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MEMORANDUM

To: Nantucket County Commissioners
From: Glenn A. Wood, Esq. and James H. Greene, Esq.
Re: Sankaty Head Golf Club, Nantucket, Massachusetts
Date: November 20, 2013

This firm represents the Sankaty Head Golf Club (the "Club") with respect to the Town of Nantucket's "Petition to the County Commissioners of the County of Nantucket Relative to Baxter Road Extension" (the "Petition"). The Petition and associated plan (attached) indicate that the Town is requesting the County Commissioners take four (4) separate easements by eminent domain to create said way. The Club has serious reservations regarding the legality and practicality of this proposed taking:

The Petition requests that the County Commissioners take an easement, labeled "Easement Parcel **B**," over a portion of Nantucket Assessor's Map 48, Parcel 28 which is owned by the Club. This Easement Parcel **B** consists of approximately 35,354 square feet and runs along the Club's Fifth (5th) Hole which is the Club's historic signature hole.

Since an official map has not been accepted by the Town pursuant to M.G.L. c.41, 81E, this proposed new lay-out must be referred to the Nantucket Planning Board for a recommendation or forty-five (45) days must elapse without a Planning Board recommendation/report. G.L. Chapter 41, §81I states in part, "...no public way shall be laid out, altered, relocated or discontinued, unless the proposed laying out, alteration, relocation or discontinuance has been referred to the planning board of such city or town and such board has reported thereon, or has allowed forty-five days to elapse after such reference without submitting its report...."

Since the earliest the Petition could have been referred to the Planning Board is October 23, 2013 (the date on the Petition), forty-five (45) days have not yet elapsed.

The existing Baxter Road is still being used and we have been informed that the Baxter Road Extension will not be constructed until necessary, which is problematic pursuant to Chapter 82 as the taking for a roadway must be necessary and here, that is not so. *Chandler v. Nantucket County Commissioners*, 437 Mass. 430 (2002) (The determination that the highway is required

by the common convenience and necessary is central to the exercise of authority under the statute, M.G.L. Chapter 82, section 4.)

Additionally, the public notice documents obtained by the Club (attached) are incomplete. First, the Petition does not refer to an actual plan, only a "preliminary" plan.

Second, the Petition is dated October 23, 2013 but the public notice indicates that the plan is dated October 16, 2013 and revised October 29, 2013 (after the date of the Petition) however, the documents obtained do not indicate a revision date of October 29, 2013. Thus, we question if the procedural aspects as required have been properly satisfied.

Easement Parcel **D** should not be laid out as part of Baxter Road Extension since the Town has been offered a feasible (and arguably less expensive) alternative.

While the Town and County is considering the concept of "Springing Takings" claiming that the easements will not be taken until it is necessary to relocate Baxter Road, it must be noted that regardless of when the actual property is transferred in fee or by easement, the Town will incur liability immediately. Once this so-called roadway, Baxter Road Extension, is formerly laid out by the County Commissioners and the Petition to take the depicted easements by eminent domain is favorably voted on, the affected properties are burdened and immediately suffer damages.

The "Springing Takings" concept has not been fully vetted and/or communicated to those most affected - the property owners. There are many questions remaining such as where would the funding come from to pay the award for the easements that are taken? While the Town could be considering a betterment tax pursuant to M.G.L. Chapter 80, the *pro tanto* award must be paid at the time of the vote to take by eminent domain (M.G.L. Chapter 79, §6).

Additionally, prior to voting on laying out the proposed roadway and agreeing to take easements over properties, the Town and the County should have an appraisal and make it available so that the cost and viability of the proposal can be fairly weighed.

As the original Baxter Road is still in existence and is being used, there is time for the Town to do the proper due diligence and fully inform the affected property owners and the taxpayers of all of the options.

We also have serious reservations about the "Springing Takings" concept flies in the face of the Eminent Domain Statute where the courts have determined that pursuant to M. G. L. Chapter 79, there is "a single coherent system of procedure so that everybody concerned will know how to take land by eminent domain and how to ascertain whether land or any interest therein has been seized under the power of eminent domain." *Whitehouse v. Sherborn*, 11 Mass. App. Ct. 668, 673 (1981). Here, that is not so as the public purpose for the proposed takings has not been properly articulated and the funding source of the proposed takings has been fully revealed.

We therefore encourage the Town and County to investigate the alternative plan to determine its sufficiency against the proposed plan and its potential ramifications.