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March 21, 2022

Jason Bridges, Chair
Nantucket Select Board
Nantucket Town Hall
16 Broad Street
Nantucket, MA 02554

Re: *Proposed Memorandum of Understanding Between Select Board and the Siasconset Beach Preservation Fund*

Dear Chair Bridges and Members of the Select Board:

I write on behalf of the Nantucket Conservation Commission (the “Commission”) concerning the *Final Draft as of 03/02/22 Memorandum of Understanding ... Between Town of Nantucket, by its Select Board[,] and the Siasconset Beach Preservation Fund, Inc.* (“the Proposed MOU,” a copy of which is attached hereto at **Tab 1**). According to the agenda posted last Friday afternoon for your upcoming meeting on Wednesday, March 23, 2022, the Select Board (the “Board”) plans to vote that evening on whether or not to approve the Proposed MOU. For the reasons set forth below – among several others that the time pressures created by the Board’s surprise impending vote make impractical to properly address today but which the Commission will amplify in follow-on communications – the Commission **unanimously** opposes the Proposed MOU and urges the Board not to approve it in its current form.

I. Background

The Proposed MOU is a document whose primary subject matter is the Commission’s existing Enforcement Order on the Order of Conditions (the “OOC”) the Commission issued in 2015 under the Massachusetts Wetlands Protection Act (M.G.L. c. 131, § 40, hereinafter, the “WPA”) and Nantucket’s Wetland Protection Bylaw to the Siasconset Beach Preservation Fund (“SBPF”) permitting the Geotube coastal engineering structures installed on Siasconset Beach on a pilot basis and subject to multiple strict conditions that SBPF concedes have been serially violated and remain in violation. As you know, both the WPA and Nantucket’s Wetland Protection Bylaw expressly designate the Commission as the body with the sole Town authority to enforce those laws and regulate their subject matter, which no one disputes includes this project.

As detailed further below, the Proposed MOU is also a document that purports to supplant the Commission’s statutory enforcement authority as it concerns this project and to place that authority in the Board’s hands under the banner of a “public-private partnership” with SBPF.

For those reasons, this Proposed MOU is obviously of great interest to the Commission. Yet the Board and SBPF excluded the Commission from its formulation and drafting. Indeed, the Commission was provided a copy of the Proposed MOU for the first time on Thursday, March 10, 2022, in a communication in which the Commission was also informed that the Board was poised to vote on it at its next meeting on March 16, four business days later. The Board opted not to take a vote on the Proposed MOU on March 16 after all, but now, per its meeting agenda, plans to do so on March 23. This short delay did afford the Commission the opportunity to quickly convene a duly-noticed Executive Session with me on March 17 to discuss the document.¹ The unanimous view amongst all six (6) of the participating Commissioners² in that meeting is that the Proposed MOU, for the reasons discussed herein, is deeply problematic and ill-advised and that the Board should reject it in its current form.

II. The Proposed MOU runs directly contrary to Massachusetts law

The Proposed MOU contains many troubling provisions, but the Commission wishes to focus urgent attention now on those parts of the document that seek to transfer compliance and enforcement responsibilities concerning this project from the Commission to the Board. For example, the Proposed MOU states that:

- “[S]hould the **Board** be satisfied that the existing [OOC] permit conditions are met and compliance is underway,” and the **Board** is also satisfied other conditions and “applicable triggers” are met, the current Geotube project would remain in place, contrary to the Commission’s Enforcement Order. Proposed MOU, at 2, Seventh Recital (emphasis added).³
- “The Board and SBPF shall work together to bring the Existing Project into compliance with [the OOC] *in order to resolve* the enforcement order issued by the Commission.” *Id.*, at 2, ¶ 1 (emphasis added).
- An “Operations and Maintenance Manual” prepared by SBPF and submitted jointly with the Board to the Commission is declared to resolve the project’s non-compliances by “set[ting] forth required procedures ... in accordance with the terms and conditions of the [OOC].” *Id.*
- “SBPF shall also obtain and deliver to the **Board**,” not the Commission, a “Performance Bond in an agreed upon amount.” *Id.* at 4, ¶ 7 (emphasis added). This bond requirement shall only take hold, it appears from a fair

¹ The Proposed MOU bears directly on the litigation SBPF has initiated against the Commission in Nantucket County Superior Court appealing the Enforcement Order. *See also* Section III of this letter (Commission’s Overture to SBPF).

² Commissioners Erisman, Beale, Engelbourg, Goulding, Phillips, and Williams.

³ Not only that, but should the Board deem the current project to be in compliance with the OOC, the Board would also “seek permitting, as co-applicants [with SBPF], for a phased expansion” of the project. *Id.*

reading of the text, should the Commission's current Enforcement Order be rescinded. *Id.*

Taken together, these and other provisions in the Proposed MOU appear to construct a parallel regulatory and enforcement scheme for the SBPF project. Such an effort runs counter to well-established Massachusetts law in a number of respects.

First, the Legislature has bestowed upon conservation commissions the "undisputed authority to enforce the [Wetlands Protection] act within the town." *Garrity v. Conservation Comm'n. of Hingham*, 462 Mass. 779, 792 (2012); see also *Delapa v. Conservation Commission of Falmouth*, 93 Mass. App. Ct. 729, 738 n.17 (2018) (Under the WPA, "conservation commissions have express statutory authority to issue administrative enforcement orders").⁴ This statutory power does not rest in other municipal boards. As the Supreme Judicial Court put it in *Fafard v. Conservation Com'n of Barnstable*, 432 Mass. 194 (2000):

The Legislature has granted local conservation commissions the authority to act to prevent alteration of wetlands in order to preserve certain wetlands values ... includ[ing] 'any bank, marsh, swamp, meadow, flat or other lowland subject to tidal action or coastal storm flowage.' Thus, local conservation commissions are authorized by the Legislature to protect recreation values by regulating construction on Commonwealth tidelands.

Id. at 206, quoting M.G.L. c. 131, § 40.

Second, even if the Commission were inclined to outsource its authority to determine compliance with its permits and orders to other boards, this would be unlawful because "a permit granting authority ... may not delegate to another board ... the determination of an issue of substance, i.e., one central to the matter before the permit granting authority." *Miles v. Planning Bd. of Millbury*, 29 Mass. App. Ct. 951, 952 (1990), quoting *Tebo v. Board of Appeals of Shrewsbury*, 22 Mass. App. Ct. 618, 624 (1986); see also *Weld v. Board of Appeals of Gloucester*, 345 Mass. 376, 378 (1963); *Shoestring Ltd. P'ship v. Barnstable Conservation Comm'n*, 20 Mass. L. Rptr. 279, at *7-8 (Mass. Superior Ct. June 6, 2005) (Nickerson, J.) (extending *Weld/Tebo* doctrine to conservation commission action).

Third, a municipal requirement, whether embodied in a project-specific MOU or otherwise "must provide adequate standards for the guidance of the board in deciding whether to grant or to withhold [] permits," including for wetlands matters. *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 635, 638 (1970). A town regulation or requirement that is "vague and ambiguous" or employs "terms so vague that [people] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process law."

⁴ It is worth noting that the 2013 Memorandum of Understanding between the Board and SBPF, far less ambitious in its scope than the Proposed MOU (though still problematic and largely unfulfilled in those obligations belonging to SBPF), at least acknowledged that the Board "has no control over the hearing process or the ultimate decision that the Conservation Commission may make." 2013 MOU, at 3, ¶ 5.

Cumberland Farms, Inc. v. Board of Appeals of the Town of Wellfleet, No. 12 MISC. 459503, at *7 (Mass. Land Ct. Oct. 6, 2015), quoting *O'Connell v. Brockton Bd. of Appeals*, 344 Mass. 208, 212 (1962). When town regulations or requirements lack such clarity, the courts rightly ask, “By what standards are they to be judged? How can they be applied, in practice, in anything other than an almost totally-subjective manner?” *Cumberland Farms*, at *7. “It is difficult to see how,” the Land Court continued in that decision, such vague rules “will not become a way (or, just as problematically, be perceived in practice as a way) for the [] Board to ‘play favorites.’” *Id.*

Respectfully, the Proposed MOU’s language measuring SBPF’s future compliance against ambiguous concepts such as “the Board be[ing] satisfied ... conditions are met” and “applicable triggers [being] met” and “The Board and SBPF work[ing] together to bring the Existing Project into compliance” cannot withstand even modest scrutiny under these principles of municipal due process that our courts have articulated over many decades.

Indeed, the pitfalls identified by Massachusetts courts concerning “almost totally-subjective” standards are exemplified within the Proposed MOU itself where, for example, SBPF and the Board state that “[o]nce the enforcement issues are resolved and compliance with the existing permit conditions achieved,” they will jointly pursue an “objective of obtaining an order of conditions for the expanded project no later than Summer 2022.” *Id.* at 2, ¶ 3. These two concepts are irreconcilable. Even under SBPF’s own recent “Proposal for Bringing Baxter Road Geotube Project Into Compliance,” its project will not be compliant with the OOC’s conditions until 2026 at the earliest, so by what standard would the Board possibly be able to determine SBPF’s “compliance with the existing permit conditions [being] achieved” in time for obtaining Commission approval for a new OOC for an expanded project by this summer?

Finally, concerning the Proposed MOU’s requirement that the Board receive a performance bond from SBPF – though only after SBPF agrees to the amount – and that the Board then hold and administer the bond, this further attempt to supersede the Commission’s regulatory and enforcement authority directly violates, among other things, Nantucket’s Wetland Protection Bylaw. *See id.* at § 136-9 (“The **Commission** may require, as a permit condition, that the performance and observance of other conditions be secured by ... a bond or deposit of money or negotiable securities in an amount **determined by the Commission** [not the applicant] to be sufficient and payable to the Town of Nantucket. The bond shall be released by the Commission **only after the Commission** issues a certificate of compliance”) (emphasis added).

In sum, the Proposed MOU is riddled with problems, both legal and factual. The Commission isn’t interested in pointing fingers or ascribing motivations, but somewhere along the way this Board-SBPF initiative went seriously awry and has culminated in a fundamentally deficient and legally unenforceable Proposed MOU.

III. Commission’s Overture to SBPF

The Commission remains open to discussions with SBPF. Accordingly, the Commission has responded to the recent request of SBPF’s counsel to stay proceedings in the Nantucket County

Superior Court litigation brought by SBPF appealing the Commission's Enforcement Order. As I have communicated to SBPF's counsel in a letter dated today, in its Executive Session of March 17 the Commission voted unanimously to agree to a stay of up to 90 days so long as that period is spent by SBPF cooperatively engaging with the Commission on a range of topics pertinent to the OOC. *See* Letter from Benjamin Tymann to Gary Ronan, dated March 21, 2022 (copy attached hereto at **Tab 2**).

The first requirement of the Commission's counter-proposal for a conditional 90-day stay is that SBPF engage with the Commission on the content of the Proposed MOU and that SBPF "inform the Select Board immediately that SBPF is opposed to any Select Board vote to approve the draft MOU until this process of engagement with the Commission has concluded." The Commission hopes the Board will take this into account when weighing whether to forgo action on the Proposed MOU in its current form.

IV. Conclusion

As explained in this letter, the Proposed MOU will be of no legal effect if executed. Even so, the Commission firmly believes the document has the potential to do serious damage to municipal governance on Nantucket and the public's confidence in the same because of the confusion it would create concerning the Board's and the Commission's respective legal duties and responsibilities. In addition, by seeking to marginalize the Commission and unlawfully usurp critical aspects of its regulatory and enforcement authority, the Proposed MOU would also set a disturbing precedent were it to be given the Board's imprimatur. It would put Nantucket on a path to splintered, arbitrary, and ineffective coastal protection efforts in the coming years, when the opposite will be needed to successfully address these accelerating environmental challenges on the island.

For these reasons, the Commission, by unanimous vote, strongly and respectfully urges the Board not to approve the Proposed MOU.

Very truly yours,

Benjamin B. Tymann

Benjamin B. Tymann
Special Municipal Counsel

Enclosures

cc: C. Elizabeth Gibson, Town Manager
Nantucket Conservation Commission
Jeff Carlson, Natural Resources Director
George Pucci, Esq., Town Counsel



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March 21, 2022

VIA EMAIL ONLY
(*GRonan@GOULSTONSTORRS.com*)

Gary N. Ronan, Esq.
Goulston & Storrs
400 Atlantic Avenue
Boston, MA 02110

Re: *Siasconset Beach Preservation Fund v. Nantucket Conservation Comm'n*
Nantucket County Superior Court C.A. No. 2175-CV-00030

Dear Gary:

The Nantucket Conservation Commission (the "Commission") has considered the request of your client Siasconset Beach Preservation Fund ("SBPF") to jointly move the Superior Court to enter a stay of the above-referenced action. The Commission, by the unanimous assent of its six participating Commissioners, agrees that a stay of no more than ninety (90) days would be appropriate at this time so long as that period is spent by SBPF cooperatively engaging with the Commission on a range of topics, delineated below, that are pertinent to the Commission's Order of Conditions (the "OOC") that conditionally permitted the current Geotube pilot project, and to SBPF's proposals to remedy its multiple non-compliances with the OOC.

The conditions under which the Commission would agree to such a temporary stay are as follows:

1. ***Engagement re: draft MOU.*** SBPF will agree to engage with the Commission concerning the content of the draft Memorandum of Understanding (the "draft MOU") that has been the subject of negotiation between SBPF and representatives of the Select Board. This engagement may be achieved through the parties' respective counsel, must include consideration of the Commission's written comments concerning the draft MOU, and can only begin after the Commission has been provided with a complete copy of all the draft MOU's attachments. SBPF would also need to inform the Select Board immediately that SBPF is opposed to any Select Board vote to approve the draft MOU until this process of engagement with the Commission has concluded, and SBPF will refrain from signing any MOU with the Select Board or Town of Nantucket until that process is concluded.

2. ***Delinquent Reports.*** SBPF will immediately file with the Commission Sand Delivery, Quarterly Survey, and Annual Reports for 2020, which have been long delinquent, and, by April 29, 2022, for 2021. SBPF will also provide the Commission with access to all of the raw data associated with these reports to better facilitate independent review.
3. ***Further engagement re: draft O&M manual and remediation plan.*** Last month SBPF submitted to the Commission a draft Operations and Maintenance Manual and a “Proposal for Bringing Baxter Road Geotube Project Into Compliance.” SBPF, through counsel or directly, will work with the Commission to discuss what substantial revisions to these documents would be required to make them satisfactory to the Commission.
4. ***Hard data on the condition of the Geotubes.*** SBPF will agree to promptly provide the Commission with information it requests concerning the present condition, and projected durability, of the existing Geotube structure. The information the Commission will require will include detailed analysis by a qualified expert who, among other assessment steps, has physically inspected the structure in 2022. SBPF will also agree to provide the Commission any manufacturer’s documents that indicate the expected lifespan and maintenance parameters of the Geotubes.
5. ***Shoreline change analysis.*** SBPF will agree to promptly provide the Commission with the data and methodology supporting its consultants’ analysis and conclusions concerning shoreline changes arising from the project.
6. ***Peer review.*** Unless sufficient funds already exist in an applicable peer review account with the Town, SBPF will agree to fund a peer review, not to exceed \$7,500, of the shoreline change analysis, durability of the Geotubes, and conclusions reached by SBPF’s consultants. As is customary, the Commission shall select the peer reviewer.
7. ***Baxter Road relocation.*** SBPF shall provide the Commission with a substantive update, including any pertinent documents requested by the Commission, concerning the Baxter Road relocation efforts that the Select Board has reported SBPF is spearheading. (The Commission understands that, on the Town side, this project is being led by Ken Beaugrand, who should be included in SBPF-Commission communications on this subject).
8. ***Other reasonable requests.*** SBPF will also agree as part of these discussions with the Commission to fully answer other reasonable requests pertinent to the OOC and SBPF’s proposals to remedy its non-compliances therewith.

Gary N. Ronan, Esq.

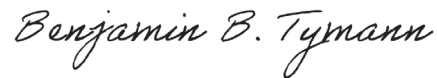
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Because the Select Board, from what the Commission understands, currently plans to take a vote on the draft MOU as soon as this Wednesday, March 23, 2022, the Commission will only keep this proposal to SBPF open until noon on that day, unless the Board forgoes approval of the current draft MOU.

Please contact me with any questions or concerns. The Commission looks forward to SBPF's reply.

Very truly yours,



Benjamin B. Tymann
Special Municipal Counsel

cc: Nantucket Select Board
Nantucket Conservation Commission
Libby Gibson, Town Manager
Jeff Carlson, Natural Resources Director
Vincent Murphy, Coastal Resilience Coordinator
Kenneth Beaugrand, Town of Nantucket Real Estate Specialist
George Pucci, Esq., Town Counsel