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July 16, 2022

Via Email Only (conscom@townofnewbury.org)

Newbury Conservation Commission
c/o Samantha Holt, Conservation Agent
12 Kent Way
Byfield, MA 01922

Re: 3 33rd Street (Sea Chanty, LLC) – Notice of Intent (DEP File Not Yet Assigned)

Dear Ms Holt:

This letter is submitted regarding the July 6, 2022 Notice of Intent (“NOI”) for a proposed project at 3 33rd Street submitted by Hughes Environmental Consulting for Sea Chanty, LLC (“Applicant” or “Proponent”). This comment letter is on behalf of the Christine Elizabeth Morris Trust (the “Trust”), through its Trustees Christine E. Morris and Gabriel O. Dumont, Jr. The Trust is the abutting owner of, among other properties, a year-round rental house at 108 Northern Boulevard immediately downgradient (mere feet) to the West of the project area and also the abutting owner to the South of the year-round home of the Trustees and also partial owner of the project work area, as discussed further below.

A. Initial Procedural Issues:

1. 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.
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.

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.

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.¹

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.

¹ The 2021 Orthophoto (p. 35 of the NOI) incorrectly identifies the northern lot line of the 108 Northern Boulevard property as the exiting wall structure. In fact, the wall structure was purposely 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.**

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.

If for whatever reason the Commission proceeds with the NOI public hearing, we offer the following preliminary concerns regarding why the 33rd Street Notice of Intent is insufficient to protect the interests defined by the state Wetlands Protection Act and the Newbury Wetlands Bylaw.

B. Environmental Violations or Concerns:

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.

The Project calls for total destruction of vegetative cover on the coastal dune. It is not possible to remove ½ 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.

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.

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.



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.

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.

2. The Proposed Work will negatively impact resource areas and 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 asserts 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 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.





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.



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 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 trampled 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.

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.



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.



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.

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.

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.³ 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).

² See “List of Endangered, Threatened, and Special Concern species,” Natural Heritage & Endangered Species Program, available at: <https://www.mass.gov/info-details/list-of-endangered-threatened-and-special-concern-species>

³ See 310 CMR 11.03.

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

Cordially,

A handwritten signature in black ink that reads "Jamy B. Madeja". The signature is written in a cursive style with a large, sweeping initial "J".

Jamy Buchanan Madeja, Esq.,
for the Christine Elizabeth Morris Trust,
106 Northern Boulevard
& 108 Northern Boulevard

Appendix

1. Photos of Dune with vegetation, proposed to be Removed by 3 33rd Street's NOI.





