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September 28, 2023

Bob Connors, Chair
Newbury Conservation Commission
Town of Newbury
Town Hall
12 Kent Way
Byfield, MA 01922.

Re: NOI (050-1386); 3 33rd Street

Dear Chairman Connors and Members of the Commission:

I am writing with respect to the next hearing on the Notice of Intent (050-1386) for Sea Chanty, LLC (the "Applicant") for a proposed driveway at 3 33rd Street (the "Property"). We have re-notified abutters and run a legal ad in the paper.

The Notice has been filed to provide for a new driveway and parking accessory to the single-family home at 3 33rd Street. In our initial hearing, a letter was received from Attorney Jamy Madeja on behalf of the Christine Elizabeth Morris Trust, owners of the property to the east at 108 Northern Boulevard and to the south at 106 Northern Boulevard. Below is a brief response to issues raised by Attorney Madeja. Attorney Madeja's comments are in bold text and my response is in plain text.

A. Initial Procedural Issues have been resolved:

- Inadequate Notice: The NOI Abutter Notice my clients received was postmarked July 12, 2022. To my eye, this is intentionally unusually short notice in hopes the abutters would not be aware of the filing or would learn of the filing without adequate time to respond to the filing. Fortunately, we monitored the published agenda and discovered this project proposal on the 14th. It also means we can only offer our preliminary concerns without benefit of more fulsome review.**

As discussed at the hearing, on July 19, 2022 the notice met the 7-day period set by DEP regulations. We continued that initial hearing after our presentation and provided the neighbor ample opportunity for comment.

Additionally, we are starting the hearing back up by re-advertising and re-notifying abutters in conformance with the regulatory standards. This is no longer an issue.

2. **Conservation Commission Independent Environmental Authority: As a preliminary matter, in reviewing the minutes of the Newbury Board of Selectmen’s meeting regarding this matter, the Project Proponent represented by Hughes Environmental Consulting provided details regarding a proposed driveway and what is referenced as disturbance of the public road, with particular reference to restoration of its prior condition. There are no details in the Proponent’s Notice of Intent filing of how the major alteration of the public road, its regulated natural resources, and its restoration will be handled. It is important to note that the Board of Selectmen did not require approval of or comment on the issuance of a Notice of Intent; it merely authorized the proponent to file with the Conservation Commission to make its own usual independent analysis for both the proposed business parking on dune and the business changes to the public street. There is nothing whatsoever obligating this Conservation Commission by the Board of Selectmen to set aside the Conservation Commission’s environmental responsibilities in favor of a business home-rental operation from a limited liability corporation on extremely sensitive resource areas which would alter the resource areas of the Property and the resource areas around it.**

Attorney Madeja continually refers to the single-family home, which is owned by the family under an LLC as a “business”. This is a family home, shared by the family (that comprises the LLC), that has been owned by the same family for more than 70 years. Like many other family homes on Plum Island, it is rented occasionally to offset ownership costs. However, it is not rented more than 12 weeks of the year. The vast majority of use is by family members. The vote of the Selectmen is a necessary part of our filing as it authorizes work on the Property within 33rd Street. This use allegation is not a Commission issue.

3. **Ownership Signatures Missing – No Public Hearing: The Wetlands Protection Act regulations require the signature of all property owners of a proposed work site on a Notice of Intent. There are no signatures from the Town of Newbury nor of my clients. For this reason, no hearing should open for this Notice of Intent until the required signatures are obtained. 310 CMR 10.05(4)(a). The NOI proposes work on property owned by parties other than the**

Applicant and is missing the required signatures of approval from these other property owners.

Signatures have been provided from the Town and from the applicant. No other signatures are required. The Selectmen vote noted above authorizes the Applicant's work on Town land. We do not need the signature from Attorney Madeja's client as no work is proposed on her client's property.

The NOI's Site Plan ("C-001") shows a shaded rectangular area on 33rd Street, which the Applicant seeks to alter. It is important to be aware that rectangular area is owned partially by my clients (survey to be provided) and partially by the Town of Newbury. As such, the Applicant's NOI needs to include signatures of approval from these two parties as legal owners of these portions of the Project work area. My clients have not given such permission, nor does the NOI bear any signatures from the Town. Moreover, on this land which the Applicant does not own, the Applicant seeks to remove a substantial, vegetated dune (photographs provided). My clients, the partial owners, specifically oppose the removal of this coastal dune for the reasons set forth below.

The letter includes the following footnote:

The 2021 Orthophoto (p. 35 of the NOI) incorrectly identifies the northern lot line of the 108 Northern Boulevard property as the existing wall structure. In fact, the wall structure was purportedly built to the South of the lot line. As a result, and particularly given that the lot lines do not run perpendicular to Northern Boulevard, a substantial portion of the vegetated dune that the proposed project will destroy is owned by the Christine Elizabeth Morris Trust.

In addition, the lot line between the 3 33rd Street property and the 108 Northern Boulevard property is also incorrectly depicted on the 2021 Orthophoto. The lot line is much further East. In fact, based on the survey stakes that were put in place by the Applicant's surveyor (since removed), it is possible, if not likely, that the proposed parking area also will intrude onto the 108 Northern Boulevard property not owned by the Applicant.

The Applicant relies upon the engineered survey plan and not a graphical depiction of assessor's lines on an aerial photograph. The survey plan shows no work on her client's land. The aerial photograph is not intended nor submitted to establish or convey property rights. Additionally, stakes placed in the ground by a surveyor are not necessarily property line stakes. Attorney Madeja is well aware that the Order of Conditions does not create or convey property rights to the Applicant.

- 4. Incorrect Project Type: With respect to the Applicant's completed WPA Form 3-Notice of Intent, the "Project Type"**

is selected as “other.” We believe it could be more accurately described as a “coastal engineering structure,” because it seeks to remove and armor the coastal dune with engineered materials and replace natural materials. Even if the materials are of origins in nature (crushed stone or shells) it remains an engineered project. We also question whether it should be a “commercial/industrial activity” because what had been a single-family home is being used for commercial purposes to rent on a persistent, intensive, weekly basis (not as a year-round home) by a Limited Liability Corporation.

The argument that a driveway and parking area is a coastal engineering structure flies in the face of the definition of such and decades of past practice and precedent. Parking areas in dunes are routinely approved by the Commission and by DEP. The materials proposed for the improvements to the roadway and for the parking are considered dune compatible materials. DEP has not considered the occasional Airbnb rental a commercial project for single family homes in the past. Similarly, Attorney Madeja’s client has a larger but similar driveway and parking area that was constructed on her client’s property in a well vegetated portion of the primary frontal dune that was not identified or regulated as a coastal engineering structure. (See Exhibit 1)

5. **No DEP File No.: As of this writing, there is no DEP file number for this NOI, which means no hearing can be held. That is the MassDEP requirement. The public is meant to know how MassDEP comments, as well as having a tracking file number.**

A file number has been issued and referenced above. This is no longer an issue.

B. *Environmental Violations or Concerns have been addressed:*

1. **The Proposed Work will negatively impact resource areas and protected values under the Wetlands Protection Act and Regulations (310 CMR 10.00 et seq.) and the Newbury Wetlands Bylaw (“Bylaw”).**

The work proposed in the Notice of Intent (“Proposed Work” or “Project”) is located on extremely sensitive resource areas, namely the agreed upon Barrier Beach and Coastal Dune as well as what we believe is Coastal Bank (not identified in the Project NOI) due to its slope, all of which are currently heavily vegetated and serve the important functions of flood control, wildlife habitat, and pollution protection.

As noted in the NOI, the Project is on a Coastal Dune and a Barrier Beach. Coastal banks

are defined at 310 CMR 10.30(2) as: “the seaward face or side of any elevated landform, other than a coastal dune, which lies at the landward edge of a coastal beach, land subject to tidal action, or other wetland”. Since the site is coastal dune, it is not coastal bank. Further, the work proposed is similar to the new driveway work performed by Attorney Madeja’s client on the adjacent property at 108 Northern Boulevard. (Exhibit 1)

The Project calls for total destruction of vegetative cover on the coastal dune. It is not possible to remove 1/2 to 2/3 of a deeply embedded, well-integrated, indigenous Rosa Rugosa without killing off its remainder. This is not only environmentally serious, but also a major change in existing use. It is prohibited to cause modification of a dune that would increase the potential for storm or flood damage. 310 CMR 10.28(3)(c). This proposal changes the dune’s form by removing the vegetation and installing easily disturbed and washed away unnatural cover.

DEP and the Commission routinely allow for mitigation of limited vegetative impacts associated with projects in coastal dunes. I note that within the right of way, vegetation impacts are to Rosa Rugosa, which is an aggressive, non-native species that DEP does not typically allow to be planted and is considered by many to be invasive. Also growing amongst the roses are invasive bittersweet that will also be removed within the project limit. (Exhibit 1) The dune functions will continue with this Project.

It is also highly doubtful that there would be no removal of sand from the coastal bank and dune, as alleged in the NOI, given the proposal’s need to extensively alter the sand dune area for a car park. See 310 CMR 28(3)(e). The area will be compressed by the weight of the proposed use as a car park which will alter its ability to act as a ground resource sponge for stormwater and will also alter the direction of the subsurface waterflow to the downgradient property’s detriment.

The NOI design took Attorney Medeja’s client’s interests into account to avoid impacts. The Project includes an infiltration trench, constructed of compatible porous material to capture runoff. This is more than the Commission historically requires for such single-family accessory projects. The Project does not propose any removal of sand from the dune. Attorney Madeja continues to assert the area is coastal bank, which it is not. Again, it is similar to the work on her client’s property. (Exhibit 1)

Please note that there was also previously unpermitted removal of beach grass on the East side of the Property, for a private party, a sign of disrespect for the environmental function of the dune and disregard for the Bylaw and state regulations. See below photo.

The picture shows a wedding party for the family that owns the Property. There was no evidence of permanent impact to dune vegetation and having a family wedding on family property is not prohibited. The activity is similar to activities on the driveway and parking installation (without mitigation) that occurred, apparently without permits, at Attorney Madeja’s client’s property. The area is fully restored. (Exhibit 1)

With reference to the provisions at 310 CMR 10.28(4), the Applicant states that no accessory buildings are proposed. The Applicant omits the fact that the proposal is to engineer a parking area and alter the resource area in ways which are not using best commercially available measures or minimizing the adverse effect. The allegation that proposed plantings increase natural vegetative cover through mitigated plantings is absurd because the mitigative plantings are elsewhere and not in the location where they are most needed on site.

The drive/parking is accessory to the structure and allowable as such. The location is in an area of the dune where sand movement is already limited due to the home to the east owned by the Applicant and by the rental property to the west owned by Attorney Madeja's client at 108 Northern Boulevard. This is evidenced by the vegetation that is growing in this area. Sumac and lawn grasses that are interspersed with American beach grass do not do well with sand movement and associated burial. I note that the parking and drive will have less impact to the dune than that installed by Attorney Madeja's client at her rental property at 108 Northern Boulevard. (Exhibit 1) If you look at conditions in 2015, before parking was installed, the adjacent Morris property contained well vegetated dune. Afterwards, a parking area that appears to exceed the allowed parking area under the bylaw was installed (apparently without permits). Unlike our location in the NOI, the location of the Morris driveway is wide open to the typical east to west sand movement that occurs by wind and water at Plum Island. The Applicant is proposing a project smaller than what Attorney Madeja's client has installed for her rental property and, unlike her client, we are fully mitigating those impacts and not harming the function as the sand is free to move by wind and water.

With respect to the Notice of Intent's Section B regarding "Resource Area Impacts", the Applicant omits "coastal bank." We believe this should be included as an impacted resource area, in addition to what the NOI has already flagged as impacted: barrier beach, coastal dune, and land subject to coastal storm flowage.

There is no coastal bank within coastal dune. The form is properly filled out.

2. The Proposed Work will not negatively impact resource areas or protected values under state law and the Bylaw

The Applicant's Notice of Intent admits the Project is located in a velocity zone (VE Zone) but assert that their parking space proposal is excluded from the definition of development. We disagree. We also disagree with the assertion that the work is excluded from the definitions of development and redevelopment. Therefore, we also disagree with the assertion that all areas of Plum Island barrier beach within 200 feet landward of the top of a coastal bank have no adverse impact on the height, stability or function of the bank or to fulfill the purposes set forth in Section 1.B of the Newbury Wetlands Bylaw ("Bylaw"). This Project will have adverse impacts on those functions of the bank and dune.

The abutter's position is not supported by the facts of the project proposal or by the language of the Bylaw. Newbury 95-3, Section 1.D(16) of the bylaw reads:

Development and Redevelopment shall not include the following activities: (*emphasis supplied*)

(16) For only those properties that do not have an existing parking area or parking area of lesser size, construction of two parking spaces that are no more than 9 feet by 18 feet per space provided that there is no other area for parking on the property, and provided further that the surface of the parking area is pervious and that the construction complies with all the Performance Standards set forth in the Commission's Regulations and 310 CMR 10.00".

In this case, the Property does not have an existing parking area; therefore the proposed parking, which meets the size limitation of this subsection does not constitute development or redevelopment. This section makes it clear that Town Meeting and the drafters of the Bylaw did not intend to prevent a property owner from having reasonable parking on their property. In fact, the parking on 108 Northern Boulevard that was installed by Attorney Madeja's client exceeds the 9x18 area and would not be allowed under the Bylaw if they had applied for approval as it constitutes new development due to its size which is prohibited in the VE flood zone.

The Project will impact floodplain elevations and velocity of flows in the floodplain of this Plum Island barrier beach in the specific location in violation of Section 1.G of the Bylaw because it compacts the dune preventing existing flows and alters the barrier beach and Dune by removing vegetation which slows velocity and replacing it with a flat, compacted, rootless surface increasing velocity. Specifically, the Project proposes to remove existing flower beds filled with established bushes, beach plum, rosa rugosa and beach grass. See below photos taken on July 14, 2022, and July 15, 2022, showing much more extensive existing vegetation in the 33rd Street project area than the Applicant's NOI's site photos depict.

The survey plans accurately depict the extent of vegetation and vegetation impacts was observed by members of the Commission during a site walk. It is not solely vegetation that slows velocity zone floodwaters, rather the extensive root system of dune grass assists stabilizing and building the dune. The dune sands and compatible aggregate material, such as proposed in the driveway, serve to convert the floodwater's energy and by doing so slow flood waters. We are replacing Rosa Rugosa and invasive bittersweet, which are non-native plants with dune grass within the active dune, improving the dune function from the existing functions. The limited vegetative impacts are fully mitigated. Additionally, during a flooding event the driveway/parking area material is compatible with and will not disturb the existing necessary dune function.

3. **The Proposed Work would encroach onto and cause stormwater flooding onto Abutter-owned property at 108 Northern Boulevard.**

As discussed above, the dune which the Applicant seeks to remove currently bears a large, deeply rooted Rosa Rugosa, a species well suited to preserving Plum Island. Below is a photo taken on July 2022 depicting the current scale of the plant and the dune from which it grows (which the Applicant proposes to flatten and replace with gravel). Additional photos of the dune and the plant are attached to this letter's Appendix. By tearing up the dune and the plant's root system and compacting the ground with layered gravel, the Project will change the Property's hydrological flow and increase flooding onto my client's adjacent properties, especially the year-round home immediately downgradient from the proposed parking area. We do not believe the Applicant's unsupported claim the project will not do so.

We disagree. While the project is not required to mitigate for stormwater, the design includes a porous infiltration bed around the parking and driveway area that exceeds the existing root system and will more than mitigate for any runoff. Rosa Rugosa is not a native plant and should be replaced.

4. **The Proposed Work would be an audacious overburdening of the defined resource areas to create a permanent parking lot, which has often been overused by crowds of short-term rentals with multiple cars for multiple visitors. Equally audacious, the Proposed Work would permanently interfere with use of the existing Right of Way as the intended access route for public trust right access to the beach and the tidelands.**

The Right of Way is the deeded access to the property at 3 33rd Street and contemplates use for roadway use, including parking. The Project will actually open up the Right of Way for foot traffic as opposed to the use that occurred for well over 50 years. Until just prior to the filing of this Notice of Intent, the family has parked on 33rd Street continually.

The 3 33rd Street property (the "Property") is described as being a "family owned" location. However, for the past five (5) years, the property has been almost exclusively used as a rental property, wherein each beach season large groups of renters converge on a weekly or less basis. These large groups who have no long-term relationship to the property have both parked and tromped indiscriminately over the Property's wetlands resource areas, as well as blocking public access to the right of way which leads to the beach. See below photo taken in July 2021 showing cars blocking the public way. Where the Proposal imposes on the system of public access to the beach and tidelands, we question whether the Applicant should seek a state-issued Chapter 91 License.

This is not a Conservation Commission issue. Chapter 91 –is not applicable to this project as it is not within filled tidelands or below Mean High Water.

Moreover, the Project Proponent asserts it fully complies with the Building Code but provides no detail as to why or how with respect to how the parking space proposal would allow for cars to enter and park without trespassing on other areas

regulated, owned in part by other parties, and interfering with the public access use of the public Right of Way.

This is not a Conservation Commission issue. The Conservation Commission does not regulate uses; it regulates impacts of a Project upon wetland resource area functions.

5. ***The Proposed Work will unnecessarily interfere with existing wildlife habitat, which is contrary to the state Wetlands Protection Regulations and the Bylaw.***

Barrier beach, dunes and coastal banks are significant for protection of wildlife habitat under the state Wetlands Protection Act Regulations and the Bylaw. Many varieties of wildlife species utilize the area at the project site, including innumerable birds, rabbits and foxes. Below is a photo taken recently of just one bird nesting habitat. Pursuant to 310 CMR 10.29(3), the Project needs to provide a much more comprehensive analysis of the Property's existing wildlife, the Project's impacts to same, and how the Project can better mitigate those impacts.

We disagree. The Act does not protect wildlife, it protects wildlife habitat. A wildlife habitat evaluation is not required by either the Wetlands Protection Act or the Newbury Wetlands Bylaw. The horizontal parking does not act as a barrier to wildlife habitat functions.

6. ***The Project itself is asserted not to be within the Estimated Habitat Map of State-Listed Rare Wildlife published by the Natural Heritage and Endangered Species Program, however, the mitigation planting area admits it does extend into mapped habitat. We disbelieve that the work itself is not in habitat. Confirming study should be required.***

Currently, there are dozens of terns nesting on almost an acre of beach that has been cordoned off by the Commonwealth within 150 feet of the area the NOI proposes to bulldoze, with piping plovers nesting in the same area. Both of these bird species are listed as "threatened" or "species of concern," entitling them to the utmost protection under the Massachusetts Endangered Species Act (M.G.L. c. 131A).² The Proponent should submit a more finely detailed habitat analysis, following guidance from the state's Natural Heritage & Endangered Species Program, before the Conservation Commission allows the NOI to proceed for review.

Natural Heritage publishes maps of the Priority Habitat areas every 4 years. The maps confirm that the Project site is not within a mapped habitat and is not subject to Natural Heritage jurisdiction. This is not a Conservation Commission matter.

7. ***Stormwater Management Standards as Consideration: We question***

whether the Project should be exempt from the MassDEP stormwater management standards given the fact that it is no longer a single-family house but a commercial rental facility. Where stormwater flow and flooding concerns are paramount in this area, among the most prevalent concerns, this is a particularly relevant distinction to get right.

This is a single-family home which is clearly exempt under 310 CMR 10.05(6)(1). Plum Island has many single-family homes, and owner-occupied single-family homes owned under various entities, whether they are trusts or LLCs that rent out part time as this property does to help the families that own them afford them. This is no different. The stormwater standards state that they do not apply to all single-family homes, the language is not restricted to single-family homes with 100% owner occupancy. If stormwater standards apply to this single-family house that may be rented for short term or long term, then they should apply to 108 Northern Boulevard and to every other property that is rented out for any time in the Commonwealth within Commission jurisdiction. That is not what the regulation states. More importantly, the design manages the stormwater from the parking area with porous infiltration so that no additional flooding occurs.

C. The Project must undergo state “MEPA Review” before a state Final Decision can be made.

Under the state Massachusetts Environmental Policy Act regulations, any alteration of coastal dune, barrier beach, or coastal bank requires a MEPA filing and certificate before any state approval can issue. As the Proposed Work would alter both barrier beach and coastal dune, and, we suspect, coastal bank, the Applicant must obtain a Certificate from the state MEPA Office before the state Department of Environmental Protection could issue a Final Order of Conditions for the Project. It is highly likely that were the Conservation Commission to approve this Notice of Intent it will be appealed to or by the Department of Environmental Protection because in addition to the severity of its impacts to defined and heavily protected resource areas, it does not offer sufficient “alternatives analysis” for how these impacts could be mitigated (even if all the procedural and site ownership concerns were resolved, which is unlikely).

This is not accurate at this time. If the Commission approval is appealed, then Attorney Madeja is correct that a MEPA ENF would be required. However, this is true of all projects on Plum Island that require a permit from the Commission. For example, any alteration undertaken by Attorney Madeja’s client in the permit process requires a MEPA Certificate if an appeal takes place. There is no need to obtain a Certificate from the Secretary in advance of the approval.

Attorney Madeja followed up with a subsequent letter dated September 20, 2022.

The 3 33rd Street project as described in the July 6, 2022 Notice of Intent (herein “Project”) submitted by Hughes Environmental Consulting for Sea Chanty, LLC (“Applicant” or “Proponent”) does not meet the applicable performance standards under

the Wetlands Protection Act Regulations for impacted resource areas. Moreover, as of the date of this letter the Applicant has provided no additional materials or analysis to show how it will meet the performance standards, which are outlined below.

We disagree. The Commission requested information to evaluate whether we could shorten the physical improvements in 33rd Street. We have evaluated this request but due to the geometry of a car backing out and turning to safely face the main street as it exits, any shortening of the turnaround would result in impacts to other areas. As noted below, contrary to the larger parking area installed by Attorney Madeja's client, the Applicant has presented a design that meets the performance standards of the regulations.

I. PERFORMANCE STANDARDS

The Project does not meet the performance standards for "Coastal Dune" which state that it "shall have no adverse effect" 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.**

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. Moreover, the Newbury Wetlands Bylaw provides no such granted right for accessory parking spaces.

Nothing in the Wetland Protection Act or its enabling regulation is by right. However, the proposal is consistent with numerous approvals by this Commission allowing minor alterations of coastal dune with dune compatible materials. Additionally, the bylaw clearly envisions the need for residents to have some parking, and excluded two 9' x 18' parking spaces from prohibited development provisions. The ability of the Project to meet the performance standards is addressed in our filing and in this letter. The regulations specifically allow parking as accessory to an existing building and decisions issued by the Newbury Conservation Commission and DEP have allowed for parking associated with buildings as a routine part of approved projects.

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.”

We have addressed the performance standards in our filing and summarize as follows.

Since the project is located on a barrier beach, it has been designed to meet the performance standards of the Wetland Protection Act as defined by the Wetland Protection Act Regulations, 310 CMR 10.28 and 10.29.

The proposed project will not adversely affect dune function and will improve dune function in portions of the lot where building and pavement are being removed.

The regulations are intended to preserve the following characteristics of barrier beaches and dune systems:

- (a) the ability of the dune to erode in response to coastal beach conditions;
- (b) dune volume;
- (c) dune form, which must be allowed to be changed by wind and natural water flow;
- (d) vegetative cover;
- (e) the ability of the dune to move landward or laterally; or
- (f) the ability of the dune to continue serving as bird nesting habitat

310 CMR 10.28 - Coastal Dunes

The performance standards for Coastal Dunes are provided in 310 CMR 10.28, sections (3) through (6). These standards are addressed below:

(3) Any alteration of, or structure on, a coastal dune or within 100 feet of a coastal dune shall not have an adverse effect on the coastal dune by:

(a) affecting the ability of waves to remove sand from the dune;

The proposed project is located on the landward side of an existing home. The driveway and parking area is comprised of dune compatible materials and will not block or impact this function.

(b) disturbing the vegetative cover so as to destabilize the dune;

The project area will impact vegetated cover, but the surface material proposed will provide dune stabilization. Additionally, the vegetation will be mitigated for as shown on the project plans.

(c) causing any modification of the dune form that would increase the potential for storm or flood damage;

The proposal will not change dune form in any way that would impact the potential for storm or flood damage.

(d) interfering with the landward or lateral movement of the dune;

The project will not interfere with the landward or lateral movement of the dune.

(e) causing removal of sand from the dune artificially; or

There will be no removal of sand from the dune.

(f) interfering with mapped or otherwise identified bird nesting habitat.

The project itself is not within the Estimated Habitat Map of State-Listed Rare Wildlife published by the Natural Heritage and Endangered Species Program, however, the mitigation planting area does extend into mapped habitat. A copy of this NOI has been sent to NHESP. NHESP has reviewed and found the project does not represent a take. (Exhibit 2).

(4) Notwithstanding the provisions of 310 CMR 10.28(3), when a building already exists upon a coastal dune, a project accessory to the existing building may be permitted, provided that such work, using the best commercially available measures, minimizes the adverse effect on the coastal dune caused by the impacts listed in 310 CMR 10.28 (3)(b) through 10.28(3)(e). Such an accessory project may include, but is not limited to, a small shed or a small parking area for residences. It shall not include coastal engineering structures.

No accessory buildings are proposed. The project does propose a parking area that is specifically allowed under this section as it is accessory to an existing building and uses the best available measures through the use of dune compatible materials and by providing runoff mitigation to protect the dune.

(5): The following projects may be permitted, provided that they adhere to the provisions of 310 CMR 10.28(3):

(a) pedestrian walkways, designed to minimize the disturbance to the vegetative cover and traditional bird nesting habitat;

(b) fencing and other devices designed to increase dune development; and

(c) plantings compatible with the natural vegetative cover.

The applicant is proposing plantings to increase the native vegetative cover through mitigative plantings as described in the Notice of Intent and as shown on the plans.

(6) Notwithstanding the provisions of 310 CMR 10.28(3) through (5), no project may be permitted which will have any adverse effect on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.37.

The lot contains mapped areas as shown on the Estimated Habitat Map of State-Listed Rare Wildlife published by the Natural Heritage and Endangered Species Program. These maps were last revised in August 1, 2021. Natural Heritage reviewed this filing and determined that the project will not adversely affect the actual Resource Area Habitat of state-protected rare wildlife species. We have attached their letter, dated August 8, 2022. (Exhibit 2)

Barrier Beach

310 CMR 10.29 (3) states that when a Barrier Beach is Determined to be Significant to Storm Damage Prevention, Flood Control, Marine Fisheries or Protection of Wildlife Habitat. 310 CMR 10.28(3) through 10.28(5) apply. These sections are addressed above.

Newbury Wetlands Bylaw, Chapter 95

The specific performance standards of the Newbury Wetlands Bylaw, prescribed in Chapter § 95-4 are addressed below.

A. No new Development shall be permitted within a FEMA V-Zone or AO-Zone.

The project is located in the VE zone, but since our parking is limited to 29 x 18 parking spaces and there is no parking on site presently, it is excluded from the definition of development. (see above)

B. No redevelopment shall be permitted within a FEMA V-Zone or AO-Zone except that Structures or Buildings may be redeveloped/repared only in accordance with current local, state and federal regulatory standards. In all instances, reconstruction, renovation or repairs to Structures or Buildings shall be authorized as stated herein, provided that the sum of the footprint of all structures or buildings would not exceed 20% of the area of the lot;

The work is excluded from the definitions of development and redevelopment. (see above)

C. In all other areas of the Plum Island Barrier Beach outside of the V-Zone and AO-Zone, all new Buildings and shall comply with State Building Code Regulations for elevation and flood proofing. All existing Buildings with Substantial Improvements, and all horizontal expansions of the existing footprint, shall comply with State Building Code Regulations for elevation and flood proofing.

The project fully complies with the Building Code.

D. In all areas of the Plum Island Barrier Beach, electrical, heating, ventilation, plumbing and air conditioning and other service facilities shall be designed to avoid or minimize impacts to coastal beaches and coastal dunes.

We are not proposing any work related to utilities.

E. In all areas of the Plum Island Barrier Beach, Development or Redevelopment on or within 200 feet landward of the top of a coastal bank or dune shall have no adverse impact on the height, stability or function of the bank or dune to fulfill the purposes set forth in Section IB.

The project is excluded from the definitions of development or redevelopment. (see above)

F. In all areas of the Plum Island Barrier Beach, in areas where there are coastal banks or primary or frontal dunes, all new Buildings and Structures, excluding replacement of existing Building and Structures, shall be set back from the beach dune interface at a distance equal to thirty times the average yearly historical erosion as shown by the most current CZM shoreline change map.

The horizontal project is not a structure. While this standard is not typically applied to fences, the long term erosion rate mapped by CZM for this property is accretive and therefore the proposed fence meets this standard regardless. (Exhibit 3)

G. In all areas of the Plum Island Barrier Beach, no activity shall increase the elevation or velocity of flows in a floodplain.

The project will not impact floodplain elevations or velocities.

H. Within the FEMA V Zone, A Zone, or AO Zone, as defined in Section III above, new or reconstructed Structures or Development that alters vegetation, interrupts sediment supply and/or changes the form or volume of a dune or beach, shall comply with the specific performance standards in this Bylaw and in the regulations promulgated pursuant hereto.
The project complies with the bylaw.

As noted in our July 16th letter, the complete removal of the existing dune, which contains deeply-rooted vegetation including the Rosa Rugosa plant native to Plum Island and serves as habitat for various wildlife, is 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.

We disagree. The Project does not propose the complete removal of the existing dune at all as shown on the project plan.

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. 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.

The Notice of Intent addresses the Project meeting the relevant performance standards. There is no wildlife habitat evaluation required under the regulations as this project is small and does not trigger the report with the work proposed under the regulations.

III. 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 home: 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.”

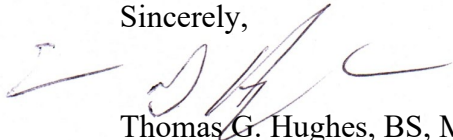
On street parking is not a reasonable alternative in this neighborhood and the Project complies with the performance standards. We note that the on-street parking alternative was also available to Attorney Madeja’s client when she chose to alter several hundred square feet of primary frontal dune, apparently without a permit, to install onsite parking. (Exhibit 1)

CONCLUSION

As we have noted in our Notice of Intent, the Applicants have proposed a reasonable approach to replacing onsite parking that was lost by the cessation of parking in 33rd Street that complies with the performance standards of the Wetland Protection Act and the Wetlands Bylaw and should be approved.

I look forward to discussing the Project with the Commission at its hearing.

Sincerely,



Thomas G. Hughes, BS, MA

Enclosures:

1. Photo sheet
2. August 8, 2022 NHESP Letter
3. CZM Shoreline Change Map

3 33rd Street — Site Photos



Primary frontal dune, vegetated directly in front of 3 33rd Street. Vegetation in front and adjacent to structure. July 2015



Dune grass restored after family wedding



Primary frontal dune with newly installed parking area in front of 3 33rd Street. Vegetation removed from structure and parking area established at 108 Northern Boulevard. 2019



Invasive bittersweet growing amongs non-native rosa rugosa in 33rd Street



MASSWILDLIFE

DIVISION OF FISHERIES & WILDLIFE

1 Rabbit Hill Road, Westborough, MA 01581

p: (508) 389-6300 | f: (508) 389-7890

MASS.GOV/MASSWILDLIFE

August 8, 2022

Newbury Conservation Commission
Town Hall, 12 Kent Way
Byfield, MA 01922

Beth Quinn
Sea Chanty, LLC
38 Hamilton Terrace
Georgetown, MA 01833

RE: Applicant: Beth Quinn, Sea Chanty, LLC
 Project Location: 3 33rd Street (portion of 33rd Street)
 Project Description: Driveway Modification & Parking Area with Dune Planting and Fence
 DEP Wetlands File No.: 050-1386
 NHESP File No.: **22-41210**

Dear Commissioners & Applicant:

The Natural Heritage & Endangered Species Program of the Massachusetts Division of Fisheries & Wildlife (the "Division") received a Notice of Intent with site plans (dated May 13, 2022) in compliance with the rare wildlife species section of the Massachusetts Wetlands Protection Act Regulations (310 CMR 10.37). The Division also received the MESA Review Checklist and supporting documentation for review pursuant to the MA Endangered Species Act Regulations (321 CMR 10.18).

Based on the Massachusetts Natural Heritage Atlas, 15th Edition, portions of this property have been delineated as *Priority Habitat* and *Estimated Habitat* for the Piping Plover (*Charadrius melodus*) a species state-listed as "Threatened" pursuant to the MESA. This species and its habitats are protected in accordance with the rare species provisions of the WPA and the MESA. The Piping Plover is federally protected as "Threatened" pursuant to the U.S. Endangered Species Act (ESA, 50 CFR 17.11). Fact sheets for state-listed species can be found at www.mass.gov/nhosp. Piping Plovers are small ground-nesting shorebirds that will establish a nest on sparsely vegetated, sandy areas of coastal beaches and dunes. Their nests are comprised of shallow depressions in the sand that may be lined with shell fragments or pebbles. Piping Plovers and their nests are particularly vulnerable to predators, unleashed pets, and human disturbance. Piping Plover chicks are not capable of flight for 25-30 days after hatching, and during this period they must feed themselves with parents in attendance, often ranging widely to forage during this period of rapid growth.

WETLANDS PROTECTION ACT (WPA)

Based on a review of the information that was provided and the information that is currently contained in our database, the Division has determined that this project, as currently proposed, **will not adversely affect** the actual Resource Area Habitat of state-protected rare wildlife species. Therefore, it is our opinion that this project meets the state-listed species performance standard for the issuance of an

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Order of Conditions. Upon filing for renewal, extension, or amendment of the Orders of Conditions, the applicant shall contact the Division for written response regarding impacts to Resource Area habitat of state-listed wildlife.

Please note that this determination addresses only the matter of **rare** wildlife habitat and does not pertain to other wildlife habitat issues that may be pertinent to the proposed project.

MASSACHUSETTS ENDANGERED SPECIES ACT (MESA)

Based on a review of the information that was provided and the information that is currently contained in our database, the Division has determined that this project, as currently proposed, **will not result in a prohibited Take** of state-listed rare species. The property owner and/or applicant has the responsibility of protecting breeding Piping Plovers and state-listed species of terns that may occur on this section of beach. Therefore, regular monitoring for the presence of Piping Plovers and terns by a qualified shorebird monitor, as determined by the Division, during the period April 1 – August 31 must be allowed as well as the protection of any nests, scrapes, or unfledged chicks with symbolic fencing (warning signs and twine fencing).

This determination is a final decision of the Division of Fisheries and Wildlife pursuant to 321 CMR 10.18. Any changes to the proposed project or any additional work beyond that shown on the site plans may require an additional filing with the Division pursuant to the MESA. This project may be subject to further review if no physical work is commenced within five years from the date of issuance of this determination, or if there is a change to the project.

Please note that this determination addresses only the matter of state-listed species and their habitats. If you have any questions regarding this letter please contact Emily Holt, Endangered Species Review Assistant, at (508) 389-6385.

Sincerely,



Everose Schlüter, Ph.D.
Assistant Director

cc: MA DEP Northeast Region
Thomas Hughes, Hughes Environmental Consulting



LT: NEWB-0019
0.7 +/- 0.9

LT: NEWB-0020
1 +/- 1

LT: NEWB-0021
1.1 +/- 1

2000

2014

2010

2018

2000

2018

2010

1978

1978

1952

1928

1952

2008

1928

2008

35TH STREET

37TH STREET

NORTHERN BOULEVARD

NORTHERN BOULEVARD

38TH STREET

36TH STREET

34TH STREET

33TH STREET