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MEMORANDUM

TO: Nantucket Board of Selectmen
FROM: Town Counsel
DATE: July 19, 2013
RE: Memorandum of Understanding Concerning Coastal Engineering Project at Sconset Bluff

The Board of Selectmen (“Board”) has entered into a Memorandum of Understanding (“MOU”) with Sconset Beach Preservation Fund, Inc. (“SBPF”) concerning a proposed coastal engineering project in order to protect public infrastructure threatened by erosion at Sconset Bluff. The Board was presented with an opinion obtained by the Town Clerk in her private capacity from former Town Counsel that the MOU is invalid for failure to obtain Town Meeting approval. This opinion is based on the premise that Town-owned land is required for this project and is also premised on an interpretation of Section 67-1.E. of the Town Code which requires a Town Meeting vote to authorize a private coastal engineering structure located on Town-owned land. Counsel for the SBPF has submitted a contrary opinion. Copies of both opinions are attached. In our opinion, however, the opinion that the MOU is invalid is incorrect for the reasons set forth below.

First, even if one assumes that the proposed project is a private project subject to the requirements of Chapter 67-1.E. and that Town Meeting approval would be required for the use of Town-owned land in connection with this project, securing a Town Meeting vote prior to the execution of the MOU would have been entirely premature because it has not yet been determined whether Town-owned land will, in fact, be needed in connection with the project. Given the substantial erosion that has recently occurred along the bluff, it is no longer clear absent a land survey where the property line is between the private homes and the Town land. The Town is in the process of engaging an engineering firm to review SBPF's filing with the Conservation Commission as contemplated in the MOU. As part of that Scope of Work, the Town's consulting engineer will review a land survey being conducted by SBPF to determine the actual ownership of the land on which the project will be constructed. At a minimum, the Town will need to know the results of the land survey before addressing the question of whether Town Meeting approval for a lease or license is even required.

Even if the survey reveals that Town-owned land is involved in the first phase of SBPF's project proposal, and assuming Town Meeting approval would be required for the use of such land, these facts would not invalidate the MOU, as the MOU is expressly conditioned and “dependent on the receipt of all required permits and approvals in a form reasonably satisfactory to both parties.” The MOU merely provides a framework of cooperation between the Town and SBPF for seeking regulatory review of compelling environmental issues facing the Town with

respect to the possible loss of sections of Baxter Road and related infrastructure as soon as possible. It is not rendered invalid by the fact that it may be subject to further approvals.

Furthermore, and again assuming that the survey reveals that Town-owned land is in fact necessary for construction of the first phase of SBPF's project proposal, it is our opinion that Town Meeting approval is not required for this project.

Chapter 67-1.E. of the Nantucket 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 Board is clearly not seeking approval for "private erosion-control protection." In entering into the MOU, the Board specifically found as a result of severe erosion of Sconset Bluff, which intensified since the winter of 2012-2013, "that an emergency exists that threatens public roads and other assets from imminent 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, the proposed project is not subject to the temporary moratorium under Chapter 67.

Moreover, approval of the proposed project by Town Meeting is not required because the proposed project is not a "private project" within the meaning of Chapter 67-1.E. The MOU expressly provides that the Town, through the Board, is cooperating with SBPF "to ensure that Baxter Road remains open and accessible to provide safe access to the residents of Baxter Road and Sankaty Light" and that the Board "is committed to supporting measures that will have the likely effect of preventing damage to or destruction of, Baxter Road as long as the project...can be accomplished without resulting in further or additional coastal erosion, or other environmental damage, as may be determined by the Town's consultant, the Conservation Commission, and/or the Department of Environmental Protection." The MOU also provides that the Board's consent on behalf of the Town for the possible use of Town-owned land in connection with the project is expressly "subject to a report and recommendation from the Town's consultant," and that the Board "reserves the right to withdraw its consent and support at any time."

Thus, the Board's agreement to enter into the MOU with SBPF is for the expressly stated public purpose of protecting Baxter Road and related public infrastructure. The fact that private parties may also benefit from the project does not negate the public purpose upon which the MOU is expressly conditioned. Of course, the opponents of the proposed project contend that the primary beneficiaries of the proposed project are the private landowners whose homes are also under an imminent threat of destruction, and therefore the project is a private project subject to the requirement of a Town Meeting vote. This argument is admittedly bolstered by the fact that at least Phase 1 of the project is being funded fully by the private parties.¹

¹ It should be noted that irrespective of Section 67 of the Town Code, any lease of Town land requires a Town Meeting vote pursuant to G.L. c. 40, s. 3. On the other hand, a license to use Town land which, unlike a lease is not an interest in land and may be revoked at any time by the Town, does not require Town Meeting approval independently of Chapter 67.

Given the highly controversial nature of the project, however, the Town can reasonably anticipate that one or more legal challenges will be filed should the project be approved by the Conservation Commission. While the Board of Selectmen could certainly leave the defense of any such legal challenges to SBPF, the filing of any lawsuit on the question of whether Town Meeting approval is required would certainly delay the project considerably. Therefore, the Board may want to consider seeking Town Meeting approval in order to remove this question as an issue in any future litigation. The Board may also want to consider whether, as a policy matter, Town Meeting should weigh in on the project.

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