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To: [Bob DeCosta](#); [Bruce D. Miller \(midasack1@comcast.net\)](#); [Rick Atherton \(rickatherton@comcast.net\)](#); [snatural@nantucket.net](#); [Tobias Glidden \(integrity11@gmail.com\)](#)
Cc: [Erika Mooney](#)
Subject: FW: Baxter Road NOI
Date: Wednesday, November 13, 2013 1:54:08 PM
Attachments: [NANT Baxter Road - Ltr C_001.pdf](#)

C. Elizabeth Gibson
Town Manager
Town of Nantucket
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From: George Pucci [mailto:GPucci@k-plaw.com]
Sent: Wednesday, November 13, 2013 12:15 PM
To: Jeff Carlson
Cc: Libby Gibson; John Giorgio
Subject: Baxter Road NOI

Dear Jeff –

Attached is a letter in response to the Commission's request for written guidance on four issues concerning the Town and SBPF's NOI for Baxter Road. If you or the Commission have further questions, please let me know. Libby, at last week's selectmen's meeting, I advised that the Commission had requested this letter at their last hearing session, and that I would be copying you on the same. Please feel free to forward this to the selectmen if you see fit.

Thanks, George

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November 13, 2013

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BY ELECTRONIC MAIL

Nantucket Conservation Commission
c/o Natural Resources Coordinator
2 Bathing Beach Road
Nantucket, MA 02554

Re: Baxter Road Notice of Intent for Temporary Stabilization Measures

Dear Members of the Conservation Commission:

You have asked for an opinion and guidance on the following four issues: 1) whether the coastal engineering project (the "Project") which is the subject of the above-referenced Notice of Intent ("NOI") qualifies as a "limited project" under 310 CMR 10.24(7)(c); 2) standards for "emergency projects"; 3) whether the Commission may order a deposit of funds under the Commission's control in order to remedy enforcement issues which may arise following the issuance of a permit; and 4) whether the Project is precluded by the Town Code moratorium on coastal engineering structures.

I. Limited Project

The co-applicants are seeking approval of the Project as a "limited project" under 310 CMR 10.24(7)(c), which provides: "Notwithstanding the provisions of 310 CMR 10.25 through 10.35, the issuing authority may issue an Order of Conditions and impose such conditions as will contribute to the interests identified in M.G.L. c. 131, §40 permitting ... [certain] limited project[s]."

Under 310 CMR 10.24(7)(c), "limited projects" include

1. Maintenance and improvement of existing public roadways, but limited to widening less than a single lane, adding shoulders, correcting substandard intersections, and improving drainage systems.
2. The maintenance, repair and improvement (but not substantial enlargement) of structures, including buildings, piers, towers, headwalls, bridges and culverts which existed on November 1, 1987.

310 CMR 10.24(7)(c)1. and 2.

In my opinion, the Commission would be warranted in making a finding that the Project qualifies as a "limited project" under 310 CMR 10.24(7)(c)1., as the purpose of the project is the

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“maintenance” of Baxter Road, by preventing breaches in its existing layout due to erosion of Siasconset Bluff.

While the regulation provides limiting language that any “improvement” of a public roadway is “limited to widening less than a single lane, adding shoulders, correcting substandard intersections, and improving drainage systems,” in my opinion, under the rule of last antecedents, this limiting language applies to the last antecedent of the clause, i.e., that only “improvements” of existing public roadways are so limited, not “maintenance” thereof. *See Taylor v. Burke*, 69 Mass. App. Ct. 77, 81 (2007) (“The last antecedent rule is a general rule of statutory as well as grammatical construction that a modifying clause is confined to the last antecedent unless there is something in the subject matter or dominant purpose which requires a different interpretation”) (internal quotations omitted); *Herrick v. Essex Reg'l Ret. Bd.*, 77 Mass. App. Ct. 645, 650 (2010) (Under “[t]he rule of the last antecedent ... qualifying phrases are to be applied to the words or phrase immediately preceding and are not to be construed as extending to others more remote”).

Further, construing the limiting language of the regulation to apply to both “maintenance” and “improvement” of the public roadway would be unreasonable as it would not permit even the most basic of maintenance issues, such as pothole repairs. *See Lynch v. Com.*, 54 Mass. App. Ct. 347 (2002) (“A construction of a statute that leads to an unreasonable conclusion where a sensible construction is permissible is disfavored”); *see also Com. v. Williamson*, 462 Mass. 676, 683 (2012) (“It is a basic principle of statutory construction that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous”) (internal quotations omitted).

Here, co-applicants are seeking only to “maintain” the existence of Baxter Road within the bounds of its current layout, and are not seeking to “improve” the public roadway. Thus, in my opinion, the Commission would be warranted in making a finding that the Project qualifies as a “limited project” under 310 CMR 10.24(7)(c)1.

II. Emergency Projects

The Nantucket Wetlands Bylaw permits an “emergency project” which it defines as

an activity in a resource area or its buffer that is necessary to protect the public health and safety, and which, because of the conditions giving rise to the emergency, to be performed effectively cannot await compliance with the notice requirements and appeal periods associated with the filing of a notice of intent or request for determination of applicability.

See Chapter 136 of the Town Code.

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An emergency project may proceed under Section 136-5 of the Town Code only upon the issuance of an emergency certification from the Commission which must comply with the following requirements:

- A. Any person requesting to undertake an emergency project shall specify why the project is necessary for the protection of the public health and safety and which agency or subagency of the Commonwealth of Massachusetts is to perform the project or has ordered the project to be performed;
- B. An emergency certification shall be issued only for the protection of public health or safety;
- C. If the project is certified to be an emergency by the Commission, the certification shall include a description of the work which is to be allowed and shall not authorize work different or more extensive than that necessary to abate the emergency which gave rise to that certification;
- D. An emergency permit shall be issued only following a site inspection by a member of the Commission, or an authorized representative thereof;
- E. All work performed pursuant to an emergency certification shall be completed within 30 days of issue;
- F. Within 21 days of commencement of an emergency project, a notice of intent ... shall be filed with the Commission for review ... In the event that such a filing is not timely ..., or is incomplete, or such filing is denied for any reason, the Commission may revoke or modify an emergency project certification and/or order appropriate restoration and mitigation measures.

Id.

The Commission's Wetland Protection Regulations provide that in the case of a request for an emergency certification, such request can either be given in writing to the Commission office or can be made directly to the Commission's chairperson. Town of Nantucket Wetland Protection Regulations, Section 1.03A.

Here, in my opinion, the co-applicants have already filed the NOI which would be required under Section F of the Bylaw quoted above, and all that remains procedurally is for the co-applicants

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to make a formal request for emergency certification, which the Commission would then be free to rule on under the above-stated procedures.

The regulations governing the Massachusetts Wetlands Protection Act also have provisions permitting emergency projects, which are similar to those provided under the Nantucket Wetlands Bylaw. See 310 CMR 10.06. Similar to the Bylaw, the state regulation requires that the person requesting permission to do the emergency project shall specify why the project is necessary for the protection of health or safety of citizens of the Commonwealth and that if the project is certified to be an emergency by the Commission, the “certification shall include a description of the work which is to be allowed and shall not include work beyond that necessary to abate the emergency.” The regulation also requires that a site inspection shall be made prior to such certification. The state regulation also has a 30-day time limit for completion of the certified emergency work.

The state regulation differs from the Bylaw in that it provides for review by the Department of Environmental Protection, which -

may, on its own motion or at the request of any person, review: an emergency certification issued by a conservation commission and any work permitted thereunder; a denial by a conservation commission of a request for emergency certification; or the failure by a conservation commission to act within 24 hours of a request for emergency certification.

310 CMR 10.06(5).

The regulation further provides that such review by the Department of Environmental Protection shall not operate to stay the work permitted by the emergency certification unless the Department specifically so orders and that the Department’s review shall be conducted within seven days of either the issuance by the Commission of the emergency certification, denial of the certification, or failure of the Commission to act within 24 hours of a request for emergency certification. Id. The regulation also provides that if the Department finds that certification was improperly granted or that the work allowed thereunder is excessive or not required to protect health and safety, that the Department may revoke the certification, condition the work permitted thereunder, or take such other action as it deems appropriate. Id.

III. Deposited Funds

In my opinion, neither state law, nor local regulation, authorizes the Commission to impose a condition on the Project requiring a deposit of funds, which the Commission controls, in order to address potential enforcement issues which may arise following the issuance of a permit. Section 136-9 of the Wetlands Bylaw does provide that the Commission may require that the performance of

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conditions be secured by a bond or deposit of money or negotiable securities in an amount determined by the Commission to be sufficient. However, the deposit must be made payable to the Town and not the Commission.

Under this provision, it is appropriate and in fact I would recommend that the Commission explore during its public hearings the amount of funds which would be necessary to secure conditions it may impose upon the Project, including but not limited to funds necessary to ensure necessary sand replenishment, maintenance and repair of the structure, and removal of the structure in the event of failure or proven adverse effects.

IV. Coastal Engineering Structures Moratorium

Chapter 67-1.E. of the Town Code provides that “leasing or licensing [of] any Town-owned coastal land for private erosion-control protection purposes shall be subject to approval by vote at an Annual or Special Town Meeting.” However, the Project is not seeking approval for “private erosion-control protection,” but rather, for protection of the existing public roadway from destruction. In this respect, Chapter 67-1.D. provides that the temporary moratorium on the use of Town-owned property for coastal engineering projects “shall not prohibit emergency armoring measures necessary to protect public roads, public buildings, or other public assets from imminent destruction.” Accordingly, in my opinion, the Project is not subject to the moratorium as it is seeking to protect a public roadway.

Very truly yours,



George X. Pucci

GXP/man
cc: Town Manager