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Nantucket Board of Selectmen
16 Broad Street
Nantucket, MA 02554

July 12, 2013

RE: Baxter Road MOU

I have reviewed the letter from Attorney Paul DeRensis to Catherine Stover concerning the MOU between SBPF and the Town of Nantucket for the protection of the Sconset Bluff. Attorney DeRensis asserts that the MOU is legally deficient and that Town Meeting approval is needed for the erosion protection project described in it. His conclusions are plainly wrong based on a simple review of the facts and the law. It is disappointing that Ms. Stover and Mr. DeRensis would attempt to create such a distraction in this important matter. The MOU is valid on its own and no further Town Meeting vote is needed, except as *already* provided in the MOU.

First, Attorney DeRensis suggests that Town Meeting is required to be consulted. He must have missed something. The protection of Sconset Bluff has been a heavily debated and voted on topic. In three separate Town Meeting votes, Chapter 67 of the Town Code was adopted in 2010 and amended in 2012 to deal specifically with using Town land to protecting the Sconset Bluff. The 2010 bylaw set a temporary moratorium on new private erosion control structures on certain Town land, but also specifically exempted "emergency armoring measures necessary to protect public roads, public buildings, or other public assets from imminent destruction." In 2012, Town Meeting adopted another exemption to the moratorium that authorized the Board of Selectmen to license the use of Town land for a new coastal engineering structure for a project described therein. At that time, Town Meeting also set the standard for when a future Town Meeting vote would or would not be required, by requiring Town Meeting approval for "leasing or licensing any Town-owned coastal land for private erosion-control protection purposes." Thus, Town Meeting has weighed in on this specific issue several times and set clear standards only a year ago. Considering how strongly Nantucket rejected the 2008 beach nourishment idea, these votes were a strong recognition that hard protection of the bluff may be needed and should be done properly.

Second, Attorney DeRensis suggests that the MOU is a lease or license in disguise. It is not. The MOU clearly provides that the Town is agreeing to the use of Town land for purposes of filing the application for the erosion protection project with the Conservation Commission, but the MOU also expressly says that if access to Town land is required to construct the project, that the granting of such a license or lease is a *future* event, as are the other permits and approvals that will or may be needed.

Third, Attorney DeRensis suggests that the protection of the Sconset Bluff is for *private* purposes, so any license or lease to a private party requires Town Meeting approval. This would be true, except that the project proposed in the MOU is clearly for *public* purposes. As stated repeatedly in the MOU, the Town is cooperatively engaging with private parties for *public* purposes to protect Town infrastructure and assets from imminent destruction, as well as other public purposes, like protecting and enhancing current and new public access ways and

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establishing possible alternative road access and utility locations on private land. The "Whereas" sections of the MOU recognize that 1) private homes may be at risk (which is stated as an observation, not a purpose), 2) public infrastructures is in imminent danger, 3) the parties agree to cooperate to stabilize the bluff (which is on public and private land) to try to protect both, and 4) the Board is committed to protecting Baxter Road, as long as it can be done without certain other harms. It is worth noting that the draft MOU said that the Board was committed to protecting the homes and the road, but the private property language was removed expressly because the Board is not committed to protecting the private property. Therefore, while the project has mixed public and private benefits and obligations, substantial private funding and many private actions, the MOU expressly states that the *public* purpose is to protect public infrastructure and assets, and otherwise as above. Private participation or benefit simply does not harm the properly recognized public purpose, which is the prerogative of the elected Board of Selectmen to determine, as has been done here.

Attorney DeRensis makes a contorted argument that if the MOU contains a private benefit, actor or funds, that this negates the public purpose. He provides no reason as to why this is true, or why the converse is not true, that an action with a public purpose is public, regardless of a corresponding private purpose. Under his reasoning, a new public park or public bike path would be for private purposes if the Town entered into an agreement with the neighbors (as is commonly done) to provide land, grant rights and waivers, pay for it, do some of the work, or similar. This makes no sense. The Town securing a good deal from private parties does not negate the public purpose. The fact that the Town is accepting a donation and cooperation from a private party, or that an abutter may benefit from action is irrelevant to whether the action is for public purposes.

Moreover, Attorney DeRensis' interpretation of the law cannot work in application. It is physically impossible for the Town to protect the public assets in and around Baxter Road without cooperating with the private property owners and allowing some ancillary benefit. That is, if the erosion protection at Sconset Bluff is placed on Town land, it will necessarily protect both private and public interests. However, if the erosion continues past the Town land, then the public infrastructure can only be protected by placing the erosion control measures on private property that lies between the public land and the infrastructure. There is no feasible way to protect this public infrastructure and assets from erosion from the Town land without providing some private benefit too, which is why the private property owners are willing to use private funds to protect this public infrastructure. Town Meeting did not adopt a bylaw that requires a nonsensical application when the Town determines to protect its infrastructure; it adopted a bylaw that implicitly and expressly allows erosion protection to protect public assets and for other public purposes, as determined by the Board of Selectmen.

Thus, the MOU between the Town and SBPF is valid, Town Meeting has spoken, and Chapter 67 allows for the proposed project without further Town Meeting approval. However, as noted in the MOU, several aspects of this project will require future approval by the Board and other Town agencies, including the Conservation Commission, and the use of Town funds, for example, would require Town Meeting approval. All necessary and appropriate approvals will be sought in due course.

Sincerely,



Steven Cohen,
As Counsel to SBPF