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August 31, 2023

By Email Correspondence

Ian Golding, Chair
Nantucket Conservation Commission
131 Pleasant Street
Nantucket, MA 02554

RE: ACK Hang Ten, LLC, 21 Meader Street

Dear Commission Members:

We are writing on behalf of ACK Hang Ten, LLC in response to Diane Coombs and the Kims' August 29, 2023 letter ("Abutter Letter").

Ms. Coombs and the Kims resubmit their December 2022 letter and request that the Commission confirm a finding that a vegetated wetland exists on the 21 Meader Street property (the "Property") based on facts submitted in that letter. However, as the Commission is aware, the applicant's consultant Kevin Garneau, of Northeastern Consulting Forestry Services, submitted a January 13, 2023 letter in response to the December 2022 letter. Further, on January 26, 2013, Arthur Gasbarro, PE, PLS, of Nantucket Engineering & Survey, PC, submitted a revised plan to remove landscape timbers and install a vegetated rain garden basin to mitigate stormwater runoff.

The Commission, at its February 2, 2023 hearing, considered all of the above submissions and discussed in detail the allegations regarding a potential vegetated wetland at the Property. The Commission determined that the proposed rain garden would provide good mitigation and protect the functionality of a potential wetland and also address water runoff that was entering the Property from other properties. After a detailed discussion, the Commission voted to approve the driveway and rain garden, finding also that Land Subject to Coastal Storm Flowage ("LSCSF") was the only jurisdictional wetland Resource Area on the Property. In its February 10, 2023 Order of Conditions ("OOC"), on Page 4, the Commission clearly identified LSCSF as the only Resource Area on the Property. Further, Number 3 of the Commission's Additional Findings provides that "the only resource area that can be confirmed at this time is Land Subject to Coastal Storm Flowage."

While the Abutter Letter points to Finding No. 4 of the February 2023 OOC that refers to characteristics of freshwater marshes or meadows at the site, this is not a finding that there is another wetland Resource Area at the Property. The OOC was clear that the Commission only found one resource area at the site – LSCSF. If they were not satisfied with the findings in the OOC, Ms. Coombs and the Kims had the opportunity to appeal the February 2023 OOC under the Massachusetts Wetlands Protection Act (“WPA”) and local Bylaw. However, they did not. It appears that Ms. Coombs and the Kims chose not to appeal because they mistakenly believed that the Commission could find that there was another wetland resource area on the Property in the near term.

However, the law is clear that an OOC, and resource area findings and delineations forming the basis of such an OOC, are binding for three (3) years. The WPA Regulations at 310 CMR 10.05(6)(d) provides that “an Order of Conditions....[is]...valid for three years from the date of its issuance.” The Department of Environmental of Environmental Protection (“DEP”), in *In the Matter of John Walsh and Walsh Brothers Building Co., Inc.*, OADR Docket No. WET-2012-025, DEP File NO. SE 32-2099 (April 23, 2015), found that “Orders of Conditions, including any findings and wetlands delineations forming the basis of the Orders, are valid for three years from the date of the Order’s issuance.”

The DEP in *In the Matter of John Walsh and Walsh Brothers Building Co., Inc.* further found that a wetlands delineation in an unappealed OOC cannot be collaterally attacked in a separate wetlands appeal involving the same property except if the delineation was procured by fraud or mutual mistake. See also *In the Matter of Delaney*, OADR Docket No. 2002-223, Recommended Final Decision (October 23, 2003), adopted as Final Decision (November 19, 2003). The rule barring collateral attacks on a wetlands delineation in an unappealed OOC has been upheld by a Superior Court as having a rational basis because “it provides necessary certainty, enabling citizens to comply more easily with regulations while planning projects in close proximity to wetland resource areas.” *Tompkins v. Department of Environmental Protection*, 30 Mass.L.Rep. 290 (2012).

As the Superior Court in *Tompkins* found, an OOC provides necessary certainty to citizens to comply with the WPA and local Bylaw while planning projects. Here, our team carefully reviewed the February 2023 OOC Findings, in particular those related to the confirmed Resource Areas. Based on the fact the Commission found LSCSF to be the only Resource Area present on the Property, our client made a determination not to appeal the OOC, knowing that such determination was binding for three (3) years.

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Here, it is undisputed that the February 2023 OOC was not appealed by any party, and therefore it is clear that the delineation of LSCSF as the only wetland Resource Area on the Property is valid for three years, until February 2026. The Commission cannot now revisit this determination just because abutters misunderstood that the wetland Resource Area determinations in the February 2023 OOC were binding.

Thank you for your attention to this, and please contact me with any questions.

Sincerely yours,



Glenn A. Wood

cc: Arthur Gasbarro, PE, PLS, Nantucket Engineering and Survey, P.C.