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January 18, 2019

Cape Elizabeth Town Council  
320 Ocean House Road  
Cape Elizabeth, ME 04107

RE: SOS Petition for Ordinance

Dear Councilors:

I see from the video of this week's meeting on setting the January 23 public hearing for the Save Our Shoreline Access Coalition ("SOS") ordinance petition that the Council had some questions. Most were on topics I have discussed with Town Attorney Michael Hill, Esq. in his review of the ordinance language. Attorney Hill can clarify as needed, but my responses as principal drafter might be helpful.

This ordinance balances several interests. SOS primarily wants Council Members to remain acutely aware of the importance that Cape citizens place upon preservation of shoreland public access rights. The ordinance imposes a higher standard for action disposing of such rights. SOS also respects the role in Town governance played by citizen committees which provide input on preserving such rights. As a countervailing consideration, SOS does not want Council Members to be unduly constrained from carrying out their duties as elected representatives, if they determine an unelected committee recommendation should be overridden. The ordinance balances these competing interests by making the scope of the ordinance deliberately broad, while preserving the Council's ability to dispose of public rights should it achieve a strong consensus, or decide to put the matter to a public referendum.

**Why seek to adopt an ordinance rather than change the Charter?** Adopting a citizen-initiated ordinance under Charter Article VIII, Section 3 is less convoluted than amending the Charter itself. The latter process is governed by State law, 30-A MRS § 2104, which mandates different standards and procedural requirements. Attorney Hill will no doubt advise you that the ordinance is consistent with the current Charter, though it also could have been proposed as a Charter amendment. For SOS, it made no sense to choose a more tortuous path to achieve essentially the same end.

**Why does the ordinance allow for a supermajority Town Council vote rather than require a public referendum?** SOS did not intend the ordinance to hamstring the Town with unreasonable administrative burdens or impose impractical political requirements. Mandating a public referendum on every disposition that falls within the broad ambit of the ordinance would be impractical and expensive. For example, the grant an easement for a single utility pole along existing road frontage of

a shoreland parcel is likely to easily garner the votes of a supermajority of Councilors. Requiring a public referendum for such a trivial disposition would be a waste of time and taxpayer money. By the same token, the ordinance mandates a supermajority Council vote rather than unanimity to avoid any single Councilor leveraging his or her vote for unrelated ends. The ordinance seeks only a strong Council consensus for action, with an eye towards the public interest in preserving shoreland access.

**Why does the ordinance reference “shoreland areas” rather than “Shoreland Districts” or other terms defined in the Zoning Ordinance?** As noted above, the ordinance is crafted to be as broadly applicable as possible. Although currently delineated Shoreland Districts obviously fall within the scope of “shoreland areas” in the ordinance, the broad ordinance language will remain applicable even should existing defined terms such a “Shoreland Districts” be later circumscribed or eliminated.

**What does “indirect access” mean?** The ordinance is not intended to limit protection only to Town-owned shore frontage. It also protects the means of the public accessing shoreland areas. The term “indirect access” is used to indicate the breadth of public rights intended to be protected. An obvious example would be a Town right of way that is not itself bounded by the shore, but identified as leading to a shorefront area. One could posit that “indirect access” then exists from any Town-owned property, even miles from the shore, because of the network of public streets leading to (say) Kettle Cove. But such an argument would be facetious because it divests the plain English phrase “indirect access” of any useful meaning. “Indirect access” is admittedly elastic, but no more so than thousands of common words and phrases throughout the Zoning Ordinance. As with all such terms, the outer bounds of “indirect access” are determined by context and common sense. The need for court interpretation in a particular case is a theoretical possibility, but no more likely than for any other undefined term in the law.

**Is there an outside date on holding a public referendum?** The Charter does not impose a limit on when a referendum on the ordinance must be held. But the Council has only thirty days from the January 23 public hearing to fix a date. SOS hopes the Council will adopt the ordinance itself rather than put it out to referendum. If the ordinance does go to referendum, it would be sensible to hold that vote at the next regularly scheduled poll as was done with the No Short Cuts referendum last decade. Deferral for any unreasonable period (say, years) could give rise to an equal protection challenge. However, the ordinance is drafted so as to apply retroactively to the January 2, 2019 date the citizen petitions were submitted to the Town Clerk, regardless of when it might be finally enacted.

I look forward to answering any other questions the Council may have at your meetings.

Your truly,

  
Richard N. Bryant, Esq.

cc: Save Our Shore Access Coalition  
Matthew Sturgis, Town Manager  
Michael Hill, Esq.