

From: [catherine.flanagan.stover](#)
To: [Erika Mooney](#)
Subject: Fw: Legal Opinion on MOU
Date: Thursday, July 11, 2013 8:36:11 AM
Attachments: [Opinion Letter.pdf](#)
[Mooney opinion.jpg](#)

[Sent last evening.]

----- Forwarded Message -----

From: catherine flanagan stover <flanaganstover@yahoo.com>
To: Rick Atherton <Rickatherton@comcast.net>; 'Bob DeCosta' <albacor@comcast.net>; Bruce D. Miller <midasack1@comcast.net>; Matt & Sheila <snatural@nantucket.net>; "integrity11@gmail.com" <integrity11@gmail.com>; Libby Gibson <LGibson@nantucket-ma.gov>; J Giorgio <jgiorgio@k-plaw.com>
Cc: "jgraziadei@inkym.com" <jgraziadei@inkym.com>
Sent: Wednesday, July 10, 2013 7:50 PM
Subject: Legal Opinion on MOU

Mr. Chairman, and members of the Board:

I have retained my own legal counsel (former Town Counsel Paul DeRensis's firm,) and have asked for an opinion regarding the legality of bypassing the requirement of a Town Meeting vote pursuant to Chapter 67-1E of the Code of Nantucket.

I am attaching a copy of Mr. DeRensis' firm's opinion. I am also attaching the opinion of the Island's premier historian and attorney extraordinaire, Robert Mooney, given to me in 2012. Mr. Mooney opines that a town meeting vote is what should precede any action by the Town.

I respectfully request that a reconsideration of the vote on the Memorandum of Understanding be placed on the Selectmen's Agenda for discussion for next week's meeting.

Respectfully,

Catherine Stover



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Paul R. DeRensis, Esq.
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July 10, 2013

Catherine A. Stover
5 Liberty Street
Nantucket, Massachusetts 02554-3615

Re: Town Meeting Vote On Coastal Erosion Control Project

Dear Ms. Stover,

You have engaged us to provide to you a legal opinion regarding whether leasing or licensing of Town property for a private erosion-control protection project (the "project") must be approved by vote at an Annual or Special Town Meeting. We have reviewed the "Memorandum Of Understanding Between The Town of Nantucket and Siasconset Beach Preservation Fund, Inc. for the Design, Permitting and Construction of a Coastal Erosion Structure and for the Protection and/or Relocation of Baxter Road" dated July 5, 2013 (the "MOU") and the videotape of the discussion and vote on Article 65 at the 2012 Annual Town Meeting and have applied our working knowledge of the real estate interests at stake at the project site.

We answer your question in the affirmative: a Town Meeting vote by the inhabitants of the Town of Nantucket is necessary to approve the leasing or licensing of town owned land for the project described in the MOU, and that the omission of that approval from the MOU renders the MOU legally deficient.

Here is our reasoning:

Chapter 67-1.E. of the Town's Code states:

"Coastal land, leasing or licensing. Except as provided in Paragraph C, leasing or licensing 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."

Chapter 67-1.C. of the Town's Code states:

"Limited pilot projects. Nothing herein shall prohibit the licensing by the Board of Selectmen and construction during the moratorium period of a limited pilot project for the installation at private expense of new coastal engineering structures by a private licensee within

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Town-owned coastal land, within one single project area not longer than 400 feet, including returns, in lateral measurement roughly parallel to the coastal bank; provided that the Board of Selectmen shall find that such project will likely provide scientific data and information which will be of benefit and assistance to the Town in developing a Coastal Management Plan, and will be in the public interest; and further provided that any license for such project shall be subject to such safeguards and conditions as the Board of Selectmen shall impose, including but not limited to the posting of security by the licensee for the maintenance and removal of the structures and the obtaining by the licensee of all necessary permits and approvals under the Massachusetts Wetlands Protection Act and the Nantucket Wetlands Protection Bylaw.”

In our opinion, pursuant to Chapter 67-1.E. of the Town’s Code, the leasing or licensing of any Town-owned coastal land for the project is subject to approval by vote at an Annual or Special Town Meeting. Based upon our knowledge of the real estate interests involved, the project identified in the MOU necessarily will include town owned land. The MOU tries to address this issue as follows:

“A portion of the Project may be constructed on Town-owned land. In such event, the Town will provide SBPF with a license or other legal instrument to permit access to the town land (MOU, section 1)

“To the extent town land is required for the Project, the Board of Selectmen hereby consents to the use of Town Land in connection with the Project.....” (MOU, section 3).

However, the above language is not effective to resolve the requirement of Town Meeting approval. It appears reasonably certain to us based on our familiarity with Nantucket real estate that town owned land will be used for this project. The above quoted language of Section 3, while failing to use traditional lease or license language, is in fact a disguised license falling squarely into the “lease or license” language of Chapter 67-1 E.

Chapter 67-1. E. refers to “private erosion-control protection purpose”. Any argument that this project does not have “private” erosion control purposes is defeated by the terms of the MOU itself, see the following, but not limited to these examples:

- the MOU title defines the MOU as being with a private party, and the language of MOU section 3 actually operates to grant a license to a private party.
- Phase I for this project is to be constructed at the “sole cost and expense” of a private party (MOU, section 5);
- The MOU states as one of its purposes that “*certain private homes located near Siasconset Bluff and Baxter Road, a public way, may be imminently threatened with damage and/or loss and destruction due to severe erosion of the Bluff... ”,*

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- the MOU expressly states an intention in section 7 that the project be private to avoid “Massachusetts Public Bidding Laws” and the “Prevailing Wage Law”, both of which would apply to public erosion control purposes.

We note that every private erosion control project can be said to have some public purpose, at the very least, preservation of tax revenue from private property, and therefore the expected existence of some public purpose for every reasonably foreseeable private project cannot be relied upon in effect to eliminate the plain language of Chapter 61-1 E from the Code. We also note that the right of citizens to vote is an important tradition in Massachusetts and should not be taken away from the citizens without the clearest of intent from expressions of the voters themselves.

Chapter 67-1E has an exception for a limited project under Chapter 67-1C (see quoted section above); that exception is not relevant to the project described in the MOU.

Chapter 67-1.C. refers to “licensing by the Board of Selectmen and construction during the moratorium period” and that Chapter 67-1.E. contains no such reference to a “moratorium period”. In our opinion, Chapter 67-1.E. imposes the requirement of a Town Meeting vote which requirement is independent of and in addition to the other provisions of Chapter 67, hence the conclusions reached in this opinion letter will not expire with the ending of the Moratorium.

Conclusion: a town meeting vote is necessary for the project described in the MOU and for the MOU to be effective.

Should you have any questions, let us know.

Very truly yours,

A handwritten signature in black ink that reads "Paul R. DeRensis" followed by a circled set of initials "PRD".

Paul R. DeRensis

PRD:ham

TO KATHERINE

FROM: BOB MOONEY

RE: SCONSET BEACH & BLOFF

BASED ON THE INFO YOU PROVIDED, AND WITH THE TIME ALLOWED, IT IS MY OPINION THE VARIOUS QUESTIONS INVOLVED, WOULD BE RESOLVED AS FOLLOWS:

1. THE PATH ON THE BLOFF IS A PERMANENT EASEMENT AND PUBLIC RIGHT OF WAY, ATOP THE BLUFF, WHEREVER THAT IS.

2. THE BLUFF IS OWNED BY THE TOWN.

3. THE BEACH IS OWNED BY THE PROPRIETORS AND THE TOWN.

FUTURE ACTION INVOLVING THE PUBLIC INTEREST IN THIS AREA IS BEST CONSIDERED BY TOWN MEETING ACTION.


RFM.....