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November 27, 2013

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BY ELECTRONIC MAIL
AND FIRST CLASS MAIL

Hon. Bruce D. Miller and
Nantucket County Commissioners
Town & County Building
16 Broad Street
Nantucket, MA 02554

Re: Baxter Road Extension and Sconset Trust Property

Dear County Commissioners:

This letter is in response to an objection letter dated November 19, 2013 from Attorney Daniel J. Bailey, III of Rackemann, Sawyer & Brewster, and in response to Attorney Bailey's comments at a hearing held on November 20, 2013 (the "Hearing"), as counsel for The Sconset Trust, Inc., the owner of the land described in a Deed recorded with Nantucket Registry of Deeds in Book 1104, Page 272 (the "Sconset Trust Deed") and shown on a plan entitled "Perimeter Plan of Land in Nantucket, Mass. Prepared for United States of America," dated August 7, 2007, recorded with said Deeds as Plan No. 2007-65" (the "Lighthouse Land"). Attorney Bailey contends that the proposed layout of Baxter Road Extension as shown on a plan entitled "Preliminary Working Plan, Town of Nantucket, County of Nantucket, 40 Foot Easement," dated October 16, 2013, Revised October 29, 2013, prepared by ACKME Survey LLC, and the proposed County takings of easements from the Sconset Trust over a portion of the Lighthouse Land should not be approved because it is not a "shovel ready" project due to a number of considerations, including the need for approvals from the United States, the Commonwealth of Massachusetts and the Massachusetts Historical Commission ("MHC").

In order for the County to move forward with the process for the proposed roadway layout and taking of Baxter Road Extension easements, this roadway project does not have to be "shovel ready." The County, pursuant to G.L. c.82, §5, may vote to lay out the roadway and take the easements within twelve months after the hearing(s) held for the review of the roadway layout plan. Therefore, the County will likely have sufficient time during that year in order to obtain certain approvals, as described below, in order to proceed with the roadway layout and the easement takings within the one-year period. Furthermore, if the federal and state agency approvals are reasonably anticipated, the layout and takings can be made within that year, even if the proposed work is still awaiting agency approvals.

Attorney Bailey raises the following issues in his objection to this roadway project to which I respond.

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1. Rights and Interest Held by the United States and the Commonwealth of Massachusetts.

Although the United States has reserved for itself and for the benefit of MHC, as set forth in the Deed of the Lighthouse Land from the United States of America, acting by and through the Secretary of Homeland Security to the Nantucket Historical Association recorded with said Deeds in Book 1104, Page 226 (the "United States Deed") and recited in the above-referenced Sconset Trust Deed, easements for purposes of access to the Lighthouse over the Lighthouse Land, these access rights do not necessarily prevent the County from taking the easements from Sconset Trust. Item (3) noted in the Sconset Trust Deed does provide that MHC has access to the Lighthouse either over the Lighthouse Land or to a relocated site for the purpose of allowing inspections. This proposed roadway layout and the easement is over a small portion of the Lighthouse Land and would not impair the MHC access to the Lighthouse Land and the Lighthouse. In addition, the United States has easement rights reserved in Item 6 of the Sconset Trust Deed on the easement path shown on the Easement Plan recorded with said Deeds in Book 1104, Page 346 for purposes of access to the Lighthouse. The United States still will be able to access the Lighthouse by means of the Easement Path, even if the roadway is laid out over a portion of the Lighthouse Land. Since the County will take the easement rights for the roadway subject to the rights and easements of the United States and MHC, the County and the United States will be able to retain their easement rights over the remainder of the Lighthouse Land, as Baxter Road Extension will be a public way providing access to the Lighthouse Land.

In addition, the United States reserved an easement for itself as set forth in Items (6), (7) and (8) of the Sconset Trust Deed for purposes of access, installation, operation and maintenance of aid(s) to navigation on the Lighthouse or if the location of the aids to navigation is insufficient for its operation in its current location, then the United States may install, access, operate and maintain an aid(s) to navigation on the Lighthouse Land on any location of its choosing. Although the taking would be subject to this easement, the County could request a release of this easement from the United States over only that portion of the Lighthouse Land which is shown as the roadway layout.

The Sconset Trust Deed does provide for a right of reverter to the United States in Item (5) as Attorney Bailey contends. However, the reverter arises only if the Lighthouse "ceases to be maintained as a nonprofit center for public benefit for the interpretation and preservation of the material culture of the U.S. Coast Guard and the maritime history of Nantucket." The layout and acceptance of a County highway over a corner of the Sconset Trust property, does not prevent the continued maintenance of the Lighthouse as a nonprofit center for the public benefit. Therefore, in my opinion, it is unlikely that as a result of this roadway layout the Lighthouse Land would revert to the United States. Furthermore, the County is not taking and does not require any rights or release of

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rights, restrictions or easements from the United States or MHC, although the County may seek to obtain from the United States release of the aids-to-navigation easement over only that portion of the Lighthouse Land which is shown as the roadway layout.

Lastly, Attorney Bailey commented at the Hearing that the Deed contained a prohibition against alienation of the Lighthouse Land by the Sconset Trust. The Sconset Trust Deed in Item 4 does provide for a prohibition against alienation but it is an alienation for no consideration that is prohibited. Upon the taking of these easements the County does intend to award damages to the Sconset Trust for their easement rights, so it is therefore not a taking for no consideration. It is, therefore my opinion that this restriction does not prevent the County from taking any easement rights for the roadway over the Lighthouse Land.

2. Historic Preservation Restrictions

Attorney Bailey argues that as a result of the Lighthouse being on the National and State Register of Historic Places, the County cannot lay out the roadway over a portion of the Lighthouse Land, as any required approvals will be too time-consuming for this road project. We have not had an opportunity to review the designation of the Lighthouse as a National and State Historic Place to determine if such a designation applies to just the Lighthouse or to the Lighthouse Land as well. It should be noted that the Historic Preservation Covenant as set forth in Exhibit A of the Sconset Deed specifically protects the Lighthouse and not the Lighthouse Land which definitions thereof are distinguished in the Sconset Trust Deed. Although no federal or state funding is involved in this roadway project, this roadway project is still in its preliminary stages and therefore, it is uncertain as to whether any federal or state permits will be involved and whether the fact that the Lighthouse or the Lighthouse Land may be designated as a National and State Historic Place triggers a review under the Massachusetts Environmental Protection Act ("MEPA") or the National Environmental Protection Act ("NEPA").

In addition, the Historic Preservation Covenant attached as Exhibit A to the Sconset Trust Deed provides that all projects involving ground-breaking activity shall be reviewed by the MHC to determine that archaeological resources are preserved. So the County will need to submit the proposed construction plans within the layout for MHC review and an MHC determination as to whether archaeological resources, if any, on the Lighthouse Land would be disturbed, and if such resources must be disturbed, then MHC must provide prior written approval of mitigation measures. Although in my opinion the County shall need MHC to review this roadway layout project and determine that any archaeological resources are to be disturbed, it is apparent, in my opinion, that MHC is concerned with the protection of the Lighthouse as a building and its surrounding archaeological resources.

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In my opinion, even if the United States and the MHC may need to grant approvals under the historic preservation restrictions set forth in the Deed, and even if a MEPA or NEPA process may be required because the Lighthouse or the Lighthouse Land is on the National and State Registers of Historic Places, the County has up to a twelve month period from the hearings on the roadway layout plan to obtain these approvals and comply with these requirements, which should be a sufficient time. If the year does elapse, a new hearing on the proposed layout would be required under G.L. c.82, §§1-7 before the layout and takings may be finally voted.

3. Legislative Approval

If the County intends to lay out the roadway over a portion of the Lighthouse Land and take easements over this property, then pursuant to G.L. c.79, §5A, the County must receive approval of the General Court of the Commonwealth of Massachusetts prior to any taking, since a portion of the property interest taken is over the site of the historical landmark. However, since there is no quantum of vote of the General Court identified in G.L. c.79, §5A, it is my opinion that the vote is of a majority of both branches and not a two-thirds (2/3) vote as Attorney Bailey claims.

In addition, Attorney Bailey states that the taking of the roadway easements would trigger the need for legislative approval under Article 97 of the Amendments to the Massachusetts Constitution. Since the County does not intend to take any land or interests therein from a public entity, and furthermore intends to take the roadway easements subject to the easement rights and restrictions of the United States and the MHC, and the property is held by a private entity, then Article 97, in my opinion, is not applicable and a taking does not trigger a vote of two-thirds (2/3) of both houses of the State legislature.

4. Potential Hazardous Material

The United States has given notice that hazardous substances have been released or disposed or stored on the Lighthouse Land and in Item (9) of the Sconset Trust Deed reserved easements to the Lighthouse Land for environmental studies or remedial action. In addition there is a restriction enforceable by the United States set forth in the Sconset Trust Deed which restricts the use of the Lighthouse Land which is inconsistent with Massachusetts State law and regulations governing lead-contaminated soil. The County would be required to acquire the necessary approvals from the Commonwealth of Massachusetts Department of Environmental Protection and any other necessary state agencies to perform any excavation, grading, removal or filling of the soil. It is not clear if these hazardous substances are located in the location of the proposed roadway layout and therefore I recommend the County consult with the United States and Sconset Trust to determine the location of the hazardous substances if possible.

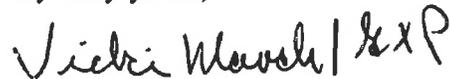
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In summary, this proposed roadway layout is over a portion of the Lighthouse Land and does not prevent access to the Lighthouse site. Due to the topography of the surrounding property and the location of this site, the County, it appears, has limited options as to where to lay out this roadway and this location may provide the best possible location given the options available. Although the County will need certain approvals to undertake this project, there will likely be sufficient time to obtain them, since the County has up to a twelve month period from the time of the hearings held for review of the layout plan, to vote to lay out Baxter Road Extension and accept the layout as a public way, and vote to take the necessary easements.

If you need assistance in seeking the necessary approvals to undertake this roadway layout or if you have any questions concerning this matter, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink that reads "Vicki Marsh" followed by a stylized monogram "VSM".

Vicki S. Marsh

VSM/ja

cc: Town Manager (By Electronic Mail and First Class Mail)
Director of Planning and Land Use Services (By Electronic Mail and First Class Mail)

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