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August 18, 2023

By Email Correspondence and First Class Mail

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 to follow up on the discussion at yesterday's hearing regarding our client ACK Hang Ten, LLC's Notice of Intent for the project at 21 Meader Street (the "Property").

As you are aware, our client was before the Commission earlier this year for a project to install a pervious driveway, hard apron, rain garden and fences as well as site restoration on the Property. The Commission approved this project, issuing an Order of Conditions on February 10, 2023. In the Commission's OOC, on Page 4, it identified Land Subject to Coastal Storm Flowage ("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."

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.

The Massachusetts Wetlands Protection Act 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."

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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).

Here, it is undisputed that the February 2023 OOC was not appealed by any parties, 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 revisiting this delineation at this time would clearly be illegal and prejudicial.

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

Sincerely,

Glenn A. Wood

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