MEMORANDUM

TO: Nantucket Board of Selectmen

FROM: John W. Giorgio

DATE: June 7, 2013

RE: Baxter Road Repairs

You have requested that I address several legal questions concerning the approvals that would be required to repair, or prevent further damage to, Baxter Road ("Road'), including the potential construction of a revetment or other coastal engineering structure ("CES") to prevent further damage to the Road. You have asked, as well, what approvals and other measures would be involved if the layout of the Road were to be altered from its current location.

As I understand the facts, the Road is located in a Coastal Bank, or within the 100-foot buffer zone to a Coastal Bank, as defined under the Wetlands Protection Act ("Act"), G.L. c. 131, §40, and Department of Environmental Protection ("DEP") Regulations, 310 CMR 10.00 ("DEP Regulations"). If a CES were to be constructed, it would also be within a Coastal Bank and, potentially, other resource areas, including a Beach and Land Under the Ocean. The work would also be subject to the Town wetlands protection bylaw ("Bylaw"), at Chapter 136 of the Town Code, and the Wetland Protection Regulations adopted by the Conservation Commission ("Bylaw Regulations").

1. <u>Repairing the Road and/or constructing a CES under "emergency certification" procedures</u>

Given the threat of further storm damage to the Road, there is a concern as to potential delay in repairing and protecting the Road, if the normal wetland permitting process is followed (i.e., submission of a Notice of Intent, scheduling of a hearing, and issuance of an Order of Conditions). You have asked, therefore, whether the process could be expedited under the provisions in the DEP Regulations and the Bylaw Regulations for an "emergency certification." In my opinion, reliance on these provisions would not necessarily expedite permitting, and (particularly if a CES is involved) may invite heightened DEP scrutiny of the project. An alternative approach would be to initiate the normal permitting process before plans are fully prepared.

Under 310 CMR 10.06, an "emergency certification" may be requested from the Conservation Commission, for the performance of work by a public agency to protect public health and safety. The work to be allowed may not include work "beyond that necessary to abate the emergency." If the emergency certification is issued, the work may be performed without filing a Notice of Intent. The Commission's issuance of an emergency certification is subject to

review by DEP, which can revoke or condition the certification. The work is to be performed within thirty days.

Under an amendment to the Act (Chapter 238 of the Acts of 2012), DEP may declare a Severe Weather Emergency following a significant storm, in which case emergency work (as defined by DEP) may be undertaken without either filing a Notice of Intent or requesting an emergency certification. DEP made such a declaration after the early February 2013 northeaster; however, any emergency work allowed by this declaration was to be completed by March 22, 2013.

Section 136-5 of the Bylaw similarly provides that the Commission may issue an emergency certification for work necessary to protect the public health and safety that, "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[.]" Under the Bylaw (unlike under the Act), a Notice of Intent is still required to be filed, within 21 days of the commencement of the emergency project.

Based on the provisions for emergency certification under both the Act and the Bylaw, it is my opinion that seeking an emergency certification for work to repair and protect the Road would not necessarily result in a significant time savings. I note that issuing the certification is at the discretion of the Commission (or, if the Commission denies the certification, the DEP Commissioner), and that such a certification does not waive the substantive requirements for work within wetland resource areas.[1] The provisions are primarily intended to allow an applicant to "abate" an emergency by restoring pre-existing conditions quickly (i.e., within 30 days), in the immediate aftermath of damage, in my opinion. An emergency certification would be more likely to be issued to restore the Road surface than for the construction of a CES, in my opinion. Based on DEP's objections to the installation of protective CES's on property elsewhere in the state after the February 2013 storm, it is my opinion that DEP is likely to give close scrutiny to a proposal to install a CES under an emergency certification.

An alternative approach to expediting the permitting process would be to file a Notice of Intent with the Commission with a basic or conceptual design, rather than waiting for final plans to become available. This would provide a basis for opening a hearing and obtaining input from the Commission earlier than if final plans are developed before filing the Notice of Intent.

2. <u>Applicability of the Coastal Properties bylaw and moratorium</u>

Chapter 67 of the Town Code, entitled "Management of Coastal Properties Owned by Town," was approved in 2008. Chapter 67 imposes a "temporary moratorium" until December 31, 2013 (or until a Coastal Management Plan is established, if that occurs earlier) on the use of

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[1] In my opinion, repairs to Baxter Road would likely be permissible as a "limited project" under 310 CMR 10.24((7)(c)(1). The construction of a new CES would be subject to the performance standards in 310 CMR 10.30 (Coastal Banks) and potentially 10.27 (Coastal Beaches), as well as the corresponding provisions in the Bylaw Regulations at § 2.05(B) and § 2.02(B).

Town-owned coastal land along the east coast of Nantucket for "new coastal engineering structures." However, §67-1(D) provides, in part: *"This moratorium shall not prohibit emergency armoring measures necessary to protect public roads, public buildings, or other public assets from imminent destruction."* In my opinion, the quoted sentence would allow the Board of Selectmen to determine that a CES to protect Baxter Road from potential storm damage is not prohibited by the moratorium.

Section 67-1(E) requires Town Meeting approval for leasing or licensing Town-owned coastal land for "private erosion control protection purposes[.]" Since a CES to protect the Road would be publicly-owned and would not involve leasing or licensing Town property to a private party, it is my opinion that the requirement in Section 67(210(E) for Town Meeting approval would not apply to a CES to protect Baxter Road.

3. Potential alteration of the layout of Baxter Road

If an alteration were to be proposed to the layout of Baxter Road, the alteration project would, of course, be subject to the requirements of the Act and the Bylaw, which would depend on the location of the altered layout and the affected wetland resource areas.

The Board has previously dealt with Sheep Pond Road, where erosion likewise necessitated altering the road layout, in that case through the layout of a new public way entitled "Sheep Pond Road Extension." Therefore, we will not provide details in this Memorandum as to the general procedures for laying out a new public way or the alteration of an existing public way. We would be happy to work with the Board on these procedures for Baxter Road, as we did in the case of Sheep Pond Road.

You have asked whether betterments could be imposed to recover the Town's cost for altering the Road (or laying out a new public way). In my opinion, pursuant to G.L. c. 80, §§ 1-5, betterments may be assessed for this purpose, as has been provided for previously with Sheep Pond Road. Under the statutes, betterments to recover the costs of a public improvement may be assessed against those properties receiving a "benefit or advantage, other than the general advantage to the community," from the improvement. Assessments of the project costs must be reasonable and proportional and calculated based on the enhancement of the value or use of the property due to the construction of the improvements. The intent to impose betterments is to be stated in the order of taking and layout.

Pursuant to G.L. c. 80, §1, as assessment of betterments cannot exceed the amount of benefit or advantage to the property. Therefore, an owner of the assessed property may file a petition for an abatement, and seek to prove that the betterment that was assessed exceeds the amount of benefit to the property from the alteration. A denial of a request for abatement may be appealed to Superior Court. (G.L. c. 80, §§ 5-7).

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