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September 8, 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 on behalf of ACK Hang Ten, LLC as a follow up to statements made at the August 31, 2023 Commission hearing as well as submissions from Fitch Law Partners, LLP and the Nantucket Land Council regarding the proposed single-family dwelling project (the "Project") at 21 Meader Street (the "Property").

Interestingly, at the Commission's recent hearing, there was no actual substantive discussion of whether the Project at issue is in compliance with either the Massachusetts Wetlands Protection Act ("WPA") or local Bylaw.

Rather, first, there was a rehashing of issues that were already fully addressed in detail during the Commission's review of the December 2022 NOI that resulted in the Commission's issuance of the February 2023 OOC – namely, whether a vegetated wetland existed at the Property. Fitch Law Partners argues, on behalf of the Kims, that the Commission should rely on past discussions related to the Kims' wetland permitting process to support their position that a vegetated wetland existed at the Property, and attaches exhibits to support the same. However, such discussions are entirely irrelevant to the current Project before the Commission. In any event, such prior discussions regarding the Kims' property were fully described in submissions/letters that were submitted to the Commission prior to the issuance of the February 2023 OOC, and they were also discussed in detail at the February 2, 2023 Commission hearing.

For example, prior to issuing the February 2023 OOC, Ms. Coombs and the Kims submitted their December 2022 letter and requested that the Commission confirm a finding that a vegetated wetland existed on the Property based on facts submitted in that letter. However, as the

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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.

It is also important to note that while Mr. Haines had submitted a letter prior to the February 2023 hearing and spoke at the August 31, 2023 hearing, he never, nor did any other abutter, formally delineate the Property. There thus was never any formal determination as to whether a jurisdictional vegetated wetland exists at the Property. Further, while there were many statements made at the recent hearing to the effect that the applicant got a "deal" on the Property and that Mr. Haines' opinion as to the existence of a vegetated wetland essentially scared potential buyers away, the fact remains that a formal delineation never occurred. Any prior potential purchaser had a full opportunity to have the Property formally delineated and to file an Abbreviated Notice of Resource Area Delineation or a Request for Determination of Applicability with the Commission for a determination to be made as to the existence of a vegetated wetland. However, no abutter or potential buyer ever made such a filing.

Second, even though Town Counsel already opined that the Resource Area findings and delineations that form the basis of the February 2023 OOC are binding for three years, in full agreement with our office's position, there was still surprisingly discussion on this issue at the recent hearing.

As our office described in detail in our August 18 and August 31, 2023 letters, the law is clear that an OOC, and Resource Area findings and delineations forming the basis of such an OOC, are binding for three 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."

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Fitch Law Partners acknowledges that OOCs may be relied upon for three years, yet states, as we did in our letters, that there is an exception in cases of fraud or mistake. However, Fitch Law Partners does not allege any fraud or mistake. Fitch Law Partners states that the applicant relied on a procedural technicality and that the applicant should not be able to do so when the applicant altered the existing site conditions. This argument has no merit because when the Commission issued the February 2023 OOC, it was fully aware of the alleged alteration as it had previously issued an EO to the applicant. Yet, as stated above, after an in depth analysis at its February 2, 2023 hearing, the Commission still issued the OOC finding LSCSF as the only Resource Area. There was clearly no attempt by the applicant to commit fraud or to hide any alteration as the alleged alteration was out in the open and in fact the entire topic of discussion at the February 2, 2023 hearing.

Additionally, Fitch Law Partners' reliance on the *Weston Forest & Trails Ass'n, Inc. v. Fishman*, 66 Mass. App. Ct. 654 (2006) case is inaccurate. At the outset, that case did not at all address the validity of any Resource Areas in an OOC. The *Weston Forest* case involved the defendant constructing a barn in an area that was restricted by a Conservation Restriction. The defendant had argued based on laches and estoppel, that they were able to construct the barn. The defendant argued that because a Conservation Commission member noticed earlier that the barn was constructed in the restricted area, but failed to inform the defendant, that the defendant could then rely on the Conservation Commissioner's failure to object to the barn and that this induced the defendant to believe the barn was permissible. The Court found that this reliance was unreasonable.

Here, we have an entirely different set of facts as the applicant is relying on a legitimate OOC issued by the Commission with a clear determination of a Resource Area. In the *Weston* case, the defendant was relying on a mistake or failure to act by a single commissioner (and not during any formal wetlands review process) -- here the applicant is relying on a valid unappealed OOC fully discussed at a Commission hearing and voted on and signed by the Commission. Other arguments raised by Fitch Law Group regarding whether the applicant should have known other wetlands existed are irrelevant to the instant NOI, as they were already fully discussed as part of the Commission's review process for the February 2023 OOC.

Third, many incorrect and flatly inaccurate representations were made by the Nantucket Land Council and Fitch Law Partners regarding the Enforcement Order "being violated" and regarding the applicant's alleged noncompliance with the February 2023 OOC. As Mr. Gasbarro, on behalf of the applicant, explained in detail at the hearing, the applicant fully complied with the Enforcement Order as the applicant appeared before the Commission on the required date, and complied with the Commission's request to file a new NOI to address work done at the site. The applicant filed the required NOI with the Commission, and when the Commission issued the

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February 2023 OOC approving the rain garden and driveway, the EO ceased to exist, with the February 2023 OOC now in effect.

Additionally, as was made clear at the hearing, an OOC is valid for three years and an applicant has that time-frame to perform the approved work. As the Commission is aware, an OOC is recorded with the Registry of Deeds and remains open until a Certificate of Compliance is issued. Here, as stated by Mr. Gasbarro, while the applicant has completed the installation of the rain garden and some of the required work in the OOC, the applicant has not yet had a chance to complete all of the approved work. However, there are no time constraints in the OOC as to when certain work has to be performed, and thus allegations by the abutters that certain photographs were not submitted timely and that monitoring wells have not been installed have no bearing on the applicant's compliance with the OOC. As Mr. Gasbarro stated at the hearing, photographs at the beginning of the growing season were not provided because the plantings had not yet been completed. Further, the applicant fully intends to install monitoring wells, and the fact that they are not yet installed seven months after the OOC was issued, when they are not required to be installed until February 2026 (when the OOC expires), does not mean that the applicant is not in compliance.

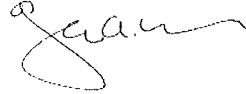
The abutters continue to refer to the fact that they chose not to appeal the February 2023 OOC based on their understanding, which clearly was a misunderstanding, of what Resource Areas the Commission found on the Property. As stated, the applicant also chose not to appeal the February 2023 OOC based on the Commission's finding that LSCSF is the only Resource Area on the Property. However, the fact that the abutters misunderstood the Commission's February 2023 OOC Resource Area findings does not mean, as the abutters suggest, that they completely lose their ability to address their concerns with the current Project in the pending NOI. Should the Commission issue a Positive OOC approving the Project, the abutters have the opportunity to appeal such OOC.

Again, the Commission cannot legally rehash issues as to whether a vegetated wetland exists at the Property in its review of the current Project as that process already occurred in great detail prior to the issuance of the February 2023 OOC, and the findings in the February 2023 OOC are binding. Rather, the only issue before the Commission now is whether the current Project is in compliance with the WPA and the local Bylaw with regard to the only legal resource area at the Property – LSCSF.

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

Sincerely yours,

A handwritten signature in black ink, appearing to read "G.A. Wood", with a stylized flourish at the end.

Glenn A. Wood

cc: Arthur Gasbarro, PE, PLS, Nantucket Engineering and Survey, P.C.  
Michele A. Hunton, Esq.