

Nantucket Select Board
16 Broad Street
Nantucket, MA 02554

May 1, 2018

Re: Baxter Road

Dear Select Board,

This letter is to clarify a misunderstanding that is being perpetuated due to a mischaracterization of a comment made by Town Counsel in response to a very limited question, in which he correctly stated that the Settlement Statement issued by the BOS/Con Com/SBPF settlement working group in 2016 is not a binding contract between the Town and SBPF. SBPF agrees that this document is not a contract, but is a summary of the framework agreement reached by the parties in good faith to resolve several important concerns and to allow the erosion protection project to move forward in a cooperative way. Many of the actions included in the Settlement Statement are dependent on actions by bodies, such as the Conservation Commission, which was clearly beyond the legal control of the working group. Up until now, this good faith framework has been followed by all parties, and it was incorporated in the Order of Conditions.

In contrast, suggestions that the Town has no legal obligations here are not accurate. As you are aware, and as Town Counsel has advised, the Town has several statutory and contractual obligations, including the following:

1. Under state law, the Town and County have legal obligations and liabilities related to the maintenance and protection of public roads, such as Baxter Road, and for public utilities impacting public health and safety, such as the water and sewer lines here.
2. The Board has voted twice to have the Town sign a 2013 Memorandum of Understanding and a subsequent 2014 Amendment to the MOU, which are binding contracts that provide for permitting erosion protection at Baxter Road, including the use of Town land for such.
3. The Board has voted to have Town enter into a License regarding the use of Town land for erosion protection at Baxter Road, and this is a binding contract.
4. The Board has voted to have the Town sign an Alternative Access Agreement related to Baxter Road, and this is a binding contract. This agreement specifically terminates the alternative access if the erosion protection is withdrawn.
5. The Town has been a *joint applicant* in prior erosion protection filing and is bound by the terms of the recorded Order of Conditions, which has obligations specific to the Town, and which expressly provides that continuing the existing project requires a new application for such by 2018, and that expansion permitting was similarly postponed until 2018, both to allow for lessons learned to be implemented at this time.
6. The Conservation Commission, as state and local regulator, is bound to issue permits consistent with the Wetlands Protection Act and the Nantucket Wetlands Bylaw, which

afford significant erosion control protections to pre-1978 structures, and which provide for other erosion protection standards for post-1978 structures. That is, abandonment and retreat are not the legal options here – the issue is *how*, not *whether* protection is provided here.

Aside from the relative legal and contractual situation, there is also a matter of acting in good faith, as Members of the Board also noted. Acting in good faith would be to have the Conservation Commission proceed with its review the existing and the original, full-length (4000 foot) project, which has been proposed and reviewed at length since 2013. As provided in the current Order of Conditions, this was supposed to start in January 2018, so that permitting could be completed and construction carried out in the Fall of 2018. The Board has delayed this process to gather information, which has been provided. While this issue will always raise questions, they can be addressed within the agreed frame work, concurrent to letting the Conservation Commission review the pending application; in fact, doing so would be more productive because the Conservation Commission will make important findings and determinations that will influence the rest of the issues. The Board will be in the position to influence the Conservation Commission process and to issue a conditioned lease or license after that, so the best way to resolve issues is to proceed with this process. On the other hand, further delay increases the risks to the Town and home-owners; increases the costs and losses, and is contrary to 3 years of good faith cooperation.

We look forward to hearing back from the Board and proceeding expeditiously and cooperatively on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven Cohen", with a long horizontal flourish extending to the right.

Steven Cohen
Counsel to SBPF