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LAW PC

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January 2, 2015

Board of Selectmen
Nantucket Town Building
16 Broad Street
Nantucket, MA 02554
BY HAND

RE: Baxter Road Protection
DEP Order

Dear Board of Selectmen,

On December 19, 2014, the Massachusetts Department of Environmental Protection (DEP) issued a Superseding Order of Conditions (SOC) concerning the joint application of the Town of Nantucket and the Sconset Beach Preservation Fund Inc (SBPF). to install an interim erosion protection system at the Sconset Bluff along 87-105 Baxter Road. The SOC overturns the Conservation Commission's denial of that joint application as it pertains to the necessary permit under state law. The SOC allows for the three tiers of geotubes that were installed last year under an Emergency Certification to remain, and allows for certain improvements, including installing a fourth tier in some locations, grading and vegetating the bluff face, adding returns to prevent flanking, and activating the capped storm-water drainage pipe. The SOC further provides for ongoing mitigation and monitoring.

The SOC is significant in several ways. The DEP, as the experts on the state Wetlands Protection Act, reviewed the applicable law and the science and engineering, and corrected the Conservation Commission's reading of state law. The SOC now answers many questions that had plagued the Conservation Commission hearings on this matter. The DEP determined that:

1. State law does allow for erosion protection to protect pre-1978 homes, as here.
2. Vital infrastructure can also be protected.
3. The protection can be outside the lot lines of the house being protected.
4. A system of hardened protection built to a 100-year storm level can be within the required environmental standards if designed properly, as here.
5. Softer systems are not feasible alternatives if they do not provide adequate protection in the applicable location.
6. The provision of sacrificial sand at 22 CY/LF/YR under the provided schedule, in conjunction with the failure criteria (failure to mitigate, failure to monitor, failure to maintain, excessive changes in updrift and downdrift beaches, and failure to maintain beach width) are sufficient mitigation to avoid harming the environment and harm to others.

7. The monitoring protocols are sufficient.
8. The SOC does not authorize a fourth tier for the entire project, but notes that this issue requires additional applications and analysis that were not part of the application, so it could be approved in the future.

While the SOC corrects the local interpretation of state law, it does not set a precedent for any property owner to install hard armoring. To qualify for hard armoring, the applicant would have to be protecting a pre-1978 structure with an appropriately designed system, and also show that softer protection is not feasible. For most of Nantucket, one or both of these do not apply. That is, where erosion protection is needed or justified, soft protection can work in most Nantucket locations – Sconset is a harsher marine environment than most other areas. The SOC also does not set the stage for the elimination of Nantucket's beaches. The SOC requires both providing sacrificial sand to mimic erosion and protect down drift beaches (in fact, it requires providing 150% more sand than the natural average), and also includes loss of beach width in front of the geotubes as a failure criteria for the project. This sets a high standard for environmentally responsible design, more than any other project we are aware of on the east coast. Moreover, the geotubes are sand filled tubes that are easily removable, and an escrow has already been privately funded and provided to the Town, if needed.

The SOC is specific that the approval is for 3-6 years only, which is what was requested by the Town and SBPF in the application. The geotubes were proposed as a substantial but quick fix for the most endangered section of the bluff while the long term protection was under review. The SOC notes that a separate future application is needed for long term protection, for adding a fourth tier in other locations, and other alterations, although the SOC specifies that adding a fourth tier and other alterations may be achieved through emergency certifications, if necessary. SBPF notes that any long term project will also likely need other approvals from the Town.

Given the clarity now provided on these legal and scientific issues, SBPF looks forward to working cooperatively with the Town, as provided in the existing MOU, as amended and as otherwise affirmed by the Board of Selectmen. As you know, the erosion protection also needs a local Order of Conditions, the appeal of which is now pending in Superior Court. Since the local Wetland Protection Bylaws are substantially similar to the state Wetland Protection Act, it is our hope that the pending appeal will now be resolved consistent with the findings and conditions in the SOC. Resolving this appeal, installing the refinements to the existing system, implementing the mitigation program, and studying the monitoring data will allow us to protect the historic homes and public infrastructure while the ConCom, BOS, and Town Meeting review and decide any future proposals, as appropriate.

Sincerely,

Steven Cohen

Steven Cohen
Counsel to SBPF

CC: Dept. of Public Works
Conservation Commission