section 15(a)).
2. The Secretary, in consultation and cooperation with the Secretary of Labour, shall investigate and where appropriate establish training and retraining programs suitable for residents of Trust lands (section 15(b)).

(ii) DISCUSSION

Senator Kennedy believes that legislation can be designed which will both preserve and conserve the natural beauty of the Islands, and at the same time maintain a sound economic base for the Islands. They are not incompatible goals. Yet,

¹¹⁴ Boston Globe, October 9, 1972.

as the Islands are not entirely wild but are partially developed with bustling towns, legislation must be more than purely preservationist. He argues: "It will not be good enough, however, to preserve the Island if local economies falter..."¹¹⁵

The Senator also believes that there are new alternative employment opportunities on the Islands which are presently untapped and hold great promise for the future. These include aquaculture (fish and shellfish farming) and viticulture (the cultivation of grapes for wine). The bill directs the Secretary of the Interior, working where appropriate with the Secretary of Labour, to examine and develop programs of this type, and others as well, to insure the long-range viability of the Islands' economies.

(iii) THE FREEZE AND ECONOMIC OPPORTUNITIES

When Senator Kennedy introduced the freeze provision, he quickly added that the freeze must be formulated in such a way as not to produce an economic hardship for the working men of the Islands. Furthermore, where it could be shown that an individual's livelihood had been seriously jeopardized, as in the case of the small island builder who may no longer have an

¹¹⁵ 119 Cong. Rec. S10,013.

opportunity to construct sufficient new homes to maintain his business, the Secretary and the Commission are to provide financial assistance and training for reemployment in an allied or similar trade on the Island in question. Such obligation shall extend for a period of four years. Kennedy argues that this proposal insures economic protection for those who have the most to lose, while at the same time providing a concrete incentive for both the Commission and the Islands' population to develop specific alternatives to present economies. All this holds an implicit notion that the bill, under the freeze provision will constrict construction and hence the number of jobs in the construction trades. As discussed above, though, the disregard of the freeze provisions by the towns on the Vineyard, gave rise to a building boom and created an excess of construction jobs.

VIII. BEACHES (SECTION 10)

(1) PROVISIONS

1. All beaches lands in the Trust boundaries are to designated to Class A lands, except where otherwise classified by other provisions (section 10(a)).
2. "Beach land" is defined as the wet and dry sand area lying between the mean low water line and the visible line of upland vegetation (section 10(b)).

(ii) DISCUSSION

The bill provides that all beaches will be open and free for public use. The bill defines beaches as the dry sand areas between the mean high water tide mark and the visible line of upland vegetation. In Massachusetts ownership extends to the mean low tide mark, but there is no accepted public right of way between the high and low tide, known as the foreshore. Therefore, under Massachusetts law, all beaches do not have open access whether under private or public ownership. From recent court cases elsewhere, it is generally being established that the dry sand areas as well as foreshores should have a public right of access.¹¹⁶

The Harvard Law School Memo considered it essential that there is public access to beaches, moors, forests and other areas of scenic recreational value. Good conservation involves concentration of intensive uses in designated areas, while preserving large stretches in their pristine or natural states. The Memo further recommended: "To provide public access and assure preservation, all beaches should be acquired in full fee."¹¹⁷ Beaches should be administered in such a way to prevent harm from high-intensity public use. The memo also suggested that it might

¹¹⁶ See State ex rel. Thornton v. Hay, 1969, Supreme Court of Oregon.

¹¹⁷ 117 Cong. Rec. 40887.

be necessary to limit the development uses of privately-held areas bordering publicly-owned beaches, in order to ensure the scenic value of the beaches and provide adequate public access to them.

IX. TRANSPORTATION AND GENERAL USES (SECTION 12)

(i) PROVISIONS

1. The Secretary shall survey access to Trust lands, by public and private air and water carriers, and shall make recommendations to Congress and the Governor of Massachusetts, as deemed consistent with the preservation and conservation purposes (section 12(a)).
2. No plan for the convenience of visitors to Trust lands shall be undertaken which would be incompatible with the preservation and conservation objectives. Yet the Secretary may provide facilities for public enjoyment and recreation as public transportation systems, trails, observation points and exhibits. Also he may develop portions of Trust lands for public uses including camping, swimming, boating, sailing, the appreciation of historic sites and natural features (section 12(b)).
3. In any plan for visitors, the Secretary shall not unreasonably diminish for its owners or occupants the value or enjoyment of any improved property within the Trust lands (section 12(c)).

(ii) DISCUSSION

These provisions call for a survey of transportation on the Islands and recommendations "consistent with the preservation and conservation purposes" of the bill. It is unclear whether limitations to access would be acceptable under these provisions as written. From the great escalation in the

traffic to the Islands in recent years, it is readily apparent that if this rate of growth continues over any extended period, the character of the Islands will be seriously affected.

X. OTHER PROVISIONS

EROSION CONTROL (SECTION 9)

1. The Secretary of the Interior and the Secretary of the Army shall cooperate in the study and formulation of plans for beach and shoreline control projects on the Nantucket Sound Islands, especially those areas immediately threatened (9(a)).
2. Any protective works for such control, undertaken by the Chief of Engineers, Department of the Army, shall be carried out in accordance with a plan approved by the Secretary (9(a)).
3. The Secretary shall undertake a program of dune and headland erosion control, especially those in need of immediate action (9(b)).

ADMINISTRATIVE PROVISIONS (SECTION 11)

1. The Secretary shall administer the Trust for the prime motive of preserving and conserving the natural resources. Plans for the convenience of visitors shall not threaten the primary purpose (11(a)).
2. The Secretary may utilize any statutory authority available to him, for the conservation, preservation and management of natural resources to the extent he finds such authority will further the purposes of the Act (11(b)).
3. The Secretary shall permit hunting, fishing, and trapping, on lands and waters under his jurisdiction in accordance with the laws of the United States and the Commonwealth of Massachusetts. The Secretary may designate zones where, and establish periods when, no hunting, fishing or trapping will be permitted for reasons of public safety, fish or wildlife management, administration, or public use and enjoyment. Except in emergencies these regulations will

be issued only after consultation with the appropriate state agency (11(c)).

POLLUTION (SECTION 14)

The Secretary shall cooperate with appropriate State and local agencies to provide safeguards against pollution of the water in and around Trust lands and against unnecessary impairment of scenery.

APPROPRIATIONS (SECTION 17)

Appropriations are not to exceed twenty million dollars for the acquisition of lands and interest and five million dollars for development.

C. CONCLUSION: THE FEDERAL ROLE

POSITION

The first version of the Islands Trust bill incorporates a very strong federal role. The Secretary of the Interior has control over most matters, being the administrator of the bill. Although he has in certain matters to consult with the Commission and obtain a majority vote, the Secretary takes the lead in practically all matters. The Secretary will work with the Commission on the setting of standards and policies. The Secretary controls financing, policing and maintenance of Trust lands. He is charged with approving land acquisition as well as local planning ordinances. The Army Engineers will move in to rebuild eroded dunes; the Islands will be covered with Interior designed trails and restrooms; and federal maintenance crews will enter and roam the Islands, garaging their vehicles on once private property.

BUT IT IS ARGUED THIS POSITION IS REALLY A PARTNERSHIP

Kennedy stresses that the most important concept of the bill is that of partnership between and among all levels of government and private resources. The Congressional intent of the original bill included:

The Congress further finds that it is in the best interests of the citizens of the United States to...encourage maximum complementary action by State and local governments and private individuals, groups, organizations and associations.¹¹⁸

He goes on to state:

The key to preserving the truly unique among these threatened resources is a partnership which provides Federal and State funds and powers, in the framework of guidelines, to be administered by local island people. Such a partnership is in fact an expansion of local powers, but an expansion realistically consistent with guidelines reflecting the national interest in preserving the islands. I do not believe that an effective preservation program can be designed without this three-level partnership.¹¹⁹

This partnership is explained in another way. Despite the earlier off hand rejection by the Senator of local and state tools to deal with the Islands' problem, he later states:

...it has become plain that Federal legislation, to be successful, must wherever possible be fitted together with whatever State and local laws are available to the people of the islands, or may become available in the future. It is this sharing of powers and sharing of responsibilities which marks one principal innovative feature of this bill, and which I believe augurs well for its operational success.¹²⁰

118 118 Cong. Rec. 12033.

119 119 Cong. Rec. S10,013.

120 Ibid.

He claims that this kind of partnership between Federal, State and local governments is essential to effective and successful preservation and conservation of the Islands. The partnership involves the sharing of authority between levels of government, in which each partner contributes its most appropriate resources. However as written this is merely lip service to the State and hides the overwhelming dominance of the Secretary of the Interior. This concept of partnership between the various levels of government and private individuals and groups is embraced by the National Park Service and its actions, for example the administration of National Seashore and Recreation Areas, but it is doubtful whether it is a "true" one.

The arguments and precedents discussed in this chapter are the grounds on which Senator Kennedy justified the role of the federal government as he defined it in the Islands Trust bill. It is doubtful that when he introduced the bill in April 1972 he was prepared for the controversy which ensued and modified the position he had defined. The mechanisms of change and substantive amendments are discussed in Chapter V.

CHAPTER V

THE MECHANISMS AND PROCESS OF AMENDMENT OF THE FEDERAL ROLE ON
MARTHA'S VINEYARD

After the Kennedy bill was introduced in April 1972, it underwent three years of vigorous discussion by all levels of government and all types of parties. It is this process of amendment which is the concern of this chapter - the mechanisms by which the original arguments Senator Kennedy made for federal involvement in the Islands and the original concepts of the first federal bill became changed, and the products of these changes. This process is important to understand as it further demonstrates the feasibility of one Senator's efforts to define the federal role in land use planning; the forces and agents which have to be reckoned with in a process of public and private discussion; and the ultimate decision makers in the federal legislative process.

This chapter contains four sections. The first section deals with the way in which local forces and mechanisms achieved

their goal of expanding local control in the bill and minimizing the federal role. The second section discusses the influences of the state bill on the Islands Trust bill, including the efforts to reach a compromise between the State and federal legislation. Section III investigates the responses of other federal Senators and Congressmen to the Kennedy bill, and the way in which their actions influenced the progress of the bill. The fourth section discusses the ultimate test of the Kennedy bill, which is the process of Congressional hearings. As a result of this legislative process, the prospects for the bill are discussed.

I. LOCAL DISCUSSION - THE PROCESS BY WHICH THE KENNEDY BILL BECAME THE 'PEOPLE'S' BILL

The major agent of change which the Kennedy bill faced was the very extensive process of citizen involvement and public discussion on the Islands. Senator Kennedy wholeheartedly welcomed extensive public discussion and when he introduced the Study bill in 1971 he remarked:

I hope that...citizen participation will be active and extensive in making known the feelings and desires of the Island people. Surely no one knows better what needs to be done or has better suggestions on how to do it than the concerned citizens themselves. ¹²¹

¹²¹ Ibid. supra note 17.

Consequently when Senator Kennedy introduced the Trust bill in April 1972, he stressed that the bill should be regarded as a "working document, a prod, a stimulus," He expected that substantial changes would be made to the bill and added:

I look forward to working closely with Island residents to refine legislation, which will be a product of broad participation by all the Islanders and which will preserve the unique characteristics of one of the most beautiful areas in the United States.¹²²

Through such an extensive process of citizen involvement, the Senator foresaw that initially there would be strong opposition and distrust to the measure. After the introduction of the Trust bill there was an immediate and sharp division of opinion about the merits of the bill. The proponents saw it as an opportunity to preserve all that was unique about the Islands. They willingly accepted the Senator's invitations to come forward with constructive suggestions for improving the bill. On the other hand, the opponents saw it more as a threat to the Islands than the pressures of suburbanization and overcrowding. Besides the builders and real estate interests who saw the bill as a threat to their livelihood, the major opposition came from local and county officials who saw the bill as a threat to

¹²² Vineyard Gazette. May 5, 1972.

local control and the town meeting form of government so much a part of the history of Massachusetts.

The opposition to the bill therefore became a fight for local control and home rule. These sentiments were typically expressed as:

We have but one request to you, Mr. Kennedy. Given this "prod" - let us take care of this ourselves! We natives can and will protect these Islands as well as anyone...¹²³

Letter from the Chilmark Selectmen
to Senator Kennedy, May, 1972.

It [the bill] insinuates that we aren't capable of handling our own affairs...all these geniuses who drew up the bill, where do they come from? New York, Boston, Philadelphia. These places are supposed to be an example to us?¹²⁴

Robert Carroll, Chairman of the Island
Action Committee

These Islanders have the same inalienable rights as every other American and to take them away by making these Islands a Trust is truly subjugation. Every town in America has been granted the right to self-government under our Constitution and your bill proposes to turn it over to the Federal Government. Is this democracy in action? I think not.¹²⁵

Mrs. Christopher King
Saratoga Springs, New York

¹²³ Vineyard Gazette. May 12, 1972.

¹²⁴ New York Times. August 30, 1972.

¹²⁵ Vineyard Gazette. May 26, 1972.

Gifford, Kennedy's aide, replied that no home rule could exist when towns had no development controls and no chance to say 'no' to a developer.¹²⁶

I.1 The Role of Public Meetings.

The main mechanism by which this opposition and support was fully expressed and discussed was via a series of public meetings and hearings. After the introduction of the first version of the bill, Senator Kennedy held many public hearings on the Islands as well as dozens of meetings with citizen groups, and public officials. He welcomed letters and recommendations and suggestions for amendments to the bill. The revisions made in the bill were then direct incorporations of recommendations from citizen participation and meetings. The revised bill then went through a similar process of meetings and revisions. This process has been going on for three years and the federal bill has undergone six complete revisions. A typical statement Senator Kennedy made on introducing a new version of the bill was:

This [draft] is the product of hundreds of hours of work by the people of these islands, who have studied, met, discussed, consulted, listened, and, most importantly, have acted positively and responded to the bill as an opportunity to restore some measures of locally-based control over the Island's future.¹²⁷

¹²⁶ Vineyard Gazette, July 11, 1972.

¹²⁷ Comments by Senator Kennedy on introducing Amendment 1372 to S.3485, July 27, 1972.

Besides the extensive process of public hearings, meetings and discussion, there were several other forms of mechanisms whereby different viewpoints and interests were expressed. These included letter writing by groups and individuals, public polls and referendum, memorial bills and the efforts of citizen groups in generating constructive alternatives and recommendations for amendment.

I.2 The Role of Citizen Groups.

The role of citizen groups in the controversy has been particularly significant. Many citizen groups, such as the Vineyarders to Amend and Support the Bill, the Island Action Committee were formed with the express purpose of presenting a viewpoint on the bill. Existing conservation groups like the Vineyard Open Land Foundation, the Vineyard Conservation Society, the Martha's Vineyard Garden Club have also played a major leadership role in strengthening and tailoring the bill's provisions to the specific needs of the Island. As Senator Kennedy expressed:

The number of groups which...either formally or informally have suggested changes has been not only gratifying, but very, very helpful as well. This amendment...[is] based in large parts upon the work of these groups, as were the proposed amendments I have earlier circulated.¹²⁸

The Vineyarders to Amend the Bill worked very hard in this respect to provide constructive suggestions for the bill's amendment.

Other groups were formed for a specific role. The most

¹²⁸ 118 Cong. Rec. 25625, July 27, 1972.

important of these was the Concensus Paper Committee of the Dukes County Planning and Economic Development Commission. Its members represented the diverse views held on the Islands Trust bill and included leading figures in the Island Action Committee, Vineyarders to Amend the Bill, the Selectmen's Association and Dukes County Planning Commission. After a series of meetings it produced "A Report to the People of Martha's Vineyard on the Development of the Island" in June, 1973. This report laid out a concensus in certain areas and on certain principles which enabled the Island to exert greater influence on the development and process of the federal (and state) legislation. Appendix 2(b) contains a copy of this report.

I.3 Some Local Opposition Tactics...The Role of Public Opinion Polls, Referenda and a Memorialization Bill that misfired..

The local opposition to the Kennedy bill was led by the Island Action Committee, a citizen group, comprised mainly of business interests and some local public officials. The All-Island Selectmen's Association was the main spokesman for the opposition of the island public officials. This body was also backed by the Dukes County Commissioners. A major tactic conducted by the opposition was a public referendum which incorporated a memorialization bill.

In September 1972¹²⁹ the Island Action Committee circulated petitions which requested that a question be put before the voters in the November ballot which would ask whether the state representative for Dukes County should be instructed to vote for a resolution in

¹²⁹ Vineyard Gazette. September 1, 1972.

opposition to the bill. The question was worded:

Shall the representative from this district be instructed to vote to approve a resolution memorializing the Congress of the United States in opposition to federal land use controls as proposed in the Nantucket Sound Islands Trust Bill?

The question was framed to address the fears of some Islanders to a federal take-over, the protection of home-rule and the opposition to any type of federal presence on the Island. Behind the question was the hope that the answer would be decisive as to the fate of the Islands Trust bill. This was the reason for the strong propoganda effort, radio advertising and the form of the question itself which assuemd an unwarranted conclusion, namely that the bill would mean "federal land control." A major local newspaper claimed that the petition question was hasty and ill-advised, and the Committee's motives were verging on "vindictiveness."¹³⁰

The question was placed on the November ballot. The wording was far from easy to understand - to register a 'yes' for the Kennedy Bill, the vote must be 'no.' A 'yes' vote on the question would not require the Island's state representative to introduce such a resolution; but only to approve one if it were offered and brought to a vote in the Great and General Court. If favorable action were taken on such a resolution in the General Court, it would not be binding on the Congress in any way, but would serve to inform the Washington lawmakers of an expression of opinion in Massachusetts.

¹³⁰ Ibid, Editorial.

Senator Kennedy responded to the referendum action by stating that the question was "miscast." A spokesman for the Senator replied:

The Kennedy bill doesn't aim at federal land use control for Martha's Vineyard.... Town governments still carry the ball.¹³¹

The Senator predicted the inevitable confusion over the wording and claimed:

The bill is simple far too important and complicated for a yes-no question. And it's unfair to people who've given the bill serious thought.

Senator Kennedy said he would be guided by the results of the referendum, but he would not be controlled by it. One of his major concerns was that non-resident taxpayers were an important constituency and as they had no voice in the referendum, its results could not be fully representative. Sixty-nine percent of all who pay taxes on the Vineyard are non-resident.

The disingenuousness of the question helped to bring about an unexpected affirmative vote. 61 percent were in favor of the federal presence. Mr. Gifford stated that he was delighted that some 1600 Vineyard voters favored the Kennedy bill, and added, "Frankly, this is a higher number than I had anticipated at this time."¹³² In response to the referendum, Senator Kennedy promised that local hearings would be held on the Island as soon as possible in order for Congressmen to examine the results and hear local opinion.

¹³¹ Vineyard Gazette. October 20, 1972.

¹³² Vineyard Gazette. November 27, 1972. Editorial.

However, the Senator's feelings of the importance of the expression of non-resident taxpayers were satisfied when a small group of non-resident taxpayers, known as the Committee of 14 Vineyarders, held a 10 percent sample opinion poll in October 1972. They felt that the November referendum would not represent their views:

The Islands Trust Bill is concerned primarily with the control of the use of land - with what owners are permitted to do with their real property regardless of whether or not they are voters. Under these circumstances it does seem important that any referendum should include the views of all of the property owners.¹³³

The poll showed that 70 percent of the non-resident taxpayers were in favor of the passage of the Trust bill, while 21 percent were against. Combined with the results of the referendum it showed that there was a broad base of support among property owners on the Vineyard.

Yet, the story does not stop there. Dukes County Commissioners and the All-Island Selectmen's Association made a request to state Representative Terrence McCarthy to introduce a memorial bill. The bill would ask the Great and General Court of Massachusetts to memorialize the Congress of the United States in opposition to federal land use controls in the Kennedy bill. The bill was introduced in January 1973 into the state legislature and given a major hearing in March. The bill obtained a favorable vote in Committee and the House adopted the resolution at the end of March. A day later it was approved by the Senate, although the bill was never meant to reach the state Senate.

However, the fact that the Senate did approve the bill, meant that the overwhelming Democratic Massachusetts legislature

¹³³ Vineyard Gazette, October 27, 1972. p. 1

had put home rule before party fidelity. As reported:

The Kennedy mystique in Massachusetts politics was booted just a bit here last week.... It is a rare occasion that the legislature would publicly and officially voice its dissent from a bill filed by a member of the Massachusetts Congressional delegation.¹³⁴

Yet, a day later, some Democrats changed their minds and the bill failed to be reconsidered. Although Representative McCarthy doubted the value of memorialization bills, he felt that the results would be interpreted in Washington as a slight affront to the Senator.

I.4 A County Alternative.

The Dukes County Planning and Economic Development Commission, the advisory County planning agency, played a role in the local effort. It was the focal point of Island discussion, and they hosted meeting and discussion groups. The Commission produced an alternative proposal to the Islands Trust bill which they presented to Senator Kennedy and was printed in the Congressional Record.¹³⁵ The County bill creates the Martha's Vineyard Resource Management Fund (the word 'Fund' is used in a similar manner to 'Trust' in the Kennedy bill). The Secretary of the Interior is authorized to enter into contractual agreements with the Martha's Vineyard Commission (created by the State Act) whereby the duties of the Commission, the classification and acquisition of lands are defined. The county bill is similar to

¹³⁴ Brockton Daily Enterprise. March 29, 1973.

¹³⁵ For text, see Cong. Rec. December 10, 1973 or Vineyard Gazette, December 21, 1973.

that of Kennedy except that there is much greater local control. Appendix 2(c) contains the text of the County bill.

I.5 The Results of These Forces and the Pressures for Local Control..
THE PEOPLE'S BILL.

As a result of these agents discussed above and the three years of public discussion, the latest version of the Kennedy bill, S.67 (January 15, 1975) is very different in form from the bill presented in April 1972. Most of the changes have been made as a result of the constant forceful demand of the Islanders for maximum local control and a minimum federal role. It is only through making these changes that Senator Kennedy has been able to quell opposition on the Island and from other Senators and Congressmen (see part III of this chapter). However, in reducing federal control and the federal role, the bill is possibly no longer acceptable to receive federal assistance (see part IV of this chapter). The major changes wrought in the bill to satisfy the demand for local control and reduction of the Secretary of Interior's power, are discussed below numerically. The discussion also includes brief analysis of the legal and constitutional questions raised by new issues. Appendix 2(d) contains a copy of the latest version of the Islands Trust Bill (S.67).

1. Trust Boundaries. From a position in the first bill where the Secretary could change the Trust boundaries with agreement from the majority of the Commission, this was amended in the second version

(July 1972) of the bill where the boundaries may only be changed by Congress after petition from the Commission (based on concurrence at town meetings), Governor of Massachusetts and the Secretary. Hence the power of the Secretary is reduced.

2. Trust Commissions. The first bill proposed that one Commission be established for the whole of the Nantucket Sound Islands. This was later amended so that three separate Commissions were established, one for Martha's Vineyard, one for Nantucket and one for Elizabeth Islands. This change seems to be the result of a recognition of the fact that the three areas are very different in character and each should work at its own pace with regard to the establishment of an Island Trust. This seems also to be partly in response to the strong opposition on the Vineyard and the lack elsewhere.

3. Membership and Duties of the Trust Commissions. In the second version of the bill, the Secretary of the Interior's power was greatly reduced when he no longer appointed all the members. In the amended form, only one member is appointed by the Secretary, while the rest are appointed by the appropriate body. A non-resident taxpayer member is added to the Commission. The clause that all local members shall be elected on the basis of their length of residence or prior interest or knowledge was dropped.

The Commission's duties and responsibilities are greatly enlarged. A statement was made in the third version (March 1973)

that the Commissions would at all times have principal management authority over the Trust, in contrast to the first version where the Secretary of Interior had prime responsibility. Commission members are also to be paid a per diem rate for their services.

4. Classification of Trust Lands

In the original version of the bill the Secretary could alter the assignments with the concurrence of the Commission within 90 days. By the sixth version (January 1975) of the bill, minor technical corrections can be made within 180 days by the Commission. Major alterations, after 180 days will be made by the Commission after town votes, and with concurrence of the Secretary and the Governor. If either the Governor or Secretary do not concur then the change can be effected on a two-thirds vote of the Commission.

The Class A lands became renamed in the latest version to "Open Lands," and Class B to "Resource Management Lands." Class C, County Planned Lands, were eliminated in the second version as it was realized that the County, without new State enabling legislation, did not have the power to zone. Class D, Town Planned Lands, became Class C, and the title was shortened to "Town Lands." The classes were renamed in order to reduce tension. Within these classifications the controls on local land usage are reduced. Within Class A lands, family ownership of the structure is allowed to continue. Also, a right of use to the owner and his successors is permitted. The twenty-five year limitation was dropped. Improvements, repairs

and extensions to structures are allowed by permission from the appropriate local government agency. In Class B lands, flexibility is added to allow limited growth. Regulations shall be formulated by the Commissions, whereby, in certain cases and taking into consideration certain factors, development beyond its present intensity will be allowed. The regulations shall be formulated after public hearings and with concurrence of the Governor and Secretary. In Town Lands, the Commission will renew and comment on variances granted by the local authority.

Until the fifth version of the bill (May, 1974) the boundaries of these land classifications were to be drawn initially by the Secretary and then subject to public discussion. In the present version of the bill this provision has been dropped, and instead the bill provides that during the period from the introduction of the revised federal legislation and prior to final action by either the Senate or House, a series of open public discussions on the proposed boundary lines will be held on the Islands. The boundary lines arrived at as a result of these open meetings will be incorporated into maps which will then become part of the legislation and the enactment. In late 1974 public town meetings began on the formulation of these boundary lines and the final map is not expected to be ready until mid-1975. This is a big concession to the localities, and many federal officials consider it has gone too far (see part IV of this Chapter).

5. Land Acquisition. The fifth version of the bill (May 1974) provides that the Secretary of the Interior is prohibited from acquiring any lands or interest without the approval of the Commission by a majority vote. This is a mammoth concession and similar to the map provision is being seriously challenged to have exceeded the bounds of delegation. Any member of the Commission may recommend an area for acquisition and call for a vote on the recommendation. If a majority vote approves the acquisition, the Secretary of the Interior would be responsible for acquiring the land or interest under the procedures of existing federal law. Immediately after completing acquisition the Secretary would be required to transfer half the ownership to the Commission. This latter provision has also generated much controversy with other federal officials.

Under the latest version of the bill every effort must be made to acquire lands or interest by other means than eminent domain, which then should only be used in the final resort. There is a hardship provision to land acquisition. The property of Massachusetts and any political subdivision can only be acquired by donation. The second version of the bill included the provision that within 180 days of enactment, the Commissions and Secretary shall notify owners of the minimum use and regulations of property use and development and if such owners agree to comply with these standards then the Secretary's power of acquisition is suspended. (This provision has precedent in the 1970 legislation establishing the Sleeping Bear Dunes National Lakeshore in Michigan¹³⁶.)

¹³⁶ 16 U.S.C. § 460x-2(f) (1970).

A major new provision in the third version of the bill was compensable land use regulations. Six months after enactment, the Secretary, after consultation with the Governor and Commissions, will issue compensable land use regulations which will establish the manner in which fair market value of lands and interests shall be calculated. Also the regulations will deal with compensation for right of passage on such lands. These regulations are in response to the potential taking issue. Yet the regulations will have to withstand a variety of tests when they are issued to see their fairness, equibilty and valuation assessment.

6. Property Taxation.

Revised versions of the bill provide that all lands and interests acquired by the trust will pay taxes, as if they were privately owned. Also any governmental jurisdiction within the state may assess taxes on government lands and fees on non-governmental uses of such lands. These provisions were the result of local fears of great losses in local revenue.

It has long been settled that property owned by the federal government is wholly immune from state or local taxation,¹³⁷ unless Congress specifically consents to its taxation by statute.¹³⁸ By granting to Massachusetts the right to tax properties held by the Secretary or the Commissions, the bill confronts directly the local revenue loss which would occur if substantial land areas were owned outright by the Secretary and the Commissions, or if substantial

¹³⁷ For example, Clallam County v. United States, 263 U.S. 341 (1923).

¹³⁸ For example, Michigan National Bank v. Michigan, 365, U.S. 467 (1961).

decreases in land values occurred through purchases of development rights.

It is unclear how the application of strict development limitations would affect the permissible scope of property assessment under this provision. The fact that the federal government is in effect the taxpayer may act as an incentive for local assessors to value land as high as possible but the bill provides that this does not occur. Taxpayers will not stand for assessments significantly in excess of restricted use value. The net effect should be a significant retardation of growth in the local property tax base as compared with current trends. The overall aim of the provision is that the relative extent of public versus private ownership of lands will not effect the local tax take.

7. Employment Opportunities. Since the first version of the bill, the employment opportunity provisions of the bill have been expanded immensely. The power of the Secretary to initiate studies of employment opportunities has been replaced by that of the Commission, and consideration is not limited to aquaculture but any kind of employment. The Commission is also authorized to prepare a plan for the development of new employment opportunities, including establishment of new industries, training programs and other activities. The Secretaries of Interior, Commerce and Labor are then authorized to aid implementation of the plan. The expansion of these provisions are in response to local fears of loss of economic livelihood.

8. Four Major Issues - Beaches, Access, Resident Home Sites and Appropriations.

This section concludes with the discussion of four major issues contained in the revised versions of the bill which are facing challenge by the federal decision-makers.

a) Beaches. Under the second version of the bill, beaches are not to be made public, but instead a non-vehicular right of passage is to be established on beaches in Class A lands, extending shoreward from the high water line of sufficient width for a person to pass and repass. The right of passage on beaches in Class C lands does not apply automatically and only as specified by the Commission. The rights of owners of residential improvements shall be respected in the granting of this right of passage. Upon agreement of the Commission, the Secretary may acquire lands to establish public beaches and public access to such beaches, which may be extensions to existing beaches. Two new public beaches are to be designated on the southwest shore of the Vineyard. The Commission shall establish regulations prohibiting cars, open fires, camping on public beaches. The latest version of the bill contains a specific appropriation of 100,000 dollars to implement litter prevention plans.

The fact that beaches should be protected from private development has never been seriously challenged in the debates surrounding the Trust bill. However, what has occasioned controversy is the rights, if any, which members of the public should have on

beaches otherwise under private ownership. The history of the Trust bill's treatment of beaches evinces a gradual clarification and curtailment of those potential rights. The "free and open" public access has been whittled down to a pedestrian right of passage. The legality of this provision will depend on the compensable land use regulations devised with regard to the right of passage. Adequate compensation would then relieve any fear of a "taking." These regulations will have to be strong in order to combat Massachusetts court decisions on the rights of passage.¹³⁹ Even bolder is the proposed National Open Beaches Act,¹⁴⁰ with a Congressional finding that all beaches should have free and unrestricted uses, within the land owning provisions of the Constitution. Finally, the Trust Bill as it stands provides that the beach lands acquired with federal funds shall be open to the public which satisfies many complaints. However, the extent of acquisition and hence public access is expected to be minimal.

b) Access Limitations. The second version of the Trust Bill stated that "because expanded access to the Islands would seriously impair and be in contravention to the purposes of this Act, it shall be a national policy that no ... direct vehicular access be constructed from the mainland to the Islands,"¹⁴¹ whether by bridge, causeway or tunnel. The bill authorized an immediate study

¹³⁹ For discussion, see Gifford, supra note 21 at 451-2.

¹⁴⁰ S.2621, 93rd Cong., 1st Sess. § 3(1973).

¹⁴¹ Ibid. supra note 128.

of access by public and private means, to and around the islands and the imposition of reasonable controls.

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The issue is partly one of policy: should there be limitations on access to an area where federal funds are to be spent? Certainly, if the purpose of preserving a unique resource for the benefit of all Americans is to be served, non-residents of the Islands who so choose should be permitted to visit and enjoy that resource; any attempt to completely exclude outsiders would therefore be highly improper. But if preservation is to have any meaning for those threatened islands and if a significant investment of federal money is to be prudently used, some limitations in access are a virtual necessity.

17
The next question is whether access can be limited without violating any constitutional guarantees. The Department of the Interior has already instituted programs restricting both the number of visitors to, and the length of stay, at National Parks and Seashores, and is considering extending them because of the irreparable damage heavy visitor use causes to the parklands. Restrictions placed upon off-road vehicles in National Wilderness Areas have been upheld, even when imposed upon plaintiffs owning land within the Area boundaries.¹⁴² The U.S. Supreme Court has imposed strict standards in cases where restrictions interfere with the right to travel.¹⁴³ In cases where access to public services was sought, application of these standards has been limited to situations of "migration with

¹⁴² See for example, McMichael v. United States, 335 F.2d 283 (1965).

¹⁴³ Shapiro v. Thompson, 394 U.S. 618 (1969).

the intent to settle and abide."¹⁴⁴ This limitation may also apply to any assertion of an unlimited right of access to geographic areas set aside for preservation. Recent state court cases have voided municipal ordinances which establish differential beach use fees for residents and non-residents.

Mr. Dun Gifford¹⁴⁵ presumes that any attempt to limit access to the Island will involve new legislation containing adequate authorization. He believes that legislatively authorized restrictions which are reasonably related to the preservation of a unique resource and which do not totally exclude non-residents should be immune to constitutional attack. Yet, similar to the beach access provision, there is much feeling at the federal level that without the islands becoming part of a National System, there may be no basis for limiting access.

c) Resident Home Sites. A novel provision, resident home sites, appeared in the third version of the trust bill, to deal with the "rapidly rising land costs which are still fueled by speculative fever."¹⁴⁶ Land prices on the Islands have risen steeply in the face of development pressures, and the Trust bill predicted that by restricting the supply of buildable land, the remaining building sites would be even more expensive. The bill's response to this is a resident home site plan. Under its terms the Commission can draw up a plan to provide Island residents with building lots at less

¹⁴⁴ Cole v. Housing Authority, 435 F.2d 807 (1970).

¹⁴⁵ Ibid. supra note 21 at 449.

¹⁴⁶ 119 Cong. Rec. S 10,016.

than their fair market value. The Commission can only do so if petitioned by a town meeting vote, and with the advice of the Secretaries of Interior and of Housing and Urban Development. The plan would establish a "fair purchase value" at a lower figure than the fair market value, and the difference would be borne by the federal government out of the appropriated funds. If a resident home site is put up for sale by an owner then the Commission would have the right of first refusal.

In the fifth version of the bill (May 1974), a "qualified resident" was defined as one being with year-round residence on the Island. The Commission is given the responsibility to determine the fair purchase and fair market values. It is doubtful however whether this provision will be acceptable to the federal decision-makers but as expressed by Dun Gifford:

But at least the federal government has offered the money and opened the doors for Islanders themselves to begin working out the equities of the situation in which upward pressures on land prices is exacerbated by federal preservation measures.¹⁴⁷

d) Appropriations. The present form of the Trust Bill offers an appropriation of 25 million dollars for the first three years of the operation of the Trust. 20 million is to be used for the acquisition of lands and interests, and 5 million for development, at April 1972 prices. Adjustments to fluctuations in construction costs are allowed for. 300,000 dollars of the appropriation shall be used for development of the shellfish industry; 500,000 dollars for employ-

¹⁴⁷ Ibid. supra note 21 at 448.

ment studies and 100,000 dollars for litter prevention.

Critics have questioned whether this twenty million dollars for acquisition is sufficient. Dun Gifford explains that the amount was calculated from the experience of similar federal activities, from an awareness of land values on the Islands, and from a prediction of the impact of the provisions to encourage voluntary private preservation actions. Senator Kennedy's limitation of the acquisition funds to the first three years is an acknowledgement that additional funds will be needed. It is general practice in conservation legislation either to leave the authorization open-ended or to place no limit on it. The Trust bill would cost less if it employed the legislative taking technique, where authorization and acquisition are simultaneous. But until the Commissions are formed after enactment of the bill, it will remain uncertain what lands will be designated for fee or less-than-fee acquisition and what the compensable land use regulations will require in the way of compensation.

This section of Chapter V has therefore demonstrated the way in which local agents and forces have changed the original Kennedy bill into a bill which satisfies the strong desires for home-rule.

II. INFLUENCES OF THE STATE ACT

The State Act has had important influences on the development of the federal legislation.

Governor Sargent made it clear when he started working on alternative state legislation that it was in no way meant to be competitive with that at the federal level. The unique ability of the federal level to provide large sums of money for land acquisition was recognized and hence the Kennedy bill has value as a "preservation" measure. The State, on the other hand, identified their abilities as providing legislative tools and power to extend the regulatory powers of the localities, by creating a regional commission which regulated certain classes of development. They did not have the monies for large scale preservation. The State bill became dubbed as a "regulatory planning" bill.

By late August 1973, feelings began to surface as to the need for State and federal efforts to work together - work out areas of agreement and compromise between their respective bills. It was felt both bills were needed but a lot of ironing out was necessary. An editorial in a local newspaper concluded:

It will be dismaying if Governor Sargent's bill is rushed through without adequate redrafting. It ought to be an effective measure on a State level to go along with the Islands Trust bill on the federal level to accomplish the partnership both Governor Sargent and Senator Kennedy have in mind. Here is a magnificent opportunity.¹⁴⁸

¹⁴⁸ Vineyard Gazette. August 28, 1973.

At a meeting on the Vineyard, May 1973, Lewis Crampton, Governor Sargent's assistant, stated that the Kennedy bill "has a lot to commend it." He felt the state and federal pieces were not incompatible:

The Kennedy bill will handle most expeditiously the areas classified Forever Wild, including beachlands, wetlands and other areas that really are not buildable. The bill provides the money to purchase and compensate the owners. In some way, what the State bill calls critical areas match very well with the Kennedy bill's Scenic Preservation Lands, but perhaps the State bill is more flexible. The difference is really that the planning is done more or less at the date of enactment in the Kennedy bill. In the State bill, the Island people have to decide how to plan the Island's growth. The State legislation is probably less preservationistic than the Kennedy bill and its protection is not as fine grained.¹⁴⁹

Yet the State legislature considered it was the Kennedy bill that had to be amended to their bill, and as expressed at a public meeting on the Vineyard:

I don't think our bill will have anything to say about federal legislation. It appears that the Kennedy Bill does have something to say about the State legislation being controlling.¹⁵⁰

Yet there was considerable disagreement as to the way in which the bills should be molded together. To reach a compromise Governor Sargent, Senators Brooke and Kennedy, and Congressman

¹⁴⁹ Vineyard Gazette. May 25, 1973.

¹⁵⁰ Vineyard Gazette. April 8, 1973.

Gerry Studds held a series of meetings in Washington in late 1973. By March 1st, 1974, Sargent, Brooke, Kennedy and McCarthy issued a joint statement on the areas of agreement between the two bills.¹⁵¹

The results of the compromises reached were incorporated into the fifth version of the bill (April, 1974). The most visible effect was that the Martha's Vineyard Commission for the purposes of the Federal bill would be the same commission as established by State legislation. The State bill provides for a 21 member commission - one member from each town, appointed by the Board of Selectmen; nine persons elected at-large (at least one from each town, but not more than two); one County Commissioner appointed by the County Commissioners; one cabinet member appointed by the Governor; and four persons whose principal residence is not on Martha's Vineyard (appointed by the Governor as non-voting members). These provisions were hence incorporated in the Federal bill.

The extensions of local control, discussed in Section 1 of this chapter, were partly the result of the stance of local control taken in the state bill. The further reduction in the Secretary of the Interior's power came partly as a result to

¹⁵¹ See Vineyard Gazette, March 8, 1974, p. 1-8.

fit with the State bill. Greater flexibility was written into the Federal bill with regard to land classifications, map preparation and prime responsibility for land use control in the hands of the local government.

In the execution and administration of the Island Trust, the Governor is given a role to play. As written into the federal bill, the Governor has to be consulted in any alterations to the Trust boundaries and the land classifications; the formulation of the regulations regarding land use classifications and compensable land use regulations; and erosion control procedures. An affirmative vote by the Governor in such matters will be important. The later versions of the Kennedy bill also recognised the significant protection afforded under Massachusetts coastal and wetland laws and added the provision that no provision contained in the Kennedy bill could be construed to be less restrictive than regulations under Massachusetts law. Appendix 2(e) contains a copy of the State Act.

III. THE RESPONSE FROM FEDERAL CONGRESSMEN

A major stumbling block which the Kennedy bill had to face was the response from other federal Senators and Congressmen. Senator Kennedy realised that opposition from key Representatives and Senators could delay the bill indefinitely.

Representative Hastings Keith (R-West Bridgewater), although not the most influential member of the House, was well-liked on the

Islands. It was considered that his support for the Kennedy bill would attract conservative Representatives who would normally oppose anything sponsored by Senator Kennedy. Keith was an early critic of the Kennedy bill. He stated, when the bill was first introduced:

I am not sure I could concur with the philosophy or the details of the bill, but it does attack a very common problem that confronts shoreline communities in many parts of the nation.¹⁵²

In May, 1972, Keith still took a guarded position:

Certainly I share your [the Islanders] concern about the way this bill was presented. Any measure so profoundly affecting the people of the Islands should, in my view, have received much more local input than this one did...You may hope for the federal government to stay away and it may. But the big developers have not and will not.¹⁵³

It was not until October 1972, that Keith finally decided that he would not support the Trust bill. He thought that the Kennedy proposal had already done some good, but he could not support it. He feared that federal involvement and funds in the Islands would accentuate their overcrowding; he was critical of the boundary lines and was afraid that the proposal

¹⁵² Vineyard Gazette, April 14, 1972.

¹⁵³ Vineyard Gazette, May 5, 1972.

would "disenfranchise" the non-property owners on the Islands.¹⁵⁴

Representative Edward Boland (D-Springfield) had indicated earlier that he would submit the Kennedy bill if Keith failed to do so. Therefore in mid-October 1974, Boland introduced the bill into the House. Congressman Boland was one of the original sponsors of the Cape Cod National Seashore legislation. He had a long record of support in conservation matters and was a senior and eminently respected member of the House. His support for the Kennedy bill was strong and never waived.

Representative Terrence McCarthy (R-Oak Bluffs) was, for a long part of the controversy, against the Kennedy bill. He stated:

No one has proved to me yet that the Kennedy bill won't annihilate the small working man. It does not address itself to the economic facts of life on the Island. The job of controlling growth is our job to do and not the federal governments.¹⁵⁵

It was Representative Gerry Studds (D-Cohasset) who co-sponsored the Kennedy bill in the House. Yet he admitted that he had doubts about certain aspects of the legislation, and he did not consider that the bill was the best approach or final word

¹⁵⁴ The Patriot Ledger, October 13, 1972. p. 4.

¹⁵⁵ Vineyard Gazette, March 23, 1973. p. 1, 4.

on the future of the Islands. He considered though that he would be in a position to affect amendments on the bill before it was voted in the House. Although he lacked the seniority to serve on most committees, he considered that he stood a good chance of serving on the conference committee that would be charged with ironing out differences between the House and Senate bills, as the legislation had a direct effect on his district. He also made it clear that he would not fight for a bill that was not completely satisfactory to the Islanders.

It was the actions of Senator Edward Brooke (R-Massachusetts) who provided the real stumbling block to the progress of the Kennedy bill. When the bill was first introduced he stated:

I hesitate to dictate the destiny of the Vineyard without a thorough discussion of the alternatives and the development of a community consensus for action. I know the people of the Vineyard want to chart their own course and not have it imposed on them from Washington.¹⁵⁶

In May 1972, the Island Action Committee petitioned Brooke for assistance on the bill, which they found "completely unacceptable." However it was reported that he was hesitant "due to the political winds" to take a stand on the issue. At the Senate Interior Subcommittee hearings in July 1973, Senator Brooke

¹⁵⁶ Vineyard Gazette, April 14, 1972.

made a very strong statement in opposition to the Kennedy bill, which included:

Philosophically, I am opposed to the basic presumption of this measure, which is that greater knowledge and capabilities in controlling the destiny of our islands dwell beyond our people and the governmental processes of our islands. I view the measure we are considering too harsh a remedy for our island ailments both diagnosed and prognosticated. I am not yet convinced that it is necessary for the Federal Government to intrude so pervasively in the lives of my fellow islanders.¹⁵⁷

He made the home-rule argument and considered that there was no need for a federal presence on the Islands. This strong opposition was a real axe to the bill. As commented:

Since a bill affecting a simple state rarely gets very far in Congress unless both Senators from that state support it, Senator Brooke's opposition has effectively blocked progress.¹⁵⁸

It was not until after the series of joint meetings in Washington at the end of 1973, that Brooke agreed to co-sponsor the Kennedy bill. His opposition until 1974, resulted in major delays of the Kennedy bills and some argue that delays at this stage have proved fatal.

¹⁵⁷ Release from the office of Senator Brooke, July 6, 1973.

¹⁵⁸ New York Times. January 7, 1974.

IV. CONGRESSIONAL COMMITTEE HEARINGS - STRONG OPPOSITION FROM THE DEPARTMENT OF THE INTERIOR EMERGED

The opposition by individual congressmen was only the stepping-stone to the sentiments expressed in a long series of Congressional Committee hearings. It is through this process that the Kennedy bill has met its doom.

The importance of the Congressional hearings process is brought out in the following quote by Congressman Boland, when he introduced the Kennedy bill into the House in October 1972:

From my experience with the Cape Cod Seashore bill and similar legislation... I realize there is a long process involved in Congressional consideration of this legislation. Hearings will be held both here in Washington, and also on the Islands in order to allow for full and fair discussion. I realize, too, that this is a highly controversial bill, but it is only through the hearings process that we will discover the full import and extent of the proposals in this legislation.¹⁵⁹

The first committee to discuss the bill, after it was introduced, was the Senate Interior Subcommittee on Parks and Recreation. After the July version of the bill was introduced, no hearings were scheduled and so the Senator had little hope for consideration of the bill in 1972. The Senate leadership at that time, had ruled against Senator Henry Jackson's request

¹⁵⁹ Vineyard Gazette, October 20, 1972. p. 2.

to hold hearings on his National Islands bill. It was reported:

The Nantucket Sound Islands Trust bill almost certainly won't pass this year. But it will be back and when it comes, the model legislation is likely to meet more opposition from Western Congressmen than it is from voters and taxpayers on the Islands. But Western Congressmen do not live in the megalopolis or they would recognize how much the bill has been improved and how badly it is needed...¹⁶⁰

When the third version of the bill was introduced in May 1973, Senator Kennedy planned to move the bill to a vote in the Senate by the fall. Representative Gerry Studds commented on the House reception of the new bill:

I don't know about the prospects in the House. One of the problems here [in Washington] is the ludicrously inadequate staffing of Representatives' offices.¹⁶¹

On July 16, 1973, the Senator Interior Subcommittee held a public hearing on the Vineyard. The meeting was chaired by Senator Alan Bible (D-Nevada). Kennedy expressed his hopes for the hearing:

The hearing will give Island people an opportunity to present their views to the Committee which has the legislation under consideration.¹⁶²

¹⁶⁰ Boston Globe. October 9, 1972.

¹⁶¹ Vineyard Gazette. May 18, 1973. p. 1.

¹⁶² Vineyard Gazette. June 15, 1973. p. 1, 7.

Yet, it was also noted that "because Kennedy is publicly committed to backing off on the bill if it is not supported by a majority of the Islands' year-round residents, the hearings promise to be more than a prefatory walk-through."¹⁶³ It was unclear what the majority position would be, but the hearings would play a major role in such determination. The opposition by Senator Brooke at the hearing delayed its progress.

However when Brooke and Studds joined with Kennedy in co-sponsoring the bill in May 1974, the bill was given relatively good chances of winning House and Senate approval. A Senate vote was expected in the summer. Action in the House, though, became bogged down due to considerations of possible impeachment and forthcoming November elections.

In August 1974, a second Senate Interior Subcommittee hearing was held on the Islands Trust Bill, this time in Washington. The chief purpose of this second public hearing was to give the Department of the Interior an opportunity to comment on the bill. As Senator Kennedy did not see this hearing as a stumbling block he hoped that the bill would be ready for a Senate vote by the fall. However, things did not turn out the way he expected.

Douglas Wheeler, Deputy Assistant Secretary of the Department of Interior, stated at the hearing: "We recommend

¹⁶³ Boston Globe. July 15, 1973.

that the bill not be enacted." He defined the Department of Interior opposition as:

It has to do with our philosophy of land use decisions, this [the bill] being essentially a land use problem. The belief is that these are matters most appropriately handled at State and local levels...¹⁶⁴

Terrence McCarthy who attended the hearings, aptly summed up the situation when he said:

They [the Department of the Interior] want to run the whole show, if there's going to be anything like this... Now that the bill has been sufficiently altered to give the Island residents most of the authority on the proposed commission, the federal people reject it, wanting to retain power in whatever they take part.¹⁶⁵

Consequently, the Department of the Interior did not see any need for the Kennedy bill. The arguments and points of opposition are as follows:

1. The Existence of Local Planning Controls

One of the main arguments used against the Kennedy bill was the presence of existing local controls. The controversy which developed around the Kennedy bill also raised local consciousness of the local towns to the need to protect the environment and manage the use and development of lands within

¹⁶⁴ The Grapevine. August 21, 1974. p. 4.

¹⁶⁵ Ibid.

their jurisdiction. Although in 1972 few towns had adopted zoning or subdivision control, by August 1974 most towns on the Vineyard had adopted both zoning and subdivision regulations and some towns were in the process of revising these ordinances. All towns had adopted conservation commissions and all were subject to a statewide building code. This surge of activity and the adoption of local controls can be related to the catalyst effect of the threat of federal controls.

Mr. Wheeler also referred to state laws which protected wetlands which the localities could avail themselves of. Under the Coastal Zone Management Act of 1972¹⁶⁶ the state is eligible to receive federal assistance in the planning of its coastal zone areas. He argues that the existence of the state act creating Martha's Vineyard Commission and a regional regulatory procedure lessen the need for any extra legislation. The one-year moratorium on construction contained in the Act allows time for local authorities and the Martha's Vineyard Commission to develop a land use plan which should protect the Island. In the light of these tools, it is argued, there is no need for federal legislation. (This is in spite of Governor Sargent and Senator Kennedy who both argue that the presence of the State Act and the local controls do not alleviate the special need for the federal bill, and that there can be

¹⁶⁶ 16 U.S.C.A. §§ 1451 et seq. (Supp. 1973). ELR 41701.

no real preservation without legislation at the federal level.)

These arguments gained added fuel when in August, 1974, Dukes County Planning and Economic Development Commission (which became the Martha's Vineyard Land and Water Commission in November 1974) unanimously voted to send to the Senator Interior Subcommittee the following statement:

No action should be taken on the Islands Trust Bill for the next twelve months because the Island needs that much time to assimilate the new state act, and in that way to avoid confusion and get the best from both. This recommendation is made in light of the numerous other new land use regulations now being implemented on Martha's Vineyard, including the wetlands regulations, zoning and sub-division ordinances, improved health and building codes. These as well as the new state act require more time for planning the nature of federal legislation.¹⁶⁷

This statement was endorsed by the All-Island Selectmen's Association, and Herbert Hancock, Chilmark Selectman, agreed to attend the Washington hearings to deliver the message. Mr. Craig Kingsbury, a Tisbury selectman and Dukes County Planning Commission representative, explained:

What we're saying is we can't handle two bills at once. It's a whole new can of sardines now. What the planning commission said is they want to hold off on the federal bill till we've got the Sargent bill operative. There may be a lot of changes we want in the federal bill. Some things we may find we need, others we may find we don't.¹⁶⁸

¹⁶⁷ The Grapevine. August 14, 1974. p. 6.

¹⁶⁸ Vineyard Gazette. August 9, 1974. p. 1, 2.

2. Cost versus Benefits of the Kennedy Bill

Mr. Wheeler made an argument that the scale of federal monies involved in the Kennedy bill could not be justified:

It will be a terribly expensive proposition and the funds provided by the bill just barely scratched the surface. No one has an estimate of what it would cost the federal government to become involved and this is just not the time that Congress is about to approve that kind of expenditure. It's part of the concern about inflation particularly when it's hard to balance that expenditure with an incremental public benefit. Senator Hansen raised the point - and I think its a good one - that the National Park Service and the Secretary in exercising the responsibility of the National Park Service have a two-fold mission: one to protect areas of national significance and it's not clear that all of the two islands are nationally significant; but more important, at the same time, it protects them, it makes them available for widespread public use. It's clear that widespread public use would be inconsistent with the objectives of the sponsors in that legislation. So you've got a real problem: how do you justify a large federal expenditure, which would not, by its nature, result in an increased opportunity for public recreation? People impact is one of the problems up here, clearly and it would be hard for the federal government to spend federal tax dollars and then say to the people whose dollars they are, "No, you shall not be allowed access to that area."¹⁶⁹

Mr. Wheeler claimed that the Kennedy bill had in no way come to grips with this dilemma, and it consequently was unacceptable as it stood.

¹⁶⁹ Ibid. supra note 163.

3. Constitutional questions of the Grant of Power to the Localities

The Senate Interior Subcommittee raised constitutional questions to the validity of the excessive grants of power to the local Commissions in the Kennedy bill. As the bill stands, there is an apparent grant of authority to a group of private citizens to acquire land, and to establish the boundaries of the reservation. The Committee felt sure that these provisions were unconstitutional and it stated:

It's a total grant of the fifth amendment to non-public officials who are really not answerable to anybody. They're not answerable to the federal government at least...¹⁷⁰

The grant of authority goes beyond that which Congress can constitutionally delegate. There have been grants of rate-setting to railroads which are private, but within that, there has always been a back-up of residual authority in the federal government. Someone in the government is always answerable to Congress. The federal bill is written so that the local commissions are answerable to Congress, which is not possible as they are not federal officials.

There is also a provision in the bill whereby amendments can be made only after they are approved by the town counsels.

¹⁷⁰ Ibid. supra note 163. Testimony by John Burney, staff member on the Senate Interior Subcommittee on Parks and Recreation.

As expressed by John Burney:

Well, that's a nullity. You enact that and so what? Congress next year can...just delete the provision. Congress can't do anything to bind another Congress... I'm concerned that we would pass a bill that would have language like that in it because people are going to think that the local town counsel has a veto over future amendments and they don't.¹⁷¹

In the bill, the Secretary is directed to acquire lands that the Commission tells it to. Constitutional questions were raised as to this provision as it in effect authorizes total land use planning by local agencies and there is no review process. This relates to an accountability problem. Private citizens are not answerable to Congress.

4. Presidential Opposition

Extra fuel was added to the opposition when it was learnt that the new Administration was against the bill. The reasons put forward were mainly due to lack of federal funding available for such a bill.

As a result of the vehemence of the opposition of the Department of the Interior, it appears that the Kennedy bill has met the ultimate test. Without Departmental support, the bill

¹⁷¹ Ibid.

can go on further. The Interior Department has flatly refused any special federal role beyond the existing grant program to help states with coastal zone management. It firmly believes that the local level is perfectly capable of dealing with the problem. If the Kennedy bill is prepared to meet the opposition of the Department by revising the bill to its requirements then there is hope, but it is probable that in such a form local controls would have to be greatly reduced. A strong federal role would not be acceptable to the localities. Yet it appears that the federal level is the ultimate decision maker. This dilemma has not been resolved on the Vineyard.

CONCLUSION : A RE-EVALUATION OF THE FEDERAL ROLE

There appear to be four major roles and grounds for involvement of the federal government, in a situation such as on Martha's Vineyard.

1. The federal government may represent a constituency larger than that of the locality, where important externalities exist and need to be acknowledged. In the case of the controversy on Martha's Vineyard, Senator Kennedy argued that the Islands were unique national resources to be protected for public use, especially public recreation. Hence, he argued, the federal presence on the Islands assured that the national interests were properly represented. However, it soon became clear that the 'uniqueness' argument never really stood up at all. National interest in islands generally was undeniable, but when the Kennedy bill proposed federal protection for only a small group of islands and when federal monies were not necessarily going to provide for increased public recreation, then the argument was found to be no longer acceptable to the federal decision-makers. Although a national interest in the Nantucket Sound Islands was found to be lacking, there may certainly exist a regional constituency, as illustrated by the large number of summer residents who come from such places as New York and Washington. The Martha's Vineyard Commission

as established by the State Act, has four non-resident taxpayer members who would presumably represent the region, and hence satisfy the concern for a broader constituency to be represented in the planning of the Island.

2. The federal government can provide technical assistance for the creation of new institutional mechanisms. It has been effectively demonstrated that the State Act has provided a sufficient instrument for the Vineyard, hence eliminating the need for a federal role in in this aspect. This mechanism is in the form of a regional commission with regional regulatory planning powers.

3. The federal government can provide financial resources especially for land acquisition. This is an unresolved issue on the Vineyard. The localities have clearly shown that they want the federal monies involved in the Kennedy bill for land acquisition without the accompanying federal authority and control over local decision-making. However, to the federal decision-makers such a position was found to be unacceptable and the Kennedy bill would not be allowed to pass unless strong federal control in the execution of those monies existed.

In 1972, Senator Kennedy made the argument that one of the reasons for federal involvement in the Nantucket Sound Islands was the absence of effective local tools and resources to control the development forces. It is important to distinguish between 'tools' and 'resources'. The localities can, and have adopted local

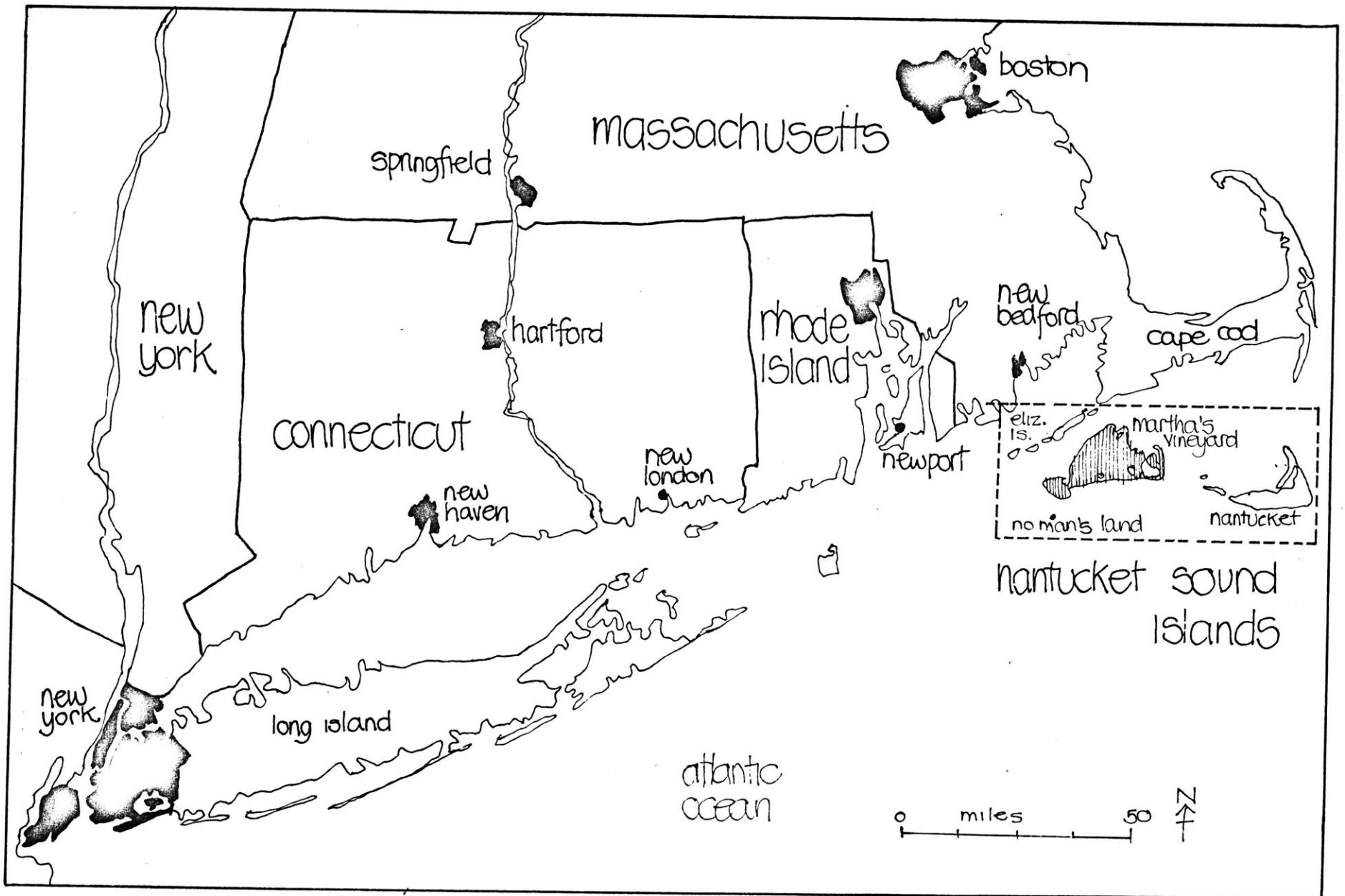
planning tools, via the state enabled powers of zoning and subdivision control, and also via the regional commission set up under the State Act and control over districts of critical planning concern and developments of regional impact. Local resources are a different matter entirely. The localities do not have sufficient financial resources in themselves to effectuate the kind of preservation that is needed in certain areas of the Island. For financial resources, the localities have to look beyond themselves to higher levels of government. Although the federal bill will probably not be forthcoming, the State does appear to have the financial resources for land acquisition on the scale necessary on the Vineyard. The real issue is one of will, and at the present time, it is not politically appropriate for the State to provide such sums. Yet as the localities are faced with the realities of the protection of critical areas, increasing pressure may be exerted on the State to provide such sums.

4. Lastly, the federal government may be a stimulant for local action. In the past, this has been seen primarily in the federal grant-in-aid programs, whereby federal aid to localities is made conditional upon the execution of certain federally-defined planning objectives and actions. Yet, on Martha's Vineyard, the sheer presence of the federal government and the local fears of the

imposition of federal controls, provided the necessary catalyst for local action and the adoption of local planning controls.

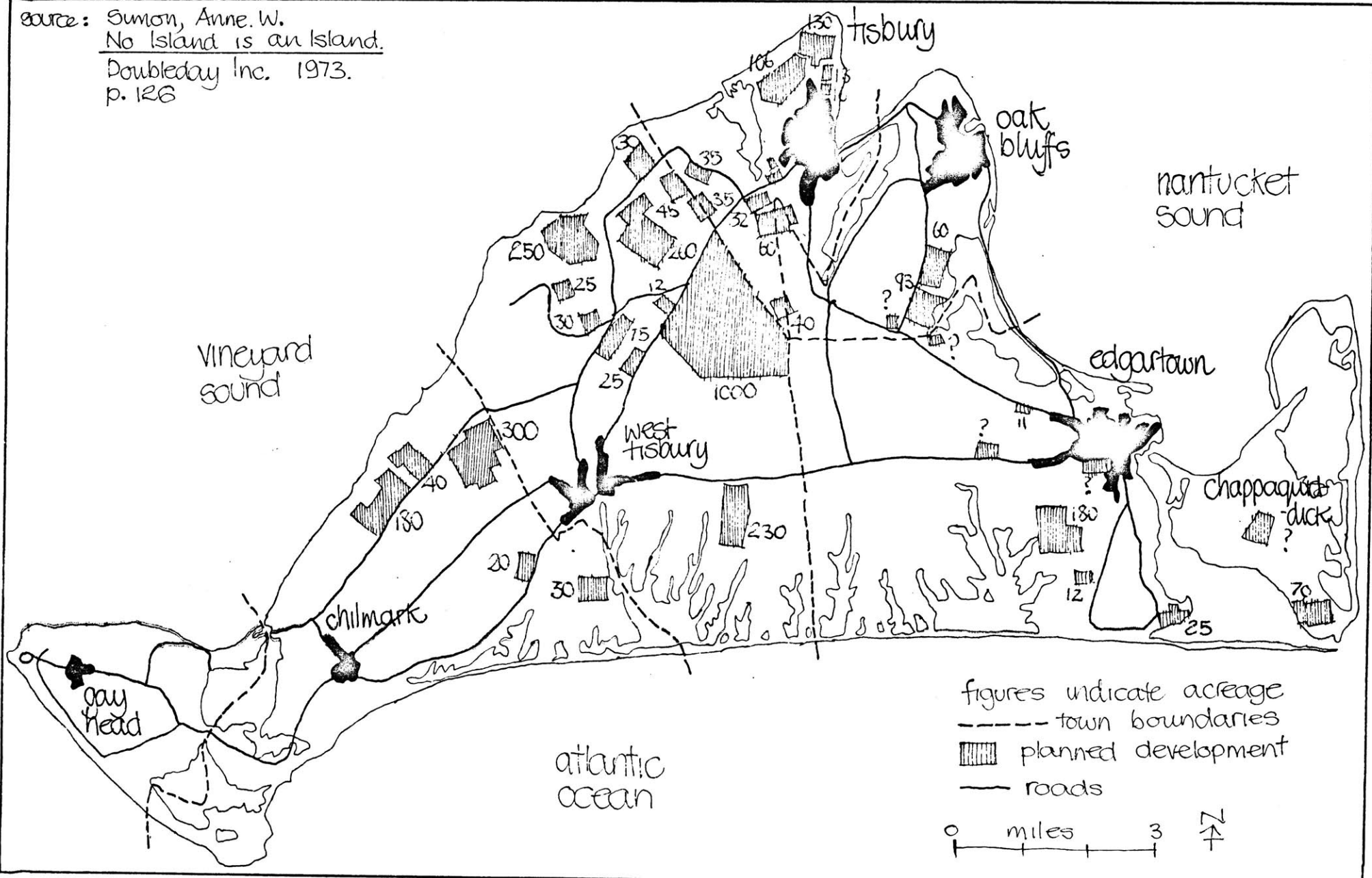
In conclusion, therefore although the Kennedy bill will most likely not pass, it has provided further light on the practical ramifications of a federal role in the land use planning of certain islands. Certain new planning tools have been tested and in retrospect, the most significant effect of Senator Kennedy's actions was to force the localities into action and to protect their island resources. At the present time, in the United States, it is still apparent that the major planning role still lies in the hands of the localities. The next decade will test the potential role that the federal government can play in land use planning.

APPENDICES



APPENDIX 1(a) : THE LOCATION OF THE NANTUCKET SOUND ISLANDS, MASSACHUSETTS

source: Simon, Anne W.
 No Island is an Island.
 Doubleday Inc. 1973.
 p. 126



APPENDIX 1(b) : DEVELOPMENTS UNDER WAY ON MARTHA'S VINEYARD, JUNE 1972

APPENDIX 1(c) : THE BUILDING BOOM ON MARTHA'S VINEYARD 1965-1974

Building Permit Data for Edgartown, Oak Bluffs, and Tisbury 1961-74

Year	Edgartown	Oak Bluffs	Tisbury/Vineyard Haven
1961	10 ^a	9 ^d	6 ^a
1962	7 ^a	15 ^d	12 ^a
1963	6 ^a	9 ^d	18 ^a
1964	6 ^a	11 ^d	11 ^a
1965	8 ^a	22 ^d	10 ^a
1966	24 ^a	24 ^d	10 ^a
1967	9 ^a	38 ^d	28 ^a
1968	9 ^a	42 ^d	28 ^a
1969	58 ^a	50 ^d	24 ^a
1970	61 ^a	74 ^d	20 ^a
1971	81 ^a	66 ^d	71 ^a
1972	84 ^b	121 ^d	44 ^b
1973	112 ^b	63 ^d	81 ^b
1974	98 ^c	23 ^c	58 ^c

Source: ^a Massachusetts Department of Commerce. New Home Building in Massachusetts.

^b Massachusetts Department of Labor and Industries estimate.

^c Massachusetts Department of Community Affairs.

^d Massachusetts Department of Labor and Industries. Summary of Building Permit Activities.

To designate a pilot program for the establishment of a national system of island trusts and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "National Island Trusts Act."

STATEMENT OF POLICY

SEC. 2.(a) It is hereby declared to be the policy of the United States that certain islands or groups of islands of the Nation which possess outstanding natural, scenic, historic, or recreational values should be protected and managed by the joint efforts of all levels of government and the private sector in order to insure that future generations will have an opportunity to enjoy our island heritage.

(b) The purpose of this Act is to implement this policy by designating a pilot program for the establishment of a national system of island trusts and prescribing the method by which islands or groups of islands subsequently designated by the Congress may become part of the system.

NATIONAL SYSTEM OF ISLAND TRUSTS

SEC. 3.(a) The Casco Bay Islands of Maine, comprising 324 islands in Cumberland and Sagadahoc Counties, are hereby designated as eligible to become the initial component of the national system of island trusts.

(b) The national system of island trusts shall comprise any other islands or groups of islands that are subsequently designated by Congress as eligible for inclusion in the system. Such islands shall—

- (1) possess outstanding natural, scenic, historic, or recreational values;
- (2) be reasonably accessible to urban areas; and
- (3) be largely undeveloped.

Such islands shall become part of the national system of island trusts upon the execution of agreements between the United States and the concerned States that are modeled after and substantially conform to the requirements of sections 4 through 9 of this Act.

TRUST COMMISSIONS

SEC. 4.(a) The Secretary of the Interior (hereinafter referred to as the "Secretary") is authorized, on behalf of the United States, to enter into an agreement with the State of Maine providing for the protection and management of the Casco Bay Islands as a national island trust after the Secretary is satisfied that State legislation exists to carry out the agreement.

(b) The agreement shall provide for the establishment of a National Island Trust Commission (hereinafter referred to as the "Commission") composed of a Federal member appointed by the Secretary, a member appointed by the Governor of Maine, and a member appointed by the governing body of each county and municipality involved. The agreement shall further provide that—

- (1) the Commission shall elect annually a Chairman and a Vice Chairman from among its members;

- (2) members of the Commission shall serve for six-year terms, except the member appointed by the Secretary shall serve at his pleasure;
- (3) vacancies on the Commission shall be filled in the same manner as the original appointment and for the balance of the unexpired term;
- (4) the Commission shall provide for its own organization and procedure and adopt rules and regulations governing its meetings and transactions, and all actions of the Commission shall require a favorable vote of a majority of its members; and
- (5) that Commission members shall be compensated at the rate of \$100 per diem while engaged in the performance of official duties and shall receive reimbursement for any necessary traveling and subsistence expenses incurred thereby.

FUNCTIONS OF THE COMMISSION

SEC. 5.(a) The agreement shall require the Commission to develop and maintain a comprehensive plan to preserve, restore, utilize, and develop the natural, scenic, historic, and recreational values of the Casco Bay National Island Trust, which plan shall (1) set forth the needs of the public for enjoyment of such values and the availability of resources to meet such needs; (2) identify critical natural, scenic, historic, and recreational problems and recommend desirable remedial actions to be taken by the Federal, State, county, and local governments involved and private interests; and (3) be in accord with the comprehensive statewide outdoor recreation plan submitted by the State of Maine pursuant to the Land and Water Conservation Fund Act of 1965 (78 Stat. 897), as amended. The Secretary may agree, within the limits of available funds and manpower, to provide the Commission with technical assistance in the development of such plans.

(b) The agreement shall require the Chairman of the Commission, within one year after the establishment of the Commission, to transmit the initial plan to the Secretary, the Governor of Maine, and the governing body of each county and municipality involved, and to transmit subsequent revisions of the plan to such persons as soon as practicable. If the plan recommends enactment of additional Federal legislation, the agreement shall require the Secretary to transmit the plan to the President of the Senate and the Speaker of the House of Representatives.

(c) The agreement shall also require the Commission to (1) formulate uniform and coordinated policies for implementation of the plan by the Federal, State, county, and local governments involved and by private interests; (2) to encourage the State, county, and local governments involved to adopt and enforce adequate master plans and zoning ordinances which will promote the use and development of privately owned lands within the national island trust in a manner consistent with the Commission's plan; and (3) to issue guidelines prescribing standards for such plans and ordinances, and provide technical assistance in obtaining their adoption.

POWERS OF THE COMMISSION

SEC. 6.(a) The agreement shall provide that if the State of Maine or any of its political subdivisions has failed, at any time after the expiration of two years from the date of transmittal of the Commission's plan to (1) adopt and enforce master plans and zoning ordinances consistent with the Commission's plan, or (2) acquire any privately owned property or interests therein recommended for acquisition by such governments in the Commission's plan, the Commission shall be empowered to—

June 7, 1973

APPENDIX 2(b) : A REPORT TO THE PEOPLE OF MARTHA'S VINEYARD
ON THE DEVELOPMENT OF THE ISLAND

The Planning Commission, believing that a common concern about the future of the Vineyard has existed despite diverse views regarding the Islands Trust Bill, has sponsored a series of meetings among individuals it regarded as representative of the various points of view. A consensus in certain areas would enable the Island to exert greater influence on the development of any legislation dealing with Island land use, and possibly accelerate the process.

This Committee, the members of which have signed their names to this report, met on the Vineyard eight times during the period of February through May, and twice went to Boston to meet with Federal and State officials. At each of these sessions Kevin Lynch of MIT and Gay Head acted as moderator and advisor. After intensive reviews of land control methods and many decisions, the Committee concluded that there was a need to:

1. moderate the annual rate of residential (second home) construction, while making ample provision for housing for low and moderate income Island residents;
2. preclude development from certain fragile areas;
3. improve the quality of development, and;
4. establish policy for transportation and access, both within and to the Island.

The meetings with State and Federal officials were held to answer six questions: Is it possible to enact legislation which would:

1. Permit a community to control and preclude development in fragile areas?
2. Permit a community to control the quality of development through the review of site plans?
3. Permit a community to control its residential growth rate?
4. Put land use proposals which have Island-wide implications under the control of an Island-wide authority?
5. Provide financial assistance for the acquisition of land which cannot be adequately protected by police power techniques, or for other necessary activities?
6. Make an Island-wide authority responsible for policy for the future of the transportation network both to and within the Island?

In return, what degree of control would the delegating authority agency wish to reserve for itself?

The response of the State and Federal officials was encouraging. Many approaches to achieving the desired results were discussed and precedents mentioned. Workable programs to satisfy all the other questions did not appear to be as difficult as would a program to establish control over residential growth. Enabling legislation and local law dealing with all the issues exists in most States today, except that direct control of the growth rate is relatively rare.

Some action can be taken by the Towns, but in general their powers are too limited. The Committee concludes that the responsibility for policy on issues which have Island-wide implications should be vested in an Island-wide Council or Commission (hereinafter simply named "The Council"), answerable to the people of Martha's Vineyard. What follows is not intended to be a new legislative proposal but a statement of methods and objectives which any proposal should comprise.

II. Suggested Principles for Evaluating Any Proposals for the Management of the Resources of Martha's Vineyard

A. Organizational Structure

1. The Council, which will make policy for managing the Island resources, should be comprised exclusively or primarily of registered voters of Dukes County but should also include a member of the student body of the Martha's Vineyard Regional High School. Nine members should be elected on an Island-wide ballot with the proviso that there should be at least one resident of each Town on the Council, but that no more than two members should be residents of any single Town. In addition to those elected members there might be up to six additional members, inclusive of the Student representative, who are either appointed by the elected members, or are elected or appointed by other bodies.

(Note: Here the Committee remains divided at the end of its discussion. Some members felt that only registered voters of Dukes County should be eligible for the Council, and that non-resident property owners might make up a separate advisory committee to the Council. Others felt that a minority of the Council should consist of persons representing the non-resident taxpayers. They also held opposing views concerning whether the six additional members should be appointed by the elected representatives of the registered voters or selected by other bodies.)

2. The Dukes County Planning and Economic Development Commission, in its present or some reorganized form, could act as a planning arm for the Council, just as local planning boards do for the Towns. The Commission would develop plans and programs, conduct public meetings and make recommendations to the Council on all matters related to land and its use. But if the Council establishes some other planning arm, then the Dukes County Planning and Economic Development Commission would cease to operate.

B. Program Responsibilities

The Council should have the responsibility and the authority to:

1. In concert with the Towns, identify those areas which are of critical importance from an Island-wide point of view and take whatever steps are necessary to

conserve and protect them, including strict site plan review, the exclusion of new structures, or the purchase of private land. The critical areas would include ground water reservoirs, scenic and historic sites and corridors, wetlands and other unique and fragile places. Regional criteria for protection of these critical areas would be developed, but regional control would only supersede Town control if it was found by the Council that a Town was not exercising, or could not exercise, the control required for that critical area, and so was either jeopardizing the Island as a whole or a neighboring Town, from an environmental or an economic point of view;

2. Have some control over activities affecting the entire Island, by specifying a threshold beyond which land subdivision and land development should be subject to the authorities of the Council. An example of a development threshold might be the subdivision of 10 or more acres or the construction of 5 or more dwelling units on any one site;
3. Develop, plan and implement the Island transportation systems which are regional in nature, such as bikeways or public buses. By working for and through a stronger Island representation on the Steamship Authority the Council should coordinate Authority policy with general strategy for Island development;
4. Propose the establishment of Island-wide or Town residential growth rates, taking into account the impact of growth on the Island economy, on its water supplies, its provision of services, its ecology, Town finances, housing for Islanders, preservation of the Island way of life, and many other critical and delicate matters;
5. Exercise the power of eminent domain for conservation, recreation, transportation and utility system purposes only. But the Council should only have the power to do so by vote of the Town Meeting in the Town affected, or by affirmative vote of all the elected Town representatives on the Council other than those representing the affected Town. The Council should convey a one-half undivided interest in any land so acquired to the Town in which it is located;
6. Provide any Town with technical assistance in establishing and administering zoning, flood plain zoning, historic and scenic district control, or subdivision and site plan review by-laws;
7. Receive funds from any source. Establish fees for its services. Borrow in anticipation of receipts. Issue bonds or levy taxes, but only within some established limits.

III. Conclusion

Except for the opposing views as to the representation of the non-resident taxpayers in the Council and the method of selection of members other than those elected by the registered voters, the undersigned generally concur with the foregoing statements and encourage public debate on the points raised. The Committee members support the establishment of principles useful for responding to any legislative proposals dealing with the development of Martha's Vineyard, and hope that they may aid in developing a public position from which to modify pending legislation at either the State or Federal level. The Committee is agreed that concerted action to control the future development of the Island is a matter of urgency.

/s/ James Alley
Robert Carroll
Nicholas Freydberg
Shirley Frisch
Anne Hale
Herbert Hancock
Henry Hough
Daniel Hull
Larry Look
Dean Swift
Edwin Tyra

Appendix

Committee Members:

A. Vineyarders to Amend the Bill

James Alley
Nicholas Freydberg
Henry Hough

B. Island Action Committee

Robert Carroll
Shirley Frisch
Daniel Hull

C. Selectmen's Association

Herbert Hancock

D. Dukes County Planning and Economic Development Commission

Anne Hale
Dean Swift
Edwin Tyra

E. Student Council of Martha's Vineyard Regional High School

Larry Look

Discussions were held with the following:

Federal representatives

- K. Dun Gifford, representing Senator Edward Kennedy
- Hap Ellis, representing Senator Edward Brooke
- Richard Norling, representing Representative Gerry Studds
- Stephe Ells, representing the Environmental Protection Agency
- Leslie Arnberger
- Albert Benjamin, and
- James Killian, representing the Department of Interior
(National Park Service)

State representatives

- Representative Terrence McCarthy
- Henry Lee, representing Governor Francis Sargent
- John Eller and Joe Wallace, representing Speaker David Bartley

APPENDIX 2(c) : THE COUNTY BILL

MARTHA'S VINEYARD RESOURCE MANAGEMENT FUND

A Bill

To establish the Martha's Vineyard Resource Management Fund in the Commonwealth of Massachusetts, to declare certain national policies essential to the preservation and conservation of the lands and waters in the Resource Management Fund area, and for other purposes.

Findings and Statements of Policy

SEC. 1 The congress finds that--

(a) Martha's Vineyard Island in the Commonwealth of Massachusetts, possesses unique natural, scenic, ecological, scientific, cultural, historic, and other values;

(b) There is a national interest in preserving and conserving these values for the present and future well-being of the Nation and for present and future generations;

(c) These values are being irretrievably damaged and lost through ill-planned development;

(d) Present state and local institutional arrangements for planning and regulating land and water uses to preserve and conserve these values are inadequate;

(e) The key to more effective preservation and conservation of the values of Martha's Vineyard Island is a program encouraging coordinate action by federal, state and local governments in partnership with private individuals, groups, organizations and associations for the purpose of administering sound policies and guidelines regulating ill-planned development.

(f) Such a program can protect the natural character and scenic beauty of Martha's Vineyard Island consistent with maintenance of sound local economies and private property values; and

(g) Because expanded access to the Island would be in contravention to the purposes of this act, it shall be the national policy that no bridge, causeway, tunnel or other direct vehicular access be constructed from the mainland to the Island.

Martha's Vineyard Resource Management Fund

SEC. 2 In order to provide for the preservation and conservation of the unique natural scenic, ecological, scientific, cultural, historic, and other values of Martha's Vineyard Island there is established for the commonwealth of Massachusetts a Martha's Vineyard Resource Management

Fund (hereinafter referred to as the "Fund"). This Fund shall be administered as hereinafter described through programs and policies designed to achieve wise use of the land and water resources of the area, giving full consideration to protection of the values of the area as well as to needs for sound local economies.

Intergovernmental Cooperation

SEC. 3 (a) The Secretary of Interior is hereby authorized and directed to enter into contractual agreements with the Martha's Vineyard Commission (established by the General Court of the Commonwealth of Massachusetts in Chapter -- of the Acts of 1974) (hereinafter referred to as the "Commission") for the purposes of developing programs aimed at satisfying the intent and purpose of this Act.

(b) All contractual arrangements shall include provisions which ensure that--

(1) All expenses reasonably incurred by the Commission in carrying out its responsibilities under this Act shall be provided for;

(2) The Commission shall publish and make available to the Secretary and to the public an annual report reviewing matters relating to the Fund, including acquisition of lands, progress towards accomplishment of the purposes of this Act, and administration, and shall make such recommendations thereto as they deem appropriate to the Secretary, the Governor, and the towns;

(3) The Commission shall have an Executive Director and such other permanent or part-time professional, clerical, or other personnel as it finds are required, and may engage such other professional services as they may reasonably require;

(4) The Commission shall have an office and a mailing address at a central location in the area of its jurisdiction, and such office shall be where its ordinary business is conducted and its maps and records kept;

(5) The Commission shall have the authority to appoint Advisory Committees at its discretion;

(6) All Commission members shall provide disclosures of ownership interest in Fund area lands.

Fund Area

SEC. 4 (a) The area served by the Fund shall encompass the lands and waters in the Commonwealth of Massachusetts known generally as Martha's Vineyard Island, and the various islands appurtenant to it.

(b) The area served by the Fund may be changed only by an amendment to this Act adopted by the Congress and signed by the President, and only upon petition therefor by the Commission with the concurrence of:

(1) The town or towns affected by vote of a town meeting or meetings;

(2) The Governor; and

(3) The Secretary.

Classification of Fund Area Lands

SEC. 5 (a) Within one year of the initial contractual agreement between the Secretary and the Commission, the Commission shall prepare a plan and program for classifying all the land within its jurisdiction. In preparing such plan and program the Commission shall delineate them in appropriate documents and maps:

(1) Land where no development should take place;

(2) Land where extraordinary or innovative controls should be introduced;

(3) Land where normal but improved control is applicable.

(b) In the process of establishing such policies and plans for land classification, the Commission shall consider all relevant ecological, economic and sociological considerations and shall have developed whatever pertinent data is necessary and currently unavailable and shall aggregate such data into a documentary body of written proceedings which shall constitute the official, testificatory record of the Commission's land and water classification actions.

Assignment of Fund Area Lands

SEC. 6 (a) Assignment of lands and waters within the Fund area to the classification established by Section 5 herein shall be as depicted on official maps of the Commission and shall be available for public inspection in:

(1) The offices of the National Park Service, Department of the Interior;

(2) The offices of the towns within the Fund area; and

(3) The offices of the Commission.

(b) Changes to the plans and policies adopted within one year of the execution of the original contractual agreement between the Secretary and the Commission shall be made only after all affected individuals and property owners are appro-

priately notified and after at least one public hearing is held.

Acquisition of Lands

SEC. 7 (a) General Provisions

(1) Within the area of the Fund, the Secretary is authorized to provide funds to the Commission for the purchase of lands in interest therein at a fair market value for the purposes of this Act.

(2) With respect to that property which the Commission is authorized to acquire without the consent of the owner under the terms of this Act, the Commission shall initiate no proceedings therefor until after it has made every reasonable effort to acquire such property or interest therein by negotiation and purchase at the fair market value.

(3) In exercising its authority to acquire property under the terms of this Act, the Commission shall give immediate and special consideration to any offer to sell made by an owner or owners of land which has been designated as land where no development should take place. An owner or owners may notify the Commission that the continued ownership of those lands would result in hardship to such owner or owners, and the Commission shall immediately consider such evidence and shall within six months following the submission of such notice, and subject to the then current availability of funds, purchase the lands offered at the fair market value;

(4) In exercising authority to acquire property under the terms of this Act, the Commission shall conform to the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42-U.S.C. 4601);

(5) Nothing in this Act shall be construed to prohibit the use of eminent domain as a means of acquiring a clear and marketable title, free of any and all encumbrances;

(6) In exercising their authority to acquire property by exchange, the Commission may accept title to any non-Federal property located within such area and convey any federally owned property under the jurisdiction of the Commission within such area. The properties so exchanged shall be approximately equal in fair market value: Provided, that the Commission may accept cash from or pay cash to the grantor in such an exchange in order to equalize the values of the properties exchanged;

(7) Any property or interests therein, owned by the Commonwealth of Massachusetts or any political subdivision thereof, may be acquired only by donation. Notwithstanding any other provision of law, any property owned by the United States located within the Fund area may, with the concurrence of the agency having custody thereof, be transferred without consideration to the administrative jurisdiction of the Commission for use by it in carrying out this Act.

(b) Transfer to Towns;

(1) Upon acquisition of any land or interests therein, the Commission shall concurrently or as soon as is practicable thereafter without consideration convey an undivided one half interest therein to the Town within whose jurisdiction it lies;

(2) Thereafter, such land or interest therein shall be held by the Commission and the appropriate Towns in a public trust;

(3) The lands or interests therein so held in trust shall be administered as described in this Act, and the Commission and Towns may exchange any such lands or interests so held in trust pursuant to the provisions of this section.

(c) Taxation;

(1) Nothing in this Act shall be construed to exempt any real property or interest therein held by the Commission and Towns under this Act from taxation by the Commonwealth of Massachusetts or any political subdivision thereof to the same extent, according to its value, as other real property is taxed;

(2) Nothing contained in this Act shall be construed as prohibiting any governmental jurisdiction in the Commonwealth of Massachusetts from assessing taxes upon any interest in real estate retained under the provisions of this Act to the non-exempt owner or owners of such interests, nor from establishing and collecting fees in lieu of taxes upon any nongovernmental use of lands acquired pursuant to this Act.

Administrative Provisions

SEC. 8 (a) The Fund shall be administered and protected by the Commission with the primary aim of preserving the natural resources located within it and preserving the area in as nearly its natural state and condition as possible. No development will be funded through the Fund which would be incompatible with the overall life-style of resi-

dents of the area, with generally accepted ecological principles, with the preservation of the physiographic conditions now prevailing, or with the preservation of historic sites or structures.

(b) The Secretary shall be responsible for developing guidelines for the use of funds and administration thereof in accordance with the provisions of this Act and the Act of August 25, 1916 (39 Stat. 535; 16 U. S. C. 1 et seq.), as amended and supplemented except that the Secretary may utilize any other statutory authority available to him for the conservation, preservation and management of natural resources to the extent he finds such authority will further the purposes of this Act;

(c) The Commission shall coordinate its administrative activities with those of other federal, state, and local government authorities and agencies operating in the Fund area.

Transportation and General Uses

SEC. 9 (a) The Commission together with the Governor and the Secretary, shall make an immediate survey of public and private water and air access to lands in the Fund area, including that by the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority and by other public and private water and air carriers, shall make such recommendations to the appropriate body or bodies for legislative or administrative action as they deem consistent with the preservation and conservation purposes of this Act. Such recommendations shall include specific measures to limit the number of motor vehicles and passengers such carriers might otherwise transport to Martha's Vineyard Island. Thereafter regular and frequent surveys of such access shall be made, and such recommendations shall be made, as are deemed appropriate to maintain the unique values of lands and waters in the Fund area.

(b) No development or plan for the convenience of visitors to Fund lands or waters shall be undertaken which would be incompatible with the preservation and conservation of the unique values thereof; provided, that the Commission, the Governor, and the Secretary may provide for the public enjoyment and understanding of the values of Martha's Vineyard Island by establishing such public transportation

systems, trails, bicycle paths, observation points and exhibits, and by providing such services as they may deem desirable for such public enjoyment and understanding, consistent with the preservation and conservation of such values.

(c) In any such provision for public enjoyment or understanding, the Commission, the Governor, and the Secretary shall not unreasonably diminish for its owners or occupants the value or enjoyment of any improved property within the Fund area.

Pollution

SEC. 10 The Commission, together with the Governor and the Secretary, shall cooperate with the appropriate Federal, State and local agencies to provide safeguards against pollution of the waters in and around the Fund area. Such safeguards shall include an immediate survey of the quality of ground water conditions of Martha's Vineyard, and the necessary funds therefor may be drawn from the appropriations authorized by section 12 herein.

New Employment Opportunities

SEC. 11 (a) The Commission is authorized to expend funds to examine opportunities to experiment with, and to encourage development of, aquaculture of all kinds, including but not limited to, fish and shellfish and other associated activities; and to examine other new employment opportunities of any kind appropriate to the purposes of the Act. Funds appropriated to the Department of Interior, Commerce and Labor under the authority of this or other laws of the United States may be used for this purpose without restriction;

(b) The Commission, the Governor and the Secretary shall to as great an extent as possible in the development of any regulations pursuant to the provisions of this Act

encourage the maintenance and commencement of agricultural uses of Fund area lands;

(c) The Commission, in consultation and cooperation with the Secretary of Labor, shall investigate, and where appropriate establish, training and retraining programs suitable for residents of Fund area lands.

Appropriations

SEC. 12 There are hereby authorized to be appropriated such sums

as may be necessary to carry out the provisions of this Act; not to exceed, however, \$20,000,000 for the acquisition of land and interests therein, and not to exceed \$5,000,000 for the development for the first three years of the operation of the Fund.

APPENDIX 2(d) : THE NANTUCKET SOUND ISLANDS TRUST BILL, AS OF JANUARY 15, 1975
S. 67

94TH CONGRESS
1ST SESSION

S. 67

IN THE SENATE OF THE UNITED STATES

JANUARY 15, 1975

Mr. KENNEDY (for himself and Mr. BROOKE) introduced the following bill;
which was read twice and referred to the Committee on Interior and
Insular Affairs

A BILL

To establish the Nantucket Sound Islands Trust in the Common-
wealth of Massachusetts, to declare certain national policies
essential to the preservation and conservation of the lands
and waters in the trust area, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 FINDINGS AND STATEMENTS OF POLICY

4 SECTION 1. The Congress finds and declares—

5 (a) that the Nantucket Sound Islands in the Com-
6 monwealth of Massachusetts, known generally as the
7 Islands of Nantucket, Tuckernuck, Muskeget, Martha's
8 Vineyard, Noman's Land, and the group of islands
9 known collectively as the Elizabeth Islands, possess

1 unique natural, scenic, ecological, scientific, cultural,
2 historic, and other values;

3 (b) that there is a national interest in preserving
4 and conserving these unique values for the present and
5 future well-being of the Nation and for present and
6 future generations;

7 (c) that in some portions of the Nantucket Sound
8 Islands these unique values are being irretrievably dam-
9 aged and lost through ill-planned development, and that
10 such development threatens heretofore successful local
11 government and private voluntary preservation and con-
12 servation efforts;

13 (d) that the present State, regional, and local
14 powers and authorities for controlling land and water
15 uses are inadequate to preserve and conserve the unique
16 values of the said islands;

17 (e) that the key to more effective preservation and
18 conservation of the unique values of the Nantucket
19 Sound Islands is a program encouraging coordinated
20 action by Federal and State Governments to assist local
21 governments, in partnership with private individuals,
22 groups, organizations, and associations, to administer
23 sound acquisition and management policies regulating
24 ill-planned development;

1 (f) that such a program can protect the natural
2 character and cultural and historic heritage of the Nan-
3 tucket Sound Islands consistent with maintenance of
4 sound local economies and private property values, thus
5 preserving and conserving their unique values; and

6 (g) that because expanded access to the said islands
7 would seriously impair their unique values and be in
8 contravention to the purposes of this Act, it shall be
9 national policy that no bridge, causeway, tunnel, or
10 other direct vehicular access be constructed from the
11 mainland to the islands.

12 NANTUCKET SOUND ISLANDS TRUST

13 SEC. 2. (a) In order to provide for the preservation
14 and conservation in the national interest of the unique nat-
15 ural, scenic, ecological, scientific, cultural, historic, and other
16 values of the Nantucket Sound Islands, there is established
17 in the Commonwealth of Massachusetts the Nantucket Sound
18 Islands Trust (hereinafter referred to as the "trust"), com-
19 prising the area described in section 4 herein.

20 (b) Guidelines contained in this Act shall be the basis
21 for programs and policies to preserve and conserve the
22 unique values of the trust area, and when such programs and
23 policies have been adopted by the islands trust commissions
24 as hereinafter provided, they shall be administered by those
25 commissions. Such policies and programs shall protect the

1 unique values of the trust area through land use controls de-
2 signed to encourage wise and prudent stewardship of land
3 and water resources consistent with maintenance of sound
4 local economies.

5 NANTUCKET SOUND ISLANDS TRUST COMMISSIONS

6 SEC. 3. (a) There are hereby established the Nantucket
7 Trust Commission, the Martha's Vineyard Trust Commission,
8 and the Elizabeth Islands Trust Commission, to be known
9 collectively as the Nantucket Sound Islands Trust Commis-
10 sions (hereinafter referred to as the "commissions").

11 (b) NANTUCKET TRUST COMMISSION.—The Nan-
12 tucket Trust Commission shall have the responsibilities as
13 established herein over the lands and waters in Nantucket
14 County, and shall be composed of seven members serving
15 three-year staggered terms which shall commence on the
16 first Monday in April. Members shall be selected as follows:

17 (1) a member appointed by the Secretary of the
18 Interior (hereinafter referred to as the "Secretary");

19 (2) a member appointed by the Governor of the
20 Commonwealth of Massachusetts (hereinafter referred
21 to as the "Governor");

22 (3) two members appointed by the Board of Se-
23 lectmen of the Town of Nantucket within two weeks
24 after the annual town meeting, one of whom shall be a
25 seasonal resident property owner;

1 (4) two members who shall be qualified voters of
2 the town and shall be elected at the annual election
3 which is a part of the annual town meeting; and

4 (5) a member appointed by the Nantucket Plan-
5 ning Board within two weeks after the annual town
6 meeting, who shall be a qualified voter of said town.

7 Not more than one member of the commission may serve si-
8 multaneously in any elective town or county office.

9 (c) MARTHA'S VINEYARD TRUST COMMISSION.—The
10 Martha's Vineyard Trust Commission shall have the respon-
11 sibilities as established herein over the lands and waters in
12 Dukes County, excepting the Elizabeth Islands, and shall be
13 composed of twenty-two members serving two-year stag-
14 gered terms which shall commence on January 1 of each
15 year. Members shall be selected as follows:

16 (1) a member appointed by the Secretary;

17 (2) a member appointed by the Governor;

18 (3) a member appointed by the board of select-
19 men of each town on Martha's Vineyard who may be a
20 selectman, a member of a planning board, or of any
21 other municipal agency board; department, or office of
22 that town;

23 (4) a member appointed by the Dukes County
24 commissioners, who may or may not be a Dukes County
25 commissioner;

1 (5) nine members elected at large in an islandwide
2 election, with not less than one member nor more than
3 two members to be elected from any one town on
4 Martha's Vineyard; elections held subsequent to the
5 initial election of members shall be held concurrent with
6 the biannual elections for State and county offices;

7 (6) four members whose principal residence is not
8 on Martha's Vineyard but who pay taxes on property
9 owned by them on Martha's Vineyard, two of such
10 members to be appointed by the Secretary and two by
11 the Governor: *Provided*, That such members shall have
12 voice but no vote in deciding matters before the com-
13 mission. Only the members selected under paragraphs
14 (3) and (4) of this subsection may hold elective town
15 or county office during their terms of office as commission
16 members.

17 In the event that the laws of the Commonwealth of Massa-
18 chusetts either before or after enactment of this Act provide
19 for a new regional agency with planning or regulatory re-
20 sponsibilities for all or a part of trust lands and waters on
21 Martha's Vineyard, such agency will, upon a majority vote
22 of its members, serve as the Martha's Vineyard Commission
23 herein established.

24 (d) ELIZABETH ISLANDS TRUST COMMISSION.—The
25 Elizabeth Islands Trust Commission shall have the responsi-

1 bilities as established herein over the lands and waters of the
2 Elizabeth Islands, and shall be composed of seven members
3 serving three-year staggered terms which shall commence on
4 the first Monday in April. Members shall be selected as
5 follows:

- 6 (1) a member appointed by the Secretary;
- 7 (2) a member appointed by the Governor;
- 8 (3) a member elected at the annual election which
9 is a part of the annual town meeting;

10 (4) two members appointed by the board of select-
11 men to represent the Island of Cuttyhunk, one of whom
12 shall be a permanent resident of Cuttyhunk and one of
13 whom shall be a seasonal resident of Cuttyhunk; and

14 (5) two members appointed by the board of select-
15 men to represent the other islands in the Elizabeth
16 Islands, one of whom shall be a permanent resident of
17 one of such other islands, and one of whom shall be a
18 seasonal resident of one of such other islands.

19 (a) GENERAL PROVISIONS APPLICABLE TO COMMISS-
20 SIONS.—(1) Each commission shall have a chairman. The
21 chairmen of the commissions shall each be elected by the
22 membership thereof for a term of not to exceed two years.
23 Any vacancy in the commissions shall be filled in the same
24 manner in which the original selection was made, except that

1 interim appointments may be made by the remaining mem-
2 bers of the commission.

3 (2) All members of the commission shall be paid at the
4 rate of \$50 per diem when actually serving. The Secretary is
5 authorized to pay the expenses reasonably incurred by the
6 commissions in carrying out their responsibilities under this
7 Act on the presentation of vouchers signed by the chairmen.

8 (3) The commissions shall publish and make available
9 to the Secretary and to the public an annual report reviewing
10 matters relating to the trust, including acquisition of lands,
11 progress toward accomplishment of the purposes of this Act,
12 and administration, and shall make such recommendations
13 thereto as they deem appropriate to the Secretary, Governor,
14 and the towns.

15 (4) The commissions may employ such permanent or
16 part-time professional, clerical, or other personnel as they
17 find are required, and may engage such other professional
18 services as they may reasonably require. Each commission
19 shall have an office and a mailing address at a central loca-
20 tion in the area of its jurisdiction, and such office shall be
21 where its ordinary business is conducted and its maps and
22 records kept.

23 (5) The commissions shall each have the authority to
24 appoint commission advisory committees in their own dis-
25 cretion. Each commission shall designate three members to

1 serve on a coordinating committee with members of the
2 other commissions to treat matters of common concern.

3 (6) At its first meeting each commission shall adopt
4 bylaws and rules of procedure, which may include dates of
5 meetings, public distribution of information relating to com-
6 mission activities, disclosure of ownership interest in trust
7 lands by commission members, and any other matters
8 normal to the operation of such bodies and consistent with
9 the purposes of this Act. The commissions shall comply with
10 the provisions of the Massachusetts Open Meetings Law, and
11 they shall be deemed to be "boards" within the meaning of
12 said law. In exercising their management and administrative
13 responsibilities under this Act the commissions shall not
14 adopt regulations which are less restrictive than regulations
15 in force and effect in the Commonwealth of Massachusetts
16 or the respective towns within the trust area.

17 TRUST AREA

18 SEC. 4. (a) The area comprising the trust shall en-
19 compass the following lands and waters in the Common-
20 wealth of Massachusetts:

21 (1) Nantucket Island, and the islands to westward
22 called variously, Smith's Island or Esther Island;

23 (2) Tuckernuck Island;

24 (3) Muskeget Island;

1 (4) Martha's Vineyard Island, and various islands
2 appurtenant to it;

3 (5) Noman's Land Island;

4 (6) the Elizabeth Islands, including but not limited
5 to the islands of Cuttyhunk, Nonamasset, Naushon,
6 Pasque, Nashawena, Uncatena, Penikese, and the Wee-
7 peckets; and

8 (7) any other lands and waters in Nantucket
9 County and Dukes County in the Commonwealth of
10 Massachusetts.

11 (b) The area included in the trust may be changed only
12 by an amendment to this Act, and only after petition therefor
13 by the commissions with the concurrence of—

14 (1) the town or towns affected expressed by vote
15 of a town meeting or meetings;

16 (2) the Governor; and

17 (3) the Secretary.

18 (c) **NOMAN'S LAND.**—The lands and waters of No-
19 man's Land Island are hereby declared part of the Na-
20 tional Wildlife Refuge System and the Secretary is directed
21 to prepare and execute forthwith the necessary documen-
22 tation to give effect to such declaration. The Secretary
23 and the Secretary of Defense shall, within twelve months
24 after the date of enactment of this Act, survey Noman's
25 Land Island and the surrounding waters for unexplored

1 military ordnance and render such ordnance, wherever it
2 may be found, harmless; and thereafter, Noman's Land
3 Island shall be administered pursuant to the National Wild-
4 life Refuge System Administration Act (16 U.S.C. 668dd).

5 CLASSIFICATION OF TRUST LANDS

6 SEC. 5. (a) Lands and waters within the trust area shall
7 all be assigned to the classifications established in subsection
8 (b) of this section. Upon the date of enactment of this
9 Act, such lands and waters shall be assigned to classifica-
10 tions as set forth in section 6 and section 17 of this Act.

11 (b) CLASSIFICATIONS OF TRUST LANDS.—

12 (1) CLASS A: OPEN LANDS.—Lands and waters so
13 classified shall remain forever free of improvements, as
14 defined hereinafter, of any kind except as provided here-
15 in. If improvements exist on any lands so classified on
16 the date of enactment of this Act, then there shall be per-
17 mitted a right of use and occupancy to the legal or bene-
18 ficial owner or owners thereof, or their successors or
19 assigns, for so long as such successors or assigns are
20 members of the same family or families as the legal or
21 beneficial owner or owners. If, however, the legal or
22 beneficial owner or owners seek to sell or otherwise
23 convey the improvement with or without the land there-
24 under to others than legal or beneficial owners or mem-
25 bers of the same family or families as the legal or bene-

1 ficial owner or owners, then the commissions and the
2 Secretary shall have an exclusive option to purchase said
3 improvement with or without the land thereunder at full
4 and fair market value, which shall be promptly deter-
5 mined, and such option shall exist for sixty days after
6 such determination. If such option is exercised, then the
7 improvement may be moved or removed; if such option
8 is not exercised, then the sale or other conveyance may
9 proceed in the ordinary course. For the purposes of this
10 paragraph, family shall mean siblings of a legal or bene-
11 ficial owner or owners, lineal descendants natural or
12 adopted, or relatives by marriage. Any change in access
13 to and/or use of lands classified as "Class A: Open
14 Lands" must first be approved by the commissions and
15 the Secretary, except that uses shall be in a manner not
16 less restrictive than permitted by general purpose local
17 ordinances, bylaws, and regulations from time to time in
18 effect. Owners of improvements may make necessary
19 repairs, and may make replacements or extensions there-
20 to which shall not alter the basic character of the lands,
21 with the approval of the commissions and the applicable
22 local government agency.

23 (2) CLASS B: RESOURCE MANAGEMENT LANDS.—
24 Lands and waters so classified shall not be developed
25 beyond their present intensity of use, except as provided

1 in this paragraph. Owners of such lands, or of improve-
2 ments thereon, or of both, may transfer, sell, assign, or
3 demise such land or improvements, or both. Reasonable
4 replacement and extension of improvements shall be
5 permitted, under regulations issued by the commissions.
6 Development on lands so classified beyond their present
7 intensity of use shall be permitted only under regula-
8 tions consistent with the following guidelines:

9 (i) the overall intensity must take into account
10 the capability of the land for such development,
11 which shall include consideration of existing land
12 use, intensity of uses in the immediate vicinity, area-
13 wide water quality and quantity, soil conditions,
14 roadway utilization, and visual and topographic
15 conditions;

16 (ii) the overall intensity guideline shall not be
17 translated into uniform lot sizes and applied to the
18 land so classified, but shall be applied with flexibility
19 to encourage sound land use planning respecting the
20 varying natural values of the different geographical
21 areas of land; and

22 (iii) the area upon which intensity is calculated
23 shall not include bodies of water or wetlands classi-
24 fied as such under Massachusetts Wetlands Pro-
25 tection Act (131 M.G.L. 40).

1 Regulations consistent with these guidelines shall be
2 issued by each commission within three months, and shall
3 become effective only after a public hearing or hearings
4 thereon to be held within thirty days of issuance and
5 after approval by the Governor and the Secretary. After
6 such regulations have become effective, the provisions of
7 section 16 herein as they apply to the lands covered by
8 the regulations shall no longer apply; and construction
9 of improvements on such lands shall thereafter be per-
10 mitted so long as the appropriate commission has issued
11 a permit therefor indicating satisfaction of the conditions
12 of this paragraph.

13 (3) CLASS C: TOWN LAND.—Lands and waters so
14 classified shall remain under the jurisdiction of the town
15 in which located for purposes of planning and zoning
16 ordinances and other land use regulations: *Provided,*
17 That such planning and zoning ordinances and other
18 land use regulations shall be reviewed and commented
19 upon by the commissions and the Secretary as to con-
20 sistency with the purposes of this Act prior to the adop-
21 tion of such ordinances or regulations or amendments
22 thereto: *And provided further,* That the commissions
23 may review and comment upon variances proposed to be
24 granted pursuant to any local zoning ordinance.

25

ASSIGNMENT OF TRUST LANDS

1 SEC. 6. (a) Assignment of lands and waters within the
2 trust area to the classifications established by section 5 of this
3 Act shall be as depicted on official Nantucket County and
4 Dukes County Nantucket Sound Island Trust maps on file
5 and available for public inspection in—

6 (1) the offices of the selectmen of the towns within
7 the trust area;

8 (2) the offices of the commissions;

9 (3) the offices of the Massachusetts Secretary of
10 Communities and Development; and

11 (4) the offices of the National Park Service, Depart-
12 ment of the Interior.

13 (b) Changes to the maps indicating changes in such as-
14 signments to classifications shall be made after the date of
15 enactment of this Act as follows—

16 (1) minor corrective adjustments in the location of
17 boundary lines due to technical or clerical errors may be
18 made within one hundred and eighty days after the first
19 official meeting of a commission by vote of such commis-
20 sion and with the concurrence of the board of selectmen
21 of the town affected;

22 (2) other changes in the location of boundary lines
23 between classifications may be made by a commission
24 acting pursuant to an affirmative vote thereon by a town
25 meeting or meetings of the town or towns affected, with

1 the concurrence of the Governor and the Secretary: *Pro-*
2 *vided*, That should either the Governor or the Secretary,
3 or both, not concur, then such change shall become effec-
4 tive upon a subsequent two-thirds vote by the commis-
5 sion: *And provided further*, That no vote upon a pro-
6 posed change shall be made at a town meeting until after
7 a public hearing on such change has been held.

8 (c) Any changes to the maps changing the location of
9 boundary lines between classifications shall be recorded on
10 the official maps within seven days after such changes be-
11 come effective, by the officials responsible for posting said
12 maps.

13 ACQUISITION OF LANDS

14 SEC. 7. (a) GENERAL AUTHORITY.—(1) Within the
15 area of the trust, the Secretary is authorized to acquire lands
16 and waters and interests therein at fair market value for the
17 purpose of this Act (i) by donation or transfer from any
18 Federal agency, (ii) by purchase with donated or appropri-
19 ated funds or transfer funds, or (iii) by exchange: *Provided*,
20 That after the date of enactment of this Act, the Secretary
21 may not purchase any lands or waters or interests therein
22 without being authorized to do so by the majority affirmative
23 vote thereon by the commission within whose jurisdiction the
24 lands or waters or interests therein are located. In exercising
25 his authority to acquire property under the terms of this

1 Act, the Secretary shall conform to the requirements of the
2 Uniform Relocation Assistance and Real Property Acquisi-
3 tion Policies Act (42 U.S.C. 4601). Any voting member of
4 a commission may recommend an area for purchase, and at a
5 regular meeting of the commission shall be able to obtain a
6 record vote on such recommendation.

7 (2) Any lands or waters or interests therein, owned by
8 the Commonwealth of Massachusetts or any political sub-
9 division thereof, may be acquired only by donation. Notwith-
10 standing any other provision of law, any property owned by
11 the United States of America on the date of enactment of
12 this Act, located within the trust area may, with the concu-
13 rence of the agency having custody thereof, be transferred
14 without consideration to the administrative jurisdiction of
15 the Secretary for use by him in carrying out this Act pur-
16 suant to its provisions.

17 (3) In exercising authority to acquire property under
18 the terms of this Act, the commissions and the Secretary
19 shall give immediate and special consideration to any offer
20 made by an owner or owners of unimproved Class A: Open
21 Lands or Class B: Resource Management Lands within the
22 trust area to sell such lands to the Secretary. An owner or
23 owners may notify the commissions and the Secretary that
24 the continued ownership of those lands would result in hard-
25 ship to such owner or owners, and the commissions shall

1 immediately consider such evidence; and the Secretary shall,
2 within six months following the majority affirmative vote
3 thereon by the appropriate commission, and subject to the
4 then current availability of funds, purchase the lands offered
5 at the fair market value prior to April 11, 1972.

6 (4) In exercising his authority to acquire property by
7 exchange, the Secretary may accept title to any non-Federal
8 property located within such area and upon the majority
9 affirmative vote of the appropriate commission, may con-
10 vey to the grantor of such property any federally owned
11 property held as in trust by the commission and the Secre-
12 tary within such area. The properties so exchanged shall
13 be approximately equal in fair market value: *Provided*,
14 That the Secretary may accept cash from or pay cash to the
15 grantor in such an exchange in order to equalize the values
16 of the properties exchanged.

17 (b) TRANSFER TO COMMISSIONS.--(1) Upon acqui-
18 sition by him of any lands or waters or interests therein, the
19 Secretary shall concurrently or as soon as is practicable
20 thereafter transfer without consideration an undivided one-
21 half interest in such acquisition to the commission within
22 whose jurisdiction the lands or waters or interests therein
23 are located.

24 (2) Thereafter, such lands or waters or interests shall
25 be held jointly by the appropriate commission and the
26 Secretary as in a public trust.

1 (3) The lands or waters or interests therein so held
2 as in trust shall be administered as described in this Act,
3 and the Secretary and the commissions may exchange any
4 such lands or interests so held as in trust pursuant to the
5 provisions of this section.

6 (c) TAXATION.—(1) Nothing in this Act shall be
7 construed to exempt any real property or interest therein
8 held by the commissions and the Secretary under this Act
9 from taxation by the Commonwealth of Massachusetts or
10 any political subdivision thereof to the same extent, ac-
11 cording to its value, as other real property is taxed.

12 (2) Nothing contained in this Act shall be construed as
13 prohibiting any governmental jurisdiction in the Common-
14 wealth of Massachusetts from assessing taxes upon any inter-
15 est in real estate retained under the provisions of this Act to
16 the nonexempt owner or owners of such interest, nor from
17 establishing and collecting fees in lieu of taxes upon any non-
18 governmental use of lands acquired pursuant to this Act.

19 LIMITATIONS AND DEFINITIONS

20 SEC. 8. (a) Not later than one hundred and eighty days
21 after the enactment of this Act, the commissions and the Sec-
22 retary shall notify an owner or owners of Class B: Resource
23 Management Lands, other than property designated for fee
24 acquisition, of the minimum regulations on use and develop-
25 ment of such property under which such property may be

1 retained in a manner compatible with the purpose for which
2 the trust was established. If the owner or owners of any such
3 lands agree to the use and development of the property in
4 accordance with such regulations, the Secretary may not
5 acquire, without the consent of such owner or owners, such
6 property or interests therein for so long as the property
7 affected is used in accordance with such regulations, unless
8 the commissions determine that such property, or any part
9 thereof, is needed for other purposes as described in this Act.
10 Such lands shall be included in the area upon which intensity
11 is calculated for purposes of section 5 (b) (2) herein.

12 (b) With respect to that property which the Secretary is
13 authorized by the commissions to acquire without the consent
14 of the owner under the terms of this Act, the Secretary shall
15 initiate no proceedings therefor until after he has made every
16 reasonable effort to acquire such property or interest therein
17 by negotiation and purchase at the fair market value prior
18 to April 11, 1972. The certificate of the determination by the
19 Secretary or his designated representative (which may be
20 the commissions) that there has been compliance with the
21 provisions of this paragraph shall be prima facie evidence
22 of such compliance: *Provided*, That nothing in this Act shall
23 be construed to prohibit the use of eminent domain as a means
24 of acquiring a clear and marketable title, free of any and all
25 encumbrances.

1 (c) The commissions and the Secretary shall furnish to
2 any interested person requesting the same a certificate indi-
3 cating, with respect to any property, which the Secretary
4 has been prohibited from acquiring without the consent of
5 the owner in accordance with the provisions of this Act,
6 that such authority is prohibited and the reasons therefor.

7 (d) DEFINITIONS.—As used in this Act, the term “im-
8 provement” means a detached, residential one-family dwell-
9 ing, construction of which was begun before April 11, 1972,
10 or such a dwelling for which a certificate of need was voted
11 pursuant to section 16 (a) herein, together with—

12 (1) so much of the land on which the dwelling is
13 situated, the said land being in the same ownership as
14 the dwelling, as the commissions and the Secretary shall
15 designate to be reasonably necessary for the enjoyment
16 of the dwelling and land for noncommercial residential
17 or agricultural purposes, and

18 (2) any structures accessory to the dwelling which
19 are situated on such land.

20 The amount of the land subject to such designation in Class
21 A: Open Lands and Class B: Resource Management Lands
22 shall in every case be at least three acres in area, or all of
23 such lesser acreage as may be held in the same ownership as
24 the dwelling. In making such designations, the commissions
25 and the Secretary shall take into account the manner of non-

1 commercial residential use in which the dwelling and land
2 have customarily been enjoyed: *Provided*, That the com-
3 missions and the Secretary may exclude from the land so
4 designated any beach lands, together with so much of the
5 land adjoining such beach lands, as they may deem neces-
6 sary for public access thereto. If they make such exclusion,
7 an appropriate buffer zone shall be provided between any
8 dwelling and the public access or beach.

9 (e) As used in this Act, the terms "development" and
10 "developed" shall mean the construction of an improvement.

11 (f) Should a commercial use in existence prior to
12 April 11, 1972, be included as part of such a dwelling, it
13 shall be considered a nonconforming use.

14 (g) The commissions shall establish regulations con-
15 sistent with the purposes of this Act governing the status of
16 boathouses, camps, piers, and other nonresidential structures.

17 EROSION CONTROL AND POLLUTION

18 SEC. 9. (a) The commissions, together with the Secre-
19 tary, the Governor, and the Secretary of the Army, shall
20 cooperate in a study and shall formulate plans for beach and
21 shoreline erosion control and restoration projects on the
22 Nantucket Sound Islands, especially in those areas most
23 immediately threatened. Any protective works, including
24 water resource developments and navigation improvements,
25 for such control undertaken by the Department of the Army

1 shall be carried out only in accordance with a plan that is
2 mutually acceptable to the commissions, the Governor, and
3 the Secretary, and is consistent with both the purposes of
4 this Act and the purposes of existing statutes dealing with
5 water and related resource development.

6 (b) The commissions together with the Governor and
7 the Secretary shall undertake a program of dune and head-
8 land erosion control, beginning with those dunes and head-
9 lands most immediately threatened and in need thereof. Such
10 dune and headland erosion may be that caused by natural
11 wind and water action, by motor vehicle passage, or by other
12 factors, and such programs may have the purposes of restor-
13 ing past and present damage and of preventing further
14 damage.

15 (c) The commissions, together with the Governor and
16 the Secretary, shall cooperate with the appropriate Federal,
17 State, and local agencies to provide safeguards against pollu-
18 tion of the waters in and around trust lands. Such safeguards
19 shall include an immediate survey of the quality of ground
20 water conditions in all or any part of the area of the trust, and
21 the necessary funds therefor may be drawn from the appro-
22 priations authorized by section 20 herein.

23 BEACHES

24 SEC. 10. (a) All beach lands within the trust area, with
25 the exception of beach lands classified as "Class C: Town

1 Lands", shall be classified as "Class A: Open Lands", not-
2 withstanding that such beach lands may be classified as
3 "Class B: Resource Management Lands" by other provisions
4 of this Act.

5 (b) As used in this Act, the term "beach lands" shall
6 mean the wet and dry sand area lying between the mean
7 low water line and the base of the headlands or the visible
8 line of upland vegetation, whichever shall be closer to the
9 mean low water line, and shall include dunes, rock beaches,
10 wetlands, marshes, and estuarine areas adjoining tidal waters.

11 (c) There is herewith established a nonvehicular right
12 of passage—

13 (1) in "Class A: Open Lands", at the high water
14 line of sufficient width for a person to pass and repass;
15 and

16 (2) in "Class C: Town Lands", at the high water
17 line of sufficient width for a person to pass and repass,
18 but only in those specified areas which each commis-
19 sion shall, within six months after its first meeting,
20 establish as right of passage beach lands.

21 The rights of owners of residential improvements on beach
22 lands as of April 11, 1972, shall be respected; and the com-
23 missions shall not permit the right of passage created in par-
24 agraphs (1) and (2) of this subsection where such right

1 would interfere with the use and enjoyment of such improve-
2 ments by the owners thereof.

3 (d) Upon agreement therefor by the commissions and
4 the Secretary, the Secretary may acquire in any manner
5 authorized by this Act lands and waters and interests therein
6 in the trust area for the purposes of—

7 (1) establishing public beaches open to public use
8 and enjoyment; and

9 (2) establishing access to such beaches.

10 Such public beaches may or may not be enlargements of
11 existing public beaches, but in any case shall to as great an
12 extent as possible be located so as to be consistent with the
13 conservation and preservation purposes of this Act. Access
14 to such public beaches shall respect the rights of private
15 property owners in the immediate vicinity, and shall be de-
16 signed to protect the natural features of the land. The com-
17 missions shall establish limitations on the number of vehicles
18 to be parked at public beach areas. Within twelve months
19 after its first meeting, the Martha's Vineyard Commission
20 shall designate two new public beaches on the southern or
21 southwestern shoreline of Martha's Vineyard; neither of such
22 new areas shall, however, be enlargements of existing
23 beaches open to public use.

24 (e) Six months after the first meeting of each commis-
25 sion, motor vehicles, open fires, and camping shall be pro-

1 hibited from beach lands within the area of its jurisdiction:
2 *Provided*, That each commission may designate beach land
3 areas open to such uses, and shall adopt regulations specify-
4 ing the conditions of use within six months after its first
5 meeting: *And provided further*, That until such regulations
6 are adopted use of beach lands shall be as determined by
7 existing State and local laws.

8 (f) The commission shall, within thirty days, develop
9 plans for protection and litter prevention on beach areas.
10 These plans will be implemented by funds as provided in
11 section 20 of this Act.

12 ADMINISTRATIVE PROVISIONS

13 SEC. 11. (a) As to the responsibilities assigned to the
14 Secretary by this Act, the same shall be administered in
15 accordance with the provisions of this Act and the Act of
16 August 25, 1916 (16 U.S.C. 1 et seq.), as amended and
17 supplemented, except that the Secretary may utilize any
18 other statutory authority available to him for the conserva-
19 tion, preservation, and management of natural resources to
20 the extent he finds such authority will further the purposes
21 of this Act.

22 (b) The Secretary is authorized to provide technical
23 assistance to the commissions and the towns and regional
24 governmental entities, and to provide the same to private
25 organizations and associations, for the purpose of establishing

1 sound land use planning and zoning bylaws and other ordi-
2 nances and regulations to carry out the purposes of this Act.
3 Such assistance may include payments for professional
4 services.

5 TRANSPORTATION AND GENERAL USES

6 SEC. 12. (a) The commissions, together with the Gov-
7 ernor and the Secretary, shall make an immediate survey of
8 public and private water and air access to lands in the trust
9 area, including that by the Woods Hole, Martha's Vineyard,
10 and Nantucket Steamship Authority, and by other public
11 and private water and air carriers, and shall make such rec-
12 ommendations to the appropriate body or bodies for leg-
13 islative or administrative action as they deem consistent
14 with the preservation and conservation purposes of this Act.
15 Such recommendations shall include specific measures to
16 limit the number of motor vehicles and passengers such car-
17 riers might otherwise transport to the Nantucket Sound
18 Islands. Thereafter, regular and frequent surveys of such ac-
19 cess shall be conducted, and such recommendations shall be
20 made as are deemed appropriate to maintain the unique
21 values of lands and waters in the trust area. Such recom-
22 mendations may include intra-island transportation programs
23 and policies.

24 (b) No development or plan for the convenience of
25 visitors to trust lands or waters shall be undertaken which

1 would be incompatible with the preservation and conserva-
2 tion of the unique values thereof: *Provided*, That the com-
3 missions, the Governor, and the Secretary may jointly
4 provide for the public enjoyment and understanding of the
5 values of the Nantucket Sound Islands by establishing such
6 public transportation systems, trails, bicycle paths, observa-
7 tion points, and exhibits, and by providing such services as
8 they may deem desirable for such public enjoyment and
9 understanding, consistent with the preservation and con-
10 servation of such values.

11 (c) In any such provision for public enjoyment or un-
12 derstanding, the commissions, the Governor, and the Secre-
13 tary shall not unreasonably diminish for its owners of
14 occupants the value or enjoyment of any improved property
15 within the trust lands.

16 PRIVATE NONPROFIT ORGANIZATIONS

17 SEC. 13. (a) In order to encourage and provide an op-
18 portunity for the establishment of natural and scenic pre-
19 serves by voluntary private action of owners of lands
20 and waters in the trust area, and notwithstanding any pro-
21 vision in this Act or in any other provision of law, the
22 authority established by this Act to acquire lands or interests
23 therein without the consent of the owner shall be suspended
24 when—

1 (i) lands or waters or interests therein which are
2 designated as being presently or from time to time
3 needed to carry out the purposes of this Act are ir-
4 revocably in the ownership of private nonprofit con-
5 servation, preservation, historic, or other organizations
6 or associations, and the restrictions against the devel-
7 opment of such lands meet the standards referred to
8 herein; or

9 (ii) lands or waters or interests therein which
10 are designated as being presently or from time to time
11 needed to carry out the purposes of this Act are, to
12 the satisfaction of the commissions, the Governor, and
13 the Secretary and within twenty-four months after
14 enactment of this Act, irrevocably committed to be
15 sold, donated, demised, or otherwise transferred to such
16 organizations or associations.

17 (b) Section 19 of this Act shall be suspended with re-
18 spect to those lands and waters and interests to which sub-
19 section (a) of this section applies; and section 10 of this Act
20 shall be similarly suspended whenever in the judgment of the
21 commissions its applicability will contravene the purposes of
22 this Act or any provision of law of the Commonwealth of
23 Massachusetts.

24 (c) The provisions of this section shall be applied only
25 to those organizations and associations which are determined
26 to be bona fide and general purpose.

1 (d) All of the provisions of this Act, except sections 1,
2 2, and 3, shall be suspended with respect to any lands, waters,
3 or interests therein so long as such lands, waters, or inter-
4 ests therein are within twenty-four months of the enactment
5 of this Act irrevocably subject to a conservation restriction
6 created, approved, and recorded under section 31 through 33
7 of chapter 184 of the General Laws of Massachusetts, which
8 forbids, or in the judgment of the commissions, and the
9 Secretary, as evidenced by their written approval of such
10 restriction, substantially limits all or a majority of the land
11 uses referred to in clauses (a) through (g) of the first para-
12 graph of said section 31. Such conservation restriction shall
13 be irrevocable unless notice of the intention to revoke is given
14 to the commissions and the Secretary not less than twelve
15 months prior to the proposed effective date of the revocation
16 or unless the lands, waters, or interests therein are in whole
17 or in part made subject to a taking by eminent domain.

18 COMPENSABLE LAND USE REGULATIONS

19 SEC. 14. The Secretary, after consultation with the com-
20 missions and the Governor and within six months after the
21 date of enactment of this Act, shall issue proposed compen-
22 sable land use regulations applicable to the trust, and after
23 due notice shall cause public hearings to be held on such
24 regulations. Thereafter, he shall issue compensable land use
25 regulations applicable to the trust which shall—

1 (a) establish the manner in which the fair market
2 value of lands or waters affected by the classification es-
3 tablished in sections 5 (b) (1) and 5 (b) (2) and by the
4 right of passage in section 10 (c) shall be calculated
5 where such classifications have caused a decrease in such
6 value, and where the provisions of section 7 (a) (3),
7 8 (a), or 13 (a) do not apply; and

8 (b) set forth the manner by which an owner or
9 owners may pursue a right of action in any court of com-
10 petent jurisdiction.

11 NEW EMPLOYMENT OPPORTUNITIES

12 SEC. 15. (a) The commissions are authorized and di-
13 rected to examine the lands and waters and other resources
14 of the trust area forthwith for the purposes of identifying
15 and developing new employment opportunities of any kind
16 for residents of the trust area appropriate to the purposes of
17 this Act.

18 (b) As part of such examination, the commissions shall
19 survey the lands and waters of the trust area for opportuni-
20 ties to experiment with and to encourage the development of
21 aquaculture of all kinds, including but not limited to fish and
22 shellfish and other associated activities.

23 (c) As soon as practicable but in no case later than six
24 months after the date of enactment of this Act, each com-
25 mission shall prepare a plan for the development of new em-

1 ployment opportunities which shall be adopted or amended
2 only after public hearings have been held on the proposed
3 plan or amendment. Such plan shall include—

4 (1) an identification of industries which should be
5 established or enlarged to provide employment oppor-
6 tunities and of any training or retraining or public em-
7 ployment programs which should be established to
8 further the goal of a sound local economy and the other
9 purposes of this Act; and

10 (2) a schedule of specific activities to be under-
11 taken to implement the goals included in the plan.

12 (d) The Secretary of the Interior, the Secretary of
13 Commerce, and the Secretary of Labor are hereby authorized
14 and directed to cooperate with the commissions in the imple-
15 mentation of the plans adopted in accordance with subsection
16 (c) and in their other activities pursuant to the provisions
17 of this section, and to provide technical assistance at the
18 request of a commission, and are authorized to make avail-
19 able to the commissions for the purposes of this Act any
20 funds appropriated to their respective departments under the
21 authority of this or any other law without restriction.

22 (e) Any other provision of law to the contrary notwith-
23 standing, the Nantucket Trust Commission, the Martha's
24 Vineyard Trust Commission, and the Elizabeth Islands Trust
25 Commission are hereby declared to be eligible applicants for

1 any grant program administered by the Department of the
2 Interior, the Department of Commerce, or the Department
3 of Labor, for which applicants other than States are eligible;
4 and the commissions may either carry out the activities under
5 such grants themselves or arrange for activities under such
6 grants to be carried out by other entities in the trust area.

7 (f) The commissions shall to as great an extent as
8 possible in the development of any regulations pursuant to
9 this Act encourage the maintenance and commencement of
10 agricultural uses of lands within the trust area.

11 FREEZE DATE

12 SEC. 16. (a) Beginning on April 11, 1972, no con-
13 struction of any improvement, whether for residential, com-
14 mercial, industrial, or any other purpose, shall be permitted
15 to commence on any land classified herein as "Class A:
16 Open Lands". Construction of improvements shall be per-
17 mitted on any lands classified as "Class C: Town Lands",
18 only upon the granting of specific approval therefor by the
19 board of selectmen of the particular town, after a showing
20 of the need therefor. Construction of improvements shall be
21 permitted on any lands classified as "Class B: Resource Man-
22 agement Lands", only upon the granting of specific ap-
23 proval therefor by the board of selectmen of the particular
24 town, after a showing of the need therefor. Approvals granted
25 by a vote of board of selectmen pursuant to a finding of need

1 therefor and pursuant to a statement of justification therefor,
2 shall subsequently be deemed valid by the commissions, the
3 Governor, and the Secretary.

4 (b) In the case of any hardship caused by the provi-
5 sions of subsection (a) of this section, the commissions and
6 the Secretary shall, on the basis of rules and regulations is-
7 sued by the commissions and the Secretary, make a valua-
8 tion thereof and shall award fair recompense to any individual
9 for whom hardship is demonstrated.

10 INDIAN COMMON LANDS

11 SEC. 17. (a) The Martha's Vineyard Commission is di-
12 rected to establish forthwith an orderly program for deter-
13 mining the precise extent of Indian Common Lands on
14 Martha's Vineyard. The program shall include a survey or
15 surveys, and such other research or field work as may be
16 necessary to establish the boundaries of the Common Lands
17 belonging to the Wampanoag Tribe of Indians and known
18 generally as the Cranberry Bogs, the Clay Cliffs, and Her-
19 ring Creek. The commission is further directed to determine
20 the location, boundaries, and owners of record title of the
21 monuments and burial grounds of the Wampanoag Tribe of
22 Indians on Martha's Vineyard. Funds to carry out the pro-
23 gram may be drawn from those authorized to be appropri-
24 ated by section 20.

1 (b) Upon completion of the program described in sub-
2 section (a) of this section, lands determined to be Indian
3 Common Lands shall be acknowledged as an Indian reserva-
4 tion owned by the Wampanoag Tribe of Indians, pursuant to
5 confirmed Indian title and entitled to the full protection of
6 Federal laws pertaining to Indian lands: *Provided*, That the
7 provisions of section 5 (b) (2) of this Act shall apply to such
8 Indian reservation land, subject however to the sole adminis-
9 tration and control of the Wampanoag Tribal Council of Gay
10 Head. Lands determined to be Indian monuments or burial
11 grounds which are found to be in private ownership shall be
12 classified as "Class A: Open Lands", and such lands found
13 to be in public ownership shall be transferred to the owner-
14 ship of the Wampanoag Tribe of Indians and classified as
15 "Class A: Open Lands".

16 (c) Nothing contained in this Act shall be construed to
17 prejudice or limit any claims which the Wampanoag Tribe of
18 Indians, or any member of that tribe, may have for past vio-
19 lations of their rights as Indians, including but not limited to
20 claims arising under the Indian Trade and Intercourse Act
21 (25 U.S.C. 177).

22 RESIDENT HOMESITES

23 SEC. 18. (a) Upon petition therefor by any town, act-
24 ing pursuant to a vote of a town meeting, the appropriate
25 commission shall, with the advice and assistance of the Gov-

1 ernor and the Secretary and the Secretary of Housing and
2 Urban Development, prepare a resident homesite plan.

3 (b) A resident homesite plan shall—

4 (1) state the reasons for the establishment of the
5 plan;

6 (2) delineate the land area or land areas in the town
7 intended to be utilized for carrying out the plan;

8 (3) define the criteria by which town residents may
9 avail themselves of the plan;

10 (4) project the total number of sites envisioned by
11 the plan; and

12 (5) establish the fair purchase value of such sites
13 for qualified residents.

14 (c) Upon approval of a resident homesite plan by the
15 appropriate town, and by the Governor and the Secretary,
16 the Secretary is authorized to acquire for fair market value
17 the land area or land areas specified in the plan by any man-
18 ner authorized by this Act. The Secretary and the appro-
19 priate commission shall thereafter make resident homesites
20 available for sale to qualified residents at the fair purchase
21 value established in the plan. The difference between the fair
22 market value and the fair purchase value shall be borne by
23 the Secretary out of funds appropriated pursuant to section
24 20 of this Act.

1 (d) Any resident homesite sold under the authority of
2 this section shall be subject to a right of first refusal in the
3 Secretary and the appropriate commission.

4 (e) For the purposes of this section, the term "quali-
5 fied residents" shall mean year-round residents who qualify
6 for the plan under criteria established by the appropriate
7 commission; and the terms "fair market value" and "fair
8 purchase value" shall be determined by the criteria set forth
9 by the appropriate commission.

10 HUNTING AND FISHING

11 SEC. 19. Hunting, fishing, and trapping on lands and
12 waters within the trust area shall be permitted in accordance
13 with the applicable laws of towns in the trust area, the Com-
14 monwealth of Massachusetts, and the United States, except
15 that the commissions, the Governor, and the Secretary may
16 designate zones where, and establish periods when, no hunt-
17 ing, no fishing, and no trapping shall be permitted for rea-
18 sons of public health, public safety, fish or wildlife manage-
19 ment, administration, or public use and enjoyment. Except
20 in emergencies, any regulations prescribing any such restric-
21 tions shall be issued only after consultation with the appro-
22 priate agency of said Commonwealth and any political sub-
23 division thereof which has jurisdiction over such activities.

APPROPRIATIONS

1
2 SEC. 20. There are hereby authorized to be appropriated
3 such sums as may be necessary to carry out the provisions of
4 this Act; not to exceed, however, \$20,000,000 for the ac-
5 quisition of lands and interests therein, and not to exceed
6 \$5,000,000 for development both in April 1972 prices,
7 for the first three years of the operation of the trust, plus
8 or minus such amounts, if any, as may be justified by reason
9 of ordinary fluctuations in construction costs as indicated
10 by engineering cost indices applicable to the types of con-
11 struction involved herein: *Provided*, That there shall, within
12 the total amounts authorized to be appropriated, be made
13 available \$300,000 for the development of the shellfish in-
14 dustry pursuant to section 15 of this Act, \$500,000 for
15 studies conducted pursuant to section 9 (c) of this Act, and
16 \$1,000,000 for resident homesites programs pursuant to
17 section 18 of this Act, and \$100,000 for the implementation
18 of plans to protect and provide litter prevention for all beach
19 areas.

SEVERABILITY CLAUSE

20
21 SEC. 21. The provisions of this Act are hereby declared
22 to be severable, and if any of its provisions are held to be in-
23 valid by any court of competent jurisdiction, the decision of
24 such court shall not affect or impair any of the remaining
25 provisions.

APPENDIX 2(e) : AN ACT PROTECTING LAND AND WATER ON MARTHA'S VINEYARD.
CHAPTER 637 OF THE ACTS OF 1974.

The Commonwealth of Massachusetts
Advance copy 1974 Acts and Resolves
JOHN F. X. DAVOREN, Secretary of the Commonwealth

Chapter 637.

AN ACT PROTECTING LAND AND WATER ON MARTHA'S VINEYARD.

Whereas, The deferred operation of this act would tend to defeat its purpose which is, in part, to preserve the natural and cultural character of the island of Martha's Vineyard, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Whereas, it is hereby declared that:

(a) the island of Martha's Vineyard possesses unique natural, historical, ecological, scientific, cultural, and other values; and that there is a regional and statewide interest in preserving and enhancing these values;

(b) these values are being threatened and may be irreversibly damaged by uncoordinated or inappropriate uses of the land;

(c) the protection of the health, safety, and general welfare of island residents and visitors requires the establishment of a regional commission whose purpose shall be to ensure that henceforth the land usages which will be permitted are those which will not be unduly detrimental to those values or to the economy of the island;

(d) the preserving and enhancing of these values requires the designation of districts of critical planning concern and the recognition of developments of regional impact, and the review thereof by the regional commission;

(e) such a program can protect the natural character and beauty of Martha's Vineyard and can contribute to the maintenance of sound local economies and private property values;

(f) the people of Martha's Vineyard did, on March fourteenth, nineteen hundred and seventy-four vote to endorse the provisions of this act;

Therefore, the purpose of the commission created by this act shall be to protect the health, safety, and general welfare of Island residents and visitors

by preserving and conserving for the enjoyment of present and future generations the unique natural, historical, ecological, scientific, and cultural values of Martha's Vineyard which contribute to public enjoyment, inspiration and scientific study, by protecting these values from developments and uses which would impair them, and by promoting the enhancement of sound local economies.

SECTION 2. 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 lands and inland waters in 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 all lands owned by the commonwealth or any of its constituent agencies, boards, departments, commissions, or offices.

The commission shall consist of twenty-one members; one selectman from each town on Martha's Vineyard, appointed by the board of selectmen of that town, or a member of the planning board or any other municipal agency, board, department, or office, appointed to the commission by the board of selectmen of that town; nine persons to be elected at large, island-wide, provided that there shall be not less than one person nor more than two persons elected from each town on Martha's Vineyard and provided that said elections shall be held in accordance with the provisions of the following paragraph; one county commissioner of Dukes county, appointed by the county commissioners of Dukes county; one member of the cabinet appointed by the governor; and four persons whose principal residence is not on Martha's Vineyard, to be appointed by the governor, said persons to have voice but not vote in deciding matters before the commission. In the event that legislation relevant to the purposes of this act is enacted by the Congress of the United States, the commission shall consist of twenty-two members: the twenty-one persons described in the above section, and the Secretary of the Interior of the United States or his designee.

The election of the nine at-large members of the commission shall be conducted at the next state election following the effective date of this act, and all succeeding elections of such members shall take place at the biennial state election. The nomination of candidates for election to the office of commission member shall be in accordance with sections six and eight of chapter fifty-three of the General Laws, provided, however, that no more than ten

The Commonwealth of Massachusetts

Advance copy

1974

Acts and Resolves

JOHN F. X. DAVOREN, Secretary of the Commonwealth

signatures of voters shall be required on nomination papers for such office. Notwithstanding the provisions of section ten of chapter fifty-three of the General Laws, nomination papers for said candidates shall be filed with the office of the state secretary on or before the tenth Tuesday preceding the day of the election. Such nomination papers shall be subject to the provisions of section seven of said chapter fifty-three. All candidates for said office are hereby exempted from the reporting requirements as provided for in section sixteen of chapter fifty-five of the General Laws. All appointing authorities shall appoint persons to the commission no later than fifteen days after the date of the election of the nine at-large commission members, and said authorities shall notify the state secretary of their appointments in writing. Upon his election or appointment to the commission, each commission member shall be sworn to the faithful execution of his duties by the town clerk in the town in which he resides; provided however, that the four commission members who do not have their principal place of residence on Martha's Vineyard shall be sworn by the town clerk of the town on Martha's Vineyard in which they reside. Upon the qualification of its members, but in no case later than December thirty-first, nineteen hundred and seventy-four, the commission members shall meet and organize by electing from among its members a chairman, vice-chairman, and clerk-treasurer. Succeeding election of officers shall be held annually, at a meeting called for that purpose; provided that the commission clerk-treasurer shall not concurrently hold the position of treasurer of Dukes County.

Terms of office for the elected members of the commission and for the non-resident taxpayer members shall be two years. Terms of office for members who are selectmen or their designees or county commissioners shall be for one year and may be renewed only upon vote of the appointing body. The cabinet officer appointed by the governor shall serve at the discretion of the governor. Terms of office shall be computed from January first of each year.

Any vacancy in an appointed position shall be filled in the same manner as the original appointment for the remainder of the unexpired term. Any vacancy

in the elected membership shall be filled by a majority vote of the planning board, or the board of selectmen in the absence of a planning board, of the town in which the former member was a registered voter; said vacancy to be filled for the remainder of the unexpired term. The Secretary of the Interior or his designee shall serve pursuant to applicable federal law.

The commission may also contract for such additional clerical, expert, legal, and other assistance as may be required to discharge its responsibilities and may reimburse its members and staff for reasonable expenses incurred in the performance of their duties, including meals, travel and lodging.

SECTION 3. The commission may adopt regulations for the control of districts of critical planning concern pursuant to sections nine through twelve, inclusive, of this act and to specify conditions and modifications necessary for the control of developments of regional impact pursuant to sections thirteen through seventeen, inclusive, of this act.

In adopting such regulations, the commission may include any type of regulation which may be adopted by any city or town under the following general laws, as amended: chapter forty, section eight C, the Conservation Commission Act; chapter forty A, the Zoning Enabling Act; chapter forty C, the Historic Districts Act; chapter forty-one, sections eighty-one E through eighty-one H, as they relate to official maps; chapter forty-one, sections eighty-one K through eighty-one GG, the subdivision control law; chapter one hundred eleven, section twenty-seven B, as it relates to regional health boards; and chapter one hundred thirty-one, sections forty and forty A, as they pertain to the protection of wetlands.

Regulations adopted pursuant to section eleven or conditions and modifications specified pursuant to section seventeen by the commission under the above-mentioned general laws may differ from the otherwise relevant local development ordinances and by-laws in their scope and magnitude when such ordinances and by-laws are clearly restrictive of the purposes of the commission. In adopting regulations or specifying conditions which would not otherwise be permitted or required by existing local development ordinances and by-laws the commission shall describe in writing and present evidence which demonstrates that the public health, safety, and welfare would be endangered or that irreversible damage would result to natural, historical, ecological, scientific, or cultural values on Martha's Vineyard by the continuing application of the existing local development ordinance or by-law as it applies to the specific district of critical planning concern or

The Commonwealth of Massachusetts
Advance copy 1974 Acts and Resolves

JOHN F. X. DAVOREN, Secretary of the Commonwealth

development of regional impact which the commission is considering.

The commission may be designated by any state or federal agency to participate in or receive funds and technical assistance from any state or federal programs, especially as those programs relate to environmental protection, conservation, land use planning, water and air quality control, economic development, transportation or the development of region-wide public services. The commission may authorize debt in anticipation of receipt of revenue as provided in section four.

SECTION 4. The commission shall annually in the month of January estimate the amount of money required to pay its total expense for the following fiscal year, deduct estimated contributions from other sources, and pro rate the net expenses to each town on the basis of its latest equalized valuation for property tax purposes as established pursuant to section nine of chapter fifty-eight of the General Laws. The commission shall certify the amount so determined to the treasurer of each town within the commission's jurisdiction who shall include the sum in the tax levy of the year.

Upon order of the commission, each town treasurer shall, subject to the provisions of sections fifty-two and fifty-six of chapter forty-one of the General Laws, pay to the commission treasurer the town's share of the commission's net expenses.

The commission may receive for the purposes of this act any funds or monies from any source, including grants, bequests, gifts, or contributions made by any individuals, association, corporations, or by municipal, county, state, or federal governments. Monies so received shall be disbursed by the commission treasurer upon an order voted by the commission; and the charges upon all towns may be reduced correspondingly upon a majority vote of the members if such monies were not included in the calculation of the town's net shares of expenses for the fiscal year.

The commission may authorize debt by a majority vote of the commission in anticipation of revenue to an amount not in excess of that to be received during the current fiscal year from all federal, state, county, and local sources. Notes

issued under authority of this section shall be signed by the clerk treasurer of the commission, and chairman of the commission shall countersign and approve them in the presence of the vice-chairman of the commission who shall certify to the fact on the face thereof. Such notes shall be payable, and shall be paid not later than one year from their dates, and shall not be renewed or paid by the issue of new notes, except as provided in section seventeen of chapter forty-four of the General Laws.

Where the imposition of a regulation promulgated by the commission pursuant to section eleven imposes costs on a municipal agency, the commission may transfer monies from its accounts to the accounts of such agency in reimbursement of such costs. For the purposes of this subsection, the term "costs" means those additional expenses incurred by a municipal agency solely in the performance of duties necessary to the enforcement of regulations promulgated pursuant to this act.

The commission may, upon a majority vote of its members, accept gifts of land, interests in land, or grants, bequests, gifts, or contributions for the purpose of acquiring land or interests in land in order to preserve and conserve land on Martha's Vineyard for the enjoyment and inspiration of present and future generations. The commission may also receive land or interests in land in trust or act in any appropriate capacity in a trust, provided that said trust be for the purpose of preserving and conserving land on Martha's Vineyard for public use and enjoyment.

SECTION 5. Notwithstanding the provisions of any ordinance or by-law of a municipality on Martha's Vineyard, every municipal land regulatory agency shall be governed by the procedures, standards, and criteria established pursuant to this act in passing on applications for development permits relating to areas and developments subject to this act. A copy of each such permit granted by any such agency after the temporary moratorium as provided in section seven shall be filed with the commission.

SECTION 6. The following words, wherever used in this act shall, unless the context requires otherwise, have the following meanings:

"Development", means any building, mining, dredging, filling, excavation, or drilling operation; or any material change in the use or appearance of any structure or in the land itself; or the dividing of land into parcels; or a change in the intensity of use of land, such as an increase in the number of dwelling

The Commonwealth of Massachusetts
Advance copy 1974 Acts and Resolves
JOHN F. X. DAVOREN, Secretary of the Commonwealth

units in a structure; or alteration of a shore, beach, seacoast, river, stream, lake, pond, or canal, including coastal construction; or demolition of a structure; or the clearing of land as an adjunct of construction; or the deposit of refuse, solid, or liquid waste or fill on a parcel of land.

“Development ordinances and by-laws”, any by-law, ordinance, rule, regulation, or code adopted by a municipality for the control or regulation of activities related to construction, improvement, or alteration made to buildings of land within the boundaries of said municipality.

“Development permit”, any permit, license, authority, or permission required from a municipal agency prior to the commencement of construction, improvement, or alteration made to buildings or land.

“Municipal land regulatory agency”, any municipal agency, board, commission, department, office, or official that has statutory authority to approve or grant a development permit.

“Person”, an individual, corporation, governmental agency, business trust, estate, trust, partnership, association, two or more persons having a joint or common interest, or any legal entity.

“Regulations”, any ordinance, by-law, rule, regulation, or code which may be adopted by a city or town under the General Laws enumerated in section three of this act and which is adopted by the commission under the provisions of section eleven.

SECTION 7. Upon the election and complete organization of the commission there shall be a temporary moratorium for a period of twelve months, or for a period of forty-five days after standards and criteria are developed by the commission and approved by the secretary of communities and development as provided in section eight, whichever period is the shorter. During said moratorium period town authorities shall grant development permits only for:

(a) alterations to or replacement of existing structures, provided that the use and intensity of use of the altered or replacement structure remains substantially similar to the use and intensity of use of the previous structure;

(b) developments, construction, or improvements essential to protect the public health, safety, or welfare;

(c) the construction of one single family dwelling unit by one person on land owned by such person as of the effective date of this act. No person shall, however, be granted more than one development permit on Martha's Vineyard for the construction of a single family dwelling unit during the period of the moratorium, and all applications for permits to be granted during the moratorium period shall be submitted by the agency issuing the permit to the commission for certification as to compliance with this subsection. All permits granted under the provisions of this subsection shall also be registered with the commission within ten days of the granting of said permit;

(d) such other development, construction, or improvements as the commission once constituted, may specify; provided, however, that the commission, in acting under this provision, shall find that the provisions of the moratorium cause unnecessary and substantial hardship to the applicant and, that the granting of an exemption from the terms of the moratorium would be compatible with the purposes of this act;

(e) the subdivision of land, in order to correct minor discrepancies in boundary lines or to affect minor changes in boundary lines, for the purpose of clarifying titles or deeds to land; or the subdivision of land for the purpose of resolving conflicts resulting from the probate of estates; or the subdivision of land, in order to allow for the sale, gift, or bequest of land to a public or non-profit organization dedicated to the conservation of land, for the purpose of conserving or preserving open space on Martha's Vineyard; or the subdivision of land by a person into not more than three lots during the moratorium period. Only one such subdivision shall be approved for each person, notwithstanding that such person owns land in more than one town on Martha's Vineyard, and provided further, that there shall be no further subdivision by any person of the parcels so subdivided during the moratorium period;

(f) the construction of separate, ancillary, nonresidential structures such as garages, barns, greenhouses, other agricultural structures, studios, docks, or wharves or the construction of structures such as decks, patios, porches, garages, or studios as additions to existing structures; provided that the use of any structure constructed under this subsection with the exception of agricultural structures shall not be used in any manner for commercial activities.

Nothing in this act shall be construed to prohibit the planning board of a town on Martha's Vineyard from accepting for consideration for approval any

The Commonwealth of Massachusetts
Advance copy 1974 Acts and Resolves

JOHN F. X. DAVOREN, Secretary of the Commonwealth

definitive subdivision plan pursuant to chapter forty-one of the General Laws, provided that such definitive subdivision plan was duly submitted to said planning board prior to the effective date of this act. Nothing in this act shall be construed to prohibit said planning boards from accepting for consideration for approval after the effective date of this act any preliminary or definitive subdivision plans pursuant to chapter forty-one of the General Laws, provided, however, that no approval on any definitive plan shall be granted by a planning board before the end of the temporary moratorium.

SECTION 8. Prior to any commission action pursuant to sections nine or fourteen, and within one year following the effective date of this act, the commission shall submit to the secretary of communities and development (a) standards and criteria which the commission proposes to use in determining whether or not a proposed area is one of critical planning concern as that term is defined in section nine of this act; and (b) standards and criteria which the commission proposes to use and to be used by municipal authorities in determining whether or not a proposed development is one of regional impact as that term is defined in section thirteen.

The secretary of communities and development, with the concurrence of such other members of the governor's cabinet as the governor shall designate for this purpose, may approve, disapprove or amend and approve with the advice and consent of the commission, the standards and criteria regarding designation of districts of critical planning concern and review of developments of regional impact if such standards and criteria are in accordance with the purposes of the commission. The secretary of communities and development and such other cabinet members designated by the governor shall approve, disapprove, or amend and approve standards and criteria submitted to them within forty-five days after the receipt of such standards and criteria.

SECTION 9. 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 pursuant to section two of chapter thirty A of the General Laws, designate specific geographical areas on Martha's Vineyard as districts of critical planning concern. The

designation of such districts shall be made only in accordance with the standards and criteria for districts of critical planning concern approved pursuant to section eight.

A district of critical planning concern may be designated only for (a) an area which possesses unique natural, historical, ecological, scientific, or cultural resources of regional or statewide significance; (b) an area which possesses marginal soil or topographic conditions which render it unsuitable for intense development; or (c) an area significantly affected by, or having significant impact on, an existing or proposed major public facility or other area of major public investment. A major public facility is any publicly owned facility of regional importance except:

(1) any public facility operated by a municipality primarily for the benefit of the residents of that municipality, or by any agency serving primarily the residents of one municipality;

(2) any street or highway which is not recognized as or maintained as a part of the state or federal highway system; or

(3) any educational institution serving primarily the residents of one municipality.

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. Nominations also may be made upon petition of twenty-five taxpayers of any town on the island. Within forty-five days of the receipt of a nomination the commission shall accept or reject the nomination for consideration for designation upon a majority vote of its members. The acceptance of a nomination for consideration for designation shall be accompanied by a general statement of purpose, describing the reasons for acceptance of the nomination for consideration. Nominations which are not accepted for consideration shall be returned to their sponsors with a written explanation of the commission's reasons for not accepting the nomination within forty-five days of submission. The commission may consolidate nominations which pertain to the same geographical area or to areas which are contiguous or it may amend a nomination. Nominations accepted for consideration for designation which do not receive designation may be reconsidered for designation within one year of the original acceptance for

The Commonwealth of Massachusetts
Advance copy 1974 Acts and Resolves
JOHN F. X. DAVOREN, *Secretary of the Commonwealth*

consideration upon a vote of two thirds of the commission members.

In its designation of a district of critical planning concern, the commission shall specify why the area is of critical concern to the region, the problems associated with the uncontrolled or inappropriate development of the area, and the advantages to be gained from development of the area in a controlled manner. The commission also shall specify guidelines for the development of the district. The issuance of such guidelines shall be based on, but need not necessarily be limited to, the following considerations:

(a) that development of the district will not result in undue water, air, land, or noise pollution, taking into account the elevation of the district above sea level, the nature of the soils and subsoils and their ability adequately to support waste disposal, the slope of the land and its effect on effluents, availability of streams and other conduits for disposal of effluents, and the applicable health, water resources and environmental regulations;

(b) that the existing water supply of the district will not be unreasonably burdened by any development;

(c) that development of the district will not result in increased beach erosion or damage to the littoral ecology or wetlands;

(d) that development of the district will not result in increased beach erosion or damage to the littoral ecology or wetlands.

In any application for a development permit which applies to an area within a district of critical planning concern, the burden of proof of compliance with the above considerations shall be on the applicant. The commission may amend or rescind the designation of a district in the manner provided for designation.

Nominations accepted for consideration for designation which do not receive designation from the commission within sixty days of the date of acceptance shall be returned to their sponsors with a written explanation of the commission's reasons for not granting the designation. Initial nominations for districts of critical planning concern shall not be submitted to the commission for twelve months following the effective date of this legislation, or until standards

and criteria are approved as provided in section eight, whichever period is the lesser.

SECTION 10. No municipality shall grant a development permit applicable within a district of critical planning concern except in accordance with regulations promulgated pursuant to section eleven.

The acceptance of a nomination for consideration for designation of a district of critical planning concern shall suspend the power of a municipality to grant development permits applicable within the district; provided, however that until regulations for the district adopted pursuant to section eleven have become effective, a municipality may grant development permits, applicable within the district if:

(a) the type of proposed construction, improvement, or alteration is essential to protect the public health, safety, and general welfare because of an existing emergency certified by the commission, and,

(b) a development ordinance or by-law had been in effect immediately prior to the nomination of such area and development permits would have been granted under such ordinance or by-law.

SECTION 11. After designation of a district of critical planning concern, a municipality whose boundaries include all or part of the district may adopt regulations in accordance with the guidelines for the development of the district as set forth in the designation. In adopting such regulations, each municipality shall have all of the powers it otherwise had under the General Laws. A copy of regulations so adopted shall be transmitted to the commission. If the commission determines that the regulations adopted by a municipality comply with the guidelines for the development of the district specified in the commissions' designation of the district, the commission shall, after notice to all municipalities which include within their boundaries any part of the district of critical planning concern and after notice and public hearing pursuant to section two of chapter thirty A of the General Laws, approve or amend and approve such regulations. When two or more municipalities may, pursuant to this act, adopt regulations for areas within a single district, the commission shall encourage such municipalities to adopt compatible regulations.

If a municipality whose boundaries include all or part of the district fails to submit regulations which comply with the guidelines for the development of the district within three months after the designation, the commission may

The Commonwealth of Massachusetts
Advance copy 1974 Acts and Resolves

JOHN F. X. DAVOREN, *Secretary of the Commonwealth*

after notice to such municipality and after notice and public hearing pursuant to section two of chapter thirty A of the General Laws, adopt regulations applicable to such municipality's portion of the district. Such regulations shall specify the extent to which they shall supersede the otherwise applicable local development ordinances and by-laws or be supplementary thereto. Regulations so adopted shall be only the types specified in section three.

All regulations so adopted shall be incorporated, without regard to the provisions of section thirty-two of chapter forty of the General Laws, by the municipality into the official ordinances, by-laws, and maps of the municipality and shall not be effective prior thereto. Such regulations shall be administered by the municipality as if they were part of its development ordinances and by-laws. If such a regulation requires enforcement by an administrative office or body which has not been constituted by a municipality, the board of selectmen of the municipality shall enforce said regulation. At any time after the adoption by the commission of such regulations, the municipality concerned may adopt regulations which, if approved by the commission as provided in the preceding subsection, shall supersede any regulations adopted by the commission pursuant to this subsection.

A municipality may amend or rescind regulations in the manner provided for adoption and approval.

SECTION 12. If the commission has not approved or adopted regulations applicable to the entirety of a district within twelve months after designation of such district, the designation of such part for which regulations have not been approved or adopted shall be terminated. No part of the area formerly designated as a district shall again be designated as a district for a period of twelve months from the date of such termination. Notice of such termination shall be given in the same manner as provided for designation.

SECTION 13. The commission shall adopt and submit for approval, pursuant to section eight, standards and criteria which specify the types of development which, because of their magnitude or the magnitude of their effect on the

surrounding environment, are likely to present development issues significant to more than one municipality of the island of Martha's Vineyard. For the purpose of this act, such types of development shall be termed "developments of regional impact".

In adopting standards and criteria pursuant to this section, the commission shall consider, but shall not be limited by, the following considerations:

- (a) the extent to which a type of development would create or alleviate environmental problems, including, but not limited to, air, water, and noise pollution;
- (b) the size of the site to be developed;
- (c) the amount of pedestrian and vehicular traffic likely to be generated;
- (d) the number of persons likely to be residents, employees, or otherwise present;
- (e) the extent to which a type of development is intended to serve a regional market;
- (f) the location of a type of development near a waterway, publicly-owned land, or a municipal boundary; and
- (g) the extent to which the development would require the provision of the following municipal or regional services: solid waste disposal, public water supplies, sewage treatment facilities, parking facilities and tourist services, and public education facilities.

SECTION 14. The governmental agency within each municipality which has responsibility for issuing a development permit, or when multiple permits are required, the local planning board, or board of selectmen in the absence of a planning board, shall in accordance with the standards and criteria approved pursuant to section eight determine whether or not a proposed development, for which application for a development permit has been made, is one of regional impact, it shall refer the application for the development permit to the commission.

SECTION 15. The commission shall review all applications for development permits for developments of regional impact and shall permit the referring agency to grant a development permit for such a development only if it finds, after notice and public hearing pursuant to section two of chapter thirty A of the General Laws, that:

The Commonwealth of Massachusetts
Advance copy **1974** **Acts and Resolves**
JOHN F. X. DAVOREN, Secretary of the Commonwealth

(a) the probable benefit from the proposed development will exceed the probable detriment as evaluated pursuant to section sixteen;

(b) the proposed development will not substantially or unreasonably interfere with the achievement of the objectives of the general plan of any municipality or the general plan of Dukes county;

(c) the proposed development is consistent with municipal development ordinances and by-laws, or, if it is inconsistent, the inconsistency is necessary to enable a substantial segment of the population of a larger community of which the municipality is a part to secure adequate opportunities for housing, education, or recreation, and

(d) if the proposed development is located in whole or in part within a designated district of critical planning concern, it is consistent with the regulations approved or adopted by the commission pursuant to section eleven above.

SECTION 16. In making a finding of the probable benefits and detriments of a proposed development, the commission shall not restrict its consideration to benefits and detriments within the municipality of the referring agency, but shall consider also the impact of the proposed development on the areas within other municipalities. Such probable benefits and detriments shall be considered even if they are indirect, intangible or not readily quantifiable. In evaluating the probable benefits and detriments of a proposed development of regional impact, the commission shall consider, together with other relevant factors, whether:

(a) development at the proposed location is or is not essential or especially appropriate in view of the available alternatives on the island of Martha's Vineyard;

(b) development in the manner proposed will have a more favorable or adverse impact on the environment in comparison to alternative manners of development;

(c) the proposed development will favorably or adversely affect other persons and property, and if so, whether, because of circumstances peculiar to the location, the effect is likely to be greater than is ordinarily associated with the development of the type proposed;

(d) the proposed development will favorably or adversely affect the supply of needed low and moderate income housing for island residents;

(e) the proposed development will favorably or adversely affect the provision of municipal services and the burden on taxpayers in making provision therefor;

(f) the proposed development will use efficiently or burden unduly existing public facilities or those which are to be developed within the succeeding five years;

(g) the proposed development will aid or interfere with the ability of the municipality to achieve the objectives set forth in the municipal general plan; and

(h) the proposed development will further or contravene land development objectives and policies developed by regional or state agencies.

Whenever the commission is required to find whether the probable benefit from a proposed development of regional impact will exceed the probable detriment, it shall prepare a written opinion setting forth the grounds of its findings.

SECTION 17. No referring agency shall grant a development permit for a development of regional impact except with the permission of the commission. In permitting the referring agency to grant a development permit for a development of regional impact the commission may also specify conditions to be met by the developer to whom the permit is being issued for the purpose of minimizing economic, social, or environmental damage.

SECTION 18. Any party aggrieved by a determination of the commission may appeal to any court of competent jurisdiction. The court shall hear all pertinent evidence and shall annul the determination of the commission if it finds that said determination is unsupported by the evidence or exceeds the authority of the commission, or it may remand the case for further action by the commission or may make such other decree as is just and equitable. Costs of the appeal shall not be allowed against the commission unless it shall appear to the court that the commission acted with gross negligence, bad faith or malice. Costs of such appeal shall not be allowed against the appellant unless it shall appear to the court that the appellant acted in bad faith or with malice.

SECTION 19. Effective upon the date of the first meeting and upon the organization of the commission, chapter six hundred and ninety of the acts of nineteen hundred and sixty-six is repealed. All powers and duties of the Dukes

The Commonwealth of Massachusetts
Advance copy 1974 Acts and Resolves
JOHN F. X. DAVOREN, *Secretary of the Commonwealth*

County Planning and Economic Development Commission, including those authorized by the commonwealth and the federal government, shall be transferred to the commission and the terms of office of the members of the Dukes County Planning and Economic Development Commission shall expire at that time. For the purposes of executing the functions of the Dukes County Planning and Economic Development Commission as transferred, the commission boundaries shall include all of the land in Dukes county, specifically including the Elizabeth Islands and the Indian Common Lands.

All employees of the Dukes County Planning and Economic Development Commission who hold positions with the Dukes County Planning and Economic Development Commission immediately prior to the repeal of chapter six hundred and ninety of the acts of nineteen hundred and sixty-six shall be transferred to the commission at the time of repeal of said chapter six hundred and ninety. Such transfer shall be without impairment of seniority, retirement, or other rights or benefits, without interruption of service, and without reduction in compensation or salary grade notwithstanding any change in job title or duties resulting from such transfer.

All books, papers, records, documents, equipment, lands, interests in land, buildings, facilities, and other property, both personal and real, which immediately prior to the repeal of chapter six hundred and ninety of the acts of nineteen hundred and sixty-six, are in the custody of the Dukes County Planning and Economic Development Commission shall be transferred to the commission as of the date of the repeal of said chapter six hundred and ninety.

All monies heretofore received from any source by the Dukes County Planning and Economic Development Commission for the performance of its duties and remaining unexpended on the date of the repeal of said chapter six hundred and ninety shall be transferred to the commission as of the date of repeal of said chapter and shall be available for expenditure by the commission.

All duly existing contracts, leases, and obligations of the Dukes County Planning and Economic Development Commission which are in force immediately prior

to the repeal of said chapter six hundred and ninety shall be transferred to the commission as of the date of the repeal of said chapter. All petitions, hearings, and other proceedings duly brought before, and all prosecutions and legal and other proceedings duly begun by the Dukes County Planning and Economic Development Commission which arise from or relate to the exercise of the powers or duties of said commission and which are pending immediately prior to the repeal of said chapter six hundred and ninety, shall continue unabated and remain in force notwithstanding the repeal of said chapter.

In addition to performing its functions under this act, the commission may perform any function assigned to it under federal law.

SECTION 20. The provisions of this act are severable, and if any of its provisions shall be held unconstitutional or invalid by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions.

Approved July 27, 1974.

BIBLIOGRAPHY

- Bureau of Outdoor Recreation, U.S. Department of the Interior. Islands of America. Washington, D.C. United States Government Printing Office. 1970.
- Finkler, Earl. "Can a Trust Turn the Tide on the Islands?" in Planning. November 1972.
- Gifford, K. Dun. "An Islands Trust: Leading Edges in Land Use Laws" in Harvard Journal on Legislation. April 1974.
- Martha's Vineyard Commission. The Martha's Vineyard Commission: A New Beginning. Prepared for the Massachusetts Department of Community Affairs. Unpublished. December 1974.
- New England Law Institute. Battle for Land. New England Law Institute. Publication No. 59. January 1974.
- Simon, Anne W. No Island Is An Island. Doubleday and Company, Inc.. New York. 1973.
- United States Congress. Congressional Record. (daily) 1971-
- The Grapevine. (weekly) 1971-
- The Vineyard Gazette. (weekly) 1971-