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Via Email (conscom@townofnewbury.org)

Newbury Conservation Commission, Bob Connors, Chair
Newbury
c/o Samantha Holt, Conservation Agent
Town Hall
12 Kent Way
Byfield, MA 01922

Re: 3 33rd Street (Sea Chanty, LLC) – Notice of Intent - DEP File # 050-1386
Public Hearing continued over one year from last occasion

Dear Ms. Holt, and through you to the Commission Chair and Members:

This letter supplements the September 2022 comment letter and the July 16, 2022, comment letter submitted on behalf of my client the Christine Elizabeth Morris Trust (the “Trust”), through its Trustees Christine E. Morris and Gabriel O. Dumont, Jr., the abutter to the property at 3 33rd Street, concerning the work proposed under DEP File No. 050-1386. Copies are attached for ease of reference.

The 3 33rd Street project was first described in a Notice of Intent filing *a year and three months ago* (July 6, 2022 Notice of Intent (herein “Project”) submitted by Hughes Environmental Consulting for Sea Chanty, LLC (“Applicant” or “Proponent”).

Despite many questions asked by the Conservation Commission itself (the minutes of all meetings contain questions and requests, as do the recordings), *no changed plans have been posted on the Conservation Commission website, as is always indicated on published agendas, nor have any project modifications or mitigations been published, despite all this time to make project improvements and consider alternatives.* We will comment orally if any are presented at tomorrow’s hearing. In the meantime, here are what comments we can make on the only apparent submission, which is letter targeted at me, as if my comments were the only issues of concern. Also, it merits reminding the Applicant that the only project under review is the present one by the Applicant, not any other former project site, whether owned by my clients or by a previous owner or any other project at all.

This proposed project *continues not to meet the applicable performance standards* under the Wetlands Protection Act Regulations for impacted resource areas, nor those of the local

bylaw. Nor has any MEPA submission been made, which will be required (as acknowledged by the Hughes Environmental Consulting) if an appeal is filed with MassDEP (and in court).

The Performance Standards will be addressed first, then the continuing procedural concerns.

For ease of reference, this is the vegetated resource area (between the two structures, accessed by the 10' right of way in the second photo) proposed to be dug up and destroyed; the final photo is the dune to be removed completely:





I. Performance Standards: “May” be permitted is not “shall” be permitted and the default conservation mission is resource protection, not parking space and driveway creation obliterating established, and fragile, resources on a too-small site for an existing structure

The Applicant agrees the Project is proposed on a Coastal Dune and a Barrier Beach. The Applicant denies the Project is located on a Coastal Bank. It is.

- A. The Project does not meet the performance standards for “Coastal Dune” which state that it “shall have no adverse effect”¹ by:
- (a) affecting the ability of waves to remove sand from the dune;
 - (b) disturbing the vegetative cover so as to destabilize the dune;
 - (c) causing any modification of the dune form that would increase the potential for storm or flood damage;
 - (d) interfering with the landward or lateral movement of the dune;
 - (e) causing removal of sand from the dune artificially; or
 - (f) interfering with mapped or otherwise identified bird nesting habitat.
- B. While the Wetlands Protection Regulations state that for a Coastal Dune, a parking space accessory to an existing residential building therein “may be permitted,” that provision neither mandates such permitting nor exempts it from the above-referenced Performance Standards.² Moreover, the Newbury Wetlands Bylaw provides no such granted right for new accessory parking spaces and driveways to an existing structure. The Project should not be approved for this reason alone. Regarding the local bylaw, the Applicant’s September 28, 2023 letter refers to Newbury 95-3, Section 1.D(16) and seeks to characterize the Project as “development and redevelopment” exclusions. *But this site does have a parking area of lesser size available (on the street and also on the other side of the site) and it is not a new structure! It is decades old.* Reasonable parking may or may not be a zoning consideration. It is not an entitlement under conservation laws. And again, deflection by allusions to other projects is not factually or legally relevant.

¹ See 310 CMR 10.28(3)-(6).

² See 310 CMR 10.28(4).

- C. Additionally, the Project does not meet the performance standards for “Barrier Beach” which state that it “shall not have an adverse effect by increasing erosion, decreasing the volume or changing the form of any such coastal beach or an adjacent or downdrift coastal [or barrier] beach.”³ It is impossible for the Project not to have an adverse effect, once one sees the site area.
- D. As noted in our July 16th 2022 letter, the complete removal of the existing dune, which contains deeply-rooted vegetation and serves as habitat for various wildlife, is a clear violation of these regulatory requirements, and is contrary to the Wetlands Protect Act and accompanying Regulations’ interests of “flood control,” “storm damage prevention,” and “protection of wildlife habitat,” which mirror the “special purposes” of the Newbury Wetlands Bylaw.⁴

Applicant deflects from these performance standards in the September 28, 2023 letter by claiming MassDEP “routinely” allows for mitigation of limited vegetative impacts on coastal dunes. Not so regarding the most delicate and vulnerable resources such as in this heavily regulated geographic area of Plum Island and where the Project is wholly unnecessary. Destruction of a dune is not “routinely granted.” Denying a brand new parking space for an existing structure is what is routinely done. Conservation laws are for conservation, not economic improvement for resale.

- E. Hughes seeks to deflect from this fact by emphasizing Rosa Rugosa is non-native and bittersweet is invasive. The current property owners have had decades to propose removing bittersweet and are not proposing a restoration project, they are proposing a parking space and driveway. The area is well-established in its root system and flora for all of the values the Act and the bylaw protect, especially flood control and habitat.
- F. The September 28, 2023 letter still does not address the removal of sand from the coastal bank and dune, or the compression of the parking area by the weight of cars, preventing its ability to act as a ground resource sponge for stormwater and altering the direction of subsurface waterflow downgradient. The proposal for mitigating plantings in a different area does not address the loss in this area where they are most needed. The Applicant asserts ‘conversion of the floodwater’s energy and slowing of flood waters.’ One look at the site makes this obviously erroneous, it is simply too close to the adjacent flooding areas to avoid flooding with the proposed destruction and permanent compaction. It is also useless to reference a rental property altered before my client’s ownership as this bears no relevance to the inadequacies of this Project. We do agree that the root systems of plants are immensely important and they should not be destroyed.
- G. Coastal bank should be included. The slope corresponds to that of a Coastal Bank per 310 CMR 10.02, also adopted in the Newbury bylaw.

³ See 310 CMR 10.29(2)-(3); 310 CMR 10.27(3)-(6).

⁴ See Town of Newbury Bylaws, Chapter 95 (“Wetlands”), Section 95-1 B.

- H. Proponent attempts to assert the structure is not used for rentals enough to have to comply with stormwater standards. The rentals are constant, commercial and not homeowner occupied. The point, however, is the proposal will result in increased flooding.

II. Wildlife Habitat

“Protection of wildlife habitat” is one of the stated purposes of the Massachusetts Wetlands Protection Act which is accordingly an interest protected by the Wetlands Protection Regulations. The Project Applicant has provided no wildlife habitat analysis, which is critical for this precarious Barrier Beach. All that is on the record regarding wildlife is the NHESP letter stating that the Project “will not adversely affect Priority Habitat” for state- and federally-listed piping plover. This is not the same as an analysis for “nesting bird habitat” which the applicable WPA Regulatory Performance Standards require.⁵ Neither the NHESP nor the Project Applicant has undertaken any analysis of wildlife within the Project Area, including “nesting bird habitat”, and therefore we argue the Project is insufficient under the Performance Standards’ requirement of “no adverse effect on “identified bird nesting habitat” and is contrary to the purpose of the Wetlands Protection Act and Regulations. Separate from a needed analysis on “nesting bird habitat”, there is also no study of other wildlife which utilize the site, which my clients can confirm include rabbits and foxes and dozens of birds.

III. MEPA Review: We all agree MEPA review will be required if any Order of Conditions is issued and appealed to MassDEP, which is highly likely if Proponents make no changes. Yet, the Applicant refuses to submit to MEPA their Project, perhaps because then MassDEP would comment it is not allowed and then the Proponent would be unable to market the structure for sale without also being clear parking is on the nearby street.

IV. Availability of Alternatives

Sections 24 and 53 of the Wetlands Protection Act Regulations require Conservation Commissions to “consider the availability of reasonable alternatives” to a project as proposed, as well as “the extent to which adverse impacts could be minimized.” The Applicant has a clear, less adversely impactful solution to parking for their rental structure: the tenants can park on the street, by obtaining a Town parking permit. Such on-street parking would wholly avoid any adverse impacts to “wildlife habitat,” as and would be more consistent with the Wetlands Protection Act and Regulations’ interests of “flood control” and “storm damage prevention.” Alternatives on the other side of the Property should also be considered. This alternative is clearly available because that is what has been happening for over a year now. Nothing on the record says otherwise.

V. Project Site – No Permission: The Project Site appears to be intending a fence, a driveway and a parking space, all on jurisdictional resource areas, and also seems to be assuming the right

⁵ The Newbury Wetlands Bylaw also requires that projects be “designed to minimize the disturbance to traditional bird-nesting habitat.”

to turn vehicles sharply in and out of the proposed parking area requiring trespass on my client's own property. The dune to be destroyed is also on my client's property. No permission is granted for this trespass or destruction, and none has been given for this proposed project. Therefore, the application is incomplete in not having a site owner's approval for the Notice of Intent.

VI. Application Too Old: This application is too old to be carried forward and requires new analysis and new voting and a new site visit (not just the usual new notifications to abutters). Unless at a minimum, the Applicant removes the existing porch on 33rd street (which would raise additional wetlands issues), there is no way that they can park a car or cars as proposed without intruding on the adjacent landowner's property both to the north and the west when parkers try to park. The turn is just too tight. The right of way is only 10' wide. Also, any fence the Applicant is proposing isn't usually built on the lot line (there needs to be a setback) and there needs to be a setback from the lot line to the edge of where they propose to park. These are zoning and land court issues, except that it is mor evidence this alternative as presented for addressing parking is not feasible. Frankly, the Applicant just does not have enough land that is theirs to put in parking in this area and the Conservation Commission should deny the Notice of Intent.

Conclusion

In conclusion, not only is there no entitlement to altering a Dune, Barrier Beach or Land Subject to Coastal Storm Flowage for an existing structure's new parking space, the Project *directly violates performance standards requiring 'no adverse impact.'* The Applicant has not provided either in its Notice of Intent or in supplemental filings any supporting evidence to demonstrate that the Project will not have any adverse impacts. The engineered attempts are unproven and unacceptable, whereas ample evidence is on the record of actual adverse impacts on the flooding conditions, on stability of the Dune to be removed, plant species, bird nesting habitat, and other wildlife documented at the Project Site. *Moreover, the Applicant has failed to demonstrate why the Project's wetlands resource area impacts are necessary compared to the much more environmentally and ecologically sound solution of on-street parking just down the street via a Town permit, with loading or unloading allowed on the right of way as is the case right now. Therefore, we respectfully request the Commission votes to deny an Order of Conditions for this Project. This is well within the Commission's right and dead center in its mission.*

I and my clients thank the Commission chair, members and staff for their public service and attention to these environmental concerns and for considering our comments.

Cordially,



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for the Christine Elizabeth Morris Trust,
106 Northern Boulevard

& 108 Northern Boulevard