

From: [John Giorgio](#)
To: [Libby Gibson](#); [Erika Mooney](#); [Gregg Tivnan](#); [Andrew Vorce](#)
Cc: [George Pucci](#)
Subject: Draft MOU - Baxter Road
Date: Monday, June 17, 2013 11:38:15 AM
Attachments: [Nantucket MOU re Baxter Road.pdf](#)

Hi Libby;

Attached please find the draft of a MOU which is intended to set forth a suggested approach to the public private partnership. It is intended only for discussion purposes with the Board on Wednesday afternoon. There are several policy assumptions embedded in the draft which we will need guidance on from the Board.

Thanks you.

John W. Giorgio, Esq.
Kopelman and Paige, P.C.
101 Arch Street
12th Floor
Boston, MA 02110
jgiorgio@k-plaw.com
Phone: (617) 556-0007
Fax: (617) 654-1735
Mobile Phone: (617) 785-0725

**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**

This Memorandum of Understanding (“MOU”) is entered into this ____ day of June, 2013, by and between the Board of Selectmen of the Town of Nantucket (the “Town”) and Siasconset Beach Preservation Fund, Inc. (“SBPF”), a Massachusetts 501(c)(3) corporation created by residents of Nantucket to protect historic homes and associated public infrastructure along Baxter Road in the Siasconset area of Nantucket; hereunto duly authorized.

WHEREAS, the Town and SBPF determined that certain private homes located on or 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 which has intensified since the Winter of 2012-2013;

WHEREAS, both Parties have agreed to cooperate with one another to take prudent steps in an attempt to stabilize the coastal bluff thereby protecting the remaining privately-owned properties and structures and to ensure that Baxter Road remains open and accessible to provide safe access to the residents of Baxter Road and Sankaty Light, which may by necessity include the relocation and reconstruction of all or a portion of Baxter Road and public utilities that serve the residents in the area (the Project);

WHEREAS, the Town and SBPF wish to set forth in this MOU the respective expectations of the Parties;

NOW THEREFORE, the Parties agree that the following framework and process will govern the cooperative effort to accomplish the goals set forth in this MOU.

1. The Project will be divided into three parts: (1) Phase 1 shall include construction of a coastal erosion structure consisting of a rock revetment and reinstallation of the bluff walk for a distance of approximately 1500 linear feet located between 75 and 119 Baxter Road, (2) Phase 2 shall include construction protecting the remaining exposed bank on the north end and moving south approximately 2,500 feet to the start of the eroding bank, and (3) Phase 3 shall include the planning, design, permitting, and construction or relocation of Baxter Road and public utilities if it becomes necessary due to further coastal erosion. 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.

2. The Town will undertake steps forthwith to hire an independent consultant to conduct a peer review of SBPF's plan to stabilize the coastal bank by installing the revetment. The Town's consultant will also provide an assessment to the Town regarding the likelihood that the Project will achieve the intended result of stabilizing the coastal bank, and, in particular, that it will likely preserve Baxter Road. As an additional scope of work, and subject to a further agreement on funding, the Town's Consultant will also provide a conceptual plan for relocating Baxter Road in the event it becomes necessary, and will assist in the preparation of a survey to determine the ownership of the land on which the Project will be located. The Town shall afford SBPF a reasonable opportunity to review and comment on the scope of work for the Town's consultant study.

3. A Joint Notice of Intent ("NOI") for Phase 1 will be filed with the Conservation Commission by July 1, 2013. The submission will be prepared by SBPF at its sole cost and expense, and SBPF will take the lead in the permitting effort. The Town will be afforded a reasonable opportunity to review and comment on the draft NOI.

4. SBPF agrees forthwith to provide a gift to the Town of \$ _____ to pay for the first phase of the Town's consultant study. SBPF also agrees immediately to provide funds in the amount of \$ _____ to the Town for the necessary legal fees and other costs incurred by the Town to implement this MOU through the completion of Phase 1. SBPF also agrees to further reimburse the Town for consultant and legal fees through the completion of Phases 2 and 3 in amounts agreed to by the Parties prior to commencing any work. If, at any time, the Town determines that additional consulting and legal fees or other expenses will likely be incurred, the Town will promptly notify SBPF and SBPF shall make a further contribution of funds to the Town for its agreed upon share.

5. Assuming the necessary order of conditions is issued, SBPF will construct Phase 1 at its sole cost and expense commencing as soon as the required permits are issued and become final. It is hoped that this will be accomplished by early Fall 2013. SBPF acknowledges, however, that the Board of Selectmen has no control over the hearing process or the ultimate decision that the Conservation Commission may make, although the Board agrees that it will cooperate with SBPF in presenting the request to the Conservation Commission and will reasonably advocate for approval of the Project.

6. SBPF and the affected homeowners, including those located within proximity of the Project, will provide release and indemnification agreements to the Town covering each Phase of the Project before commencement of construction, which will include waiver of damages in the case of a taking by the Town and consents to betterment assessments, where appropriate, and SBPF shall also obtain to the fullest reasonable extent releases from homeowners potentially affected by the Project. SBPF will establish and fund an escrow account in an amount reasonably acceptable to both Parties to be used for the maintenance and repair of any coastal erosion structures that are constructed. The escrow agreement will provide a trigger mechanism for maintenance of the fund at an agreed upon level and will be replenished by the SBPF if the balance in the fund falls below the agreed-upon minimum level.

7. Because construction of Phase 1 will be performed solely by SBPF, the Parties believe there will be no requirement that the Massachusetts Public Bidding Laws be followed and the project will not be subject to the Prevailing Wage Law. The Town, however, makes no specific assurance in this regard, and the Parties acknowledge that SBPF and the Town will be required to follow all federal, state, and local laws and regulations applicable to the Project.

8. The Parties agree to diligently pursue the permitting, design, and construction of Phases 2 and 3 of the Project (if necessary) including an agreement on cost sharing and possible betterment assessments. If the cost of construction in either Phase 2 or 3 involves the expenditure of Town funds, the project will require a Town Meeting appropriation at the Spring 2014 Annual Town Meeting and the construction work will be subject to the Massachusetts Public Construction Laws including the Prevailing Wage Law.

9. The Parties recognize that the order of the work in the three phases may have to be adjusted depending on the pace of continued erosion.

10. The Parties acknowledge that the ability to proceed with the Project is subject to the availability of funds including, in the case of the Town, an appropriation from Town Meeting, and it is dependent on the receipt of all required permits and approvals in a form reasonably satisfactory to both Parties.

11. If, at any time, either Party determines that it is not practical or prudent to proceed with the Project, this MOU may be terminated and shall have no further force or effect, except that to the extent SBPF has agreed to provide funding to the Town for any consulting, legal, or other services, SBPF shall be obligated to complete any funding obligations. Furthermore, any indemnification, betterment assessment, waiver of damages, or release agreements that have been executed, shall survive termination of this MOU.

Entered into the date and year written above.

Town of Nantucket

Siasconset Beach Preservation Fund, Inc.

By its Board of Selectmen

By its President

