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DIVISION OF FISHERIES & WILDLIFE

1 Rabbit Hill Road, Westborough, MA 01581
p: (508) 389-6300 | f: (508) 389-7890
MASS.GOV/MASSWILDLIFE

MA ENDANGERED SPECIES ACT (G.L. c.131A) CONSERVATION AND MANAGEMENT PERMIT

DATE	August 31, 2022
CONSERVATION PERMIT NO.:	022-402.DFW
NHESP FILE NO.	12-31035
PERMIT HOLDER	Surfside Crossing, LLC 37 Old South Road, Unit #6 Nantucket, MA 02554
PROJECT	"Surfside Crossing" Residential Development 3, 5, 7 and 9 South Shore Road Nantucket, MA 02554

A. Permit Authority

Pursuant to the authority granted in the Massachusetts Endangered Species Act ("MESA") (G.L. c. 131A) and its implementing regulations (321 CMR 10.23), the Director of the Massachusetts Division of Fisheries & Wildlife (the "Division") hereby issues a Conservation and Management Permit (the "Permit") to Surfside Crossing, LLC (the "Permit Holder"). This Permit authorizes the Take of the Coastal Heathland Cutworm (*Abagrotis benjamini*), which is State-listed as "Special Concern," pursuant to the MESA, arising out of the construction of ± 11.50 -acre residential development project (the "Project") on a ± 13.56 acre site consisting of four (4) parcels (Map 67, Parcels 336, 336.7, 336.8 and 336.9) located west of South Shore Road in the Town of Nantucket, Massachusetts (Book 1612, Page 62, Nantucket County Registry of Deeds; the "Property").

B. Description of Take

The Property currently contains ± 13.56 acres of pitch pine scrub oak barren habitat. The Division has determined (letter dated October 19, 2018) that the Project, as proposed, will result in a Take of the Coastal Heathland Cutworm through the permanent loss of suitable habitat and interference with the feeding, breeding, overwintering and migratory behaviors of this species.

C. Permit Performance Standards

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Under the authority granted by and in accordance with MGL c131A§3 and 321 CMR 10.23, the Director may permit the Take of a State-listed species for conservation and management purposes provided that there is a long-term Net Benefit to the conservation of the impacted species. If the Director determines that the applicant for a permit has avoided, minimized and mitigated impacts to the State-listed Species consistent with the following performance standards, then the Director may issue a conservation and management permit, provided:

- (a) the applicant has adequately assessed alternatives to both temporary and permanent impacts to State-listed Species;
- (b) an insignificant portion of the local population would be impacted by the Project or Activity, and;
- (c) the applicant agrees to carry out a conservation and management plan that provides a long-term Net Benefit to the conservation of the State-listed Species that has been approved by the Director, as provided in 321 CMR 10.23(5), and shall be carried out by the applicant.

The Director has determined that the applicant for this Permit has met the above noted performance standards and that the conservation and management plan described herein provides a long-term Net Benefit to the conservation of the Coastal Heathland Cutworm.

D. Conservation and Management Plan

In order to provide a long-term Net Benefit to the conservation of the Coastal Heathland Cutworm, the Permit Holder has proposed, by way of the Permit Application, to: (i) permanently protect ± 2.08 acres of the Property as open space and State-listed Species habitat through a Division-approved Declaration of Restriction; (ii) implement a Division-approved plan to restore several areas of pre-existing disturbance, and several areas of temporary disturbance associated with the Project, to high quality habitat for state-listed species within the open space; and (iii) provide mitigation funds for off-site land protection, conservation research, habitat management, and/or conservation planning in order to provide a long-term Net Benefit to the Coastal Heathland Cutworm in Massachusetts.

Therefore, the Project can be permitted pursuant to the MESA. This Permit is issued to condition the Project and to provide a long-term Net Benefit to the Coastal Heathland Cutworm.

E. Related Project Authorizations

- i. MA Environmental Policy Act (EEA 16173) Certificate: Issued June 5, 2020.

F. Documents and Plans of Records

In accordance with the documents and plans of record submitted to the Division entitled:

- "Conservation and Management Permit Application" (dated May 31, 2022; prepared LEC Environmental Consultants, Inc.) and "Surfside Crossing CMP Supplemental Letter (dated June 28, 2022; prepared by LEC Environmental Consultants, Inc.) (collectively, the "Permit Application");
- "Layout Plan" (dated February 15, 2018; revised through February 10, 2022; prepared by Bracken Engineering, Inc.; the "Project Plan"; Attachment 1);
- "Open Space Plan" (dated July 25, 2022; prepared by Bracken Engineering, Inc.; the "Open Space Plan"; Attachment 2);
- Draft Declaration of Restriction (Attachment 3);
- Draft Escrow Agreement (Attachment 4);

- "Revegetation Planting Plan" (dated August 9, 2022) and "Revegetation Planting Plan Narrative" (dated August 16, 2022) (collectively, prepared by LEC Environmental Consultants, Inc.; the "Restoration Plan"; Attachment 5);

and any other plans and documents referenced herein (collectively, the "Plans of Record"), this Permit is issued with the following General and Special Conditions:

G. General Conditions

GC 1.	The Permit Holder shall comply with all General and Special Conditions of this Permit and complete the Project consistent with all Division-approved plans and supporting documents referenced herein, except as otherwise approved by the Division in writing.
GC 2.	A violation of any General or Special Condition of this Permit will result in an unauthorized Take and may be subject to civil and or criminal penalties pursuant to M.G.L. c. 131A. The Division reserves the right to require an immediate cessation of Work (as defined in Special Condition #1), in whole or in part and at its sole discretion, should the Permit Holder violate any General or Special Condition of this Permit.
GC 3.	The Permit Holder shall submit in writing any documents, plans, reports, or other items required for submission in accordance with this Permit, for review and written approval by the Division, except as otherwise approved by the Division in writing.
GC 4.	Division representatives shall have the right to enter and inspect the Property subject to this Permit at reasonable hours to evaluate Permit compliance and require the submittal of additional, reasonable information not otherwise required by this Permit but deemed necessary by the Division to complete its evaluation.
GC 5.	Any land protected to achieve a long-term Net Benefit associated with this Permit shall remain undeveloped and protected as habitat for State-listed Species in perpetuity.
GC 6.	This Permit shall not preclude the review of future projects on the Property that are subject to the Wetlands Protection Act Regulations (310 CMR 10.37, 10.58(4)(b), 10.59), as applicable, by the Division.
GC 7.	This Permit does not relieve the Permit Holder of the necessity of complying with all applicable federal, state or local statutes, ordinances, bylaws or regulations, including but not limited to those administered by the Town of Nantucket Conservation Commission and the Massachusetts Department of Environmental Protection.
GC 8.	All Work shall be in conformance with the Plans of Record. Any changes, updates, or revisions to the Project, or any additional work beyond that shown on the Plans of Record, shall require additional review and approval by the Division prior to implementation, pursuant to General Condition #9. This Permit prohibits any work not specifically authorized by this Permit, unless otherwise approved by the Division in writing prior to performing the additional work.
GC 9.	Any proposed change to any plan identified in this Permit, or to the State-listed species conservation and management plan required by way of this Permit, shall require the Permit Holder to inquire of the Division, in writing, whether the change is significant enough to require the filing of a new Conservation and Management Permit Application, and or require additional long-term Net Benefit for affected State-

	listed Species. The Division retains the right to require the submittal of additional, reasonable information to evaluate the proposed plan change.
GC 10.	This Permit shall apply to, and inure to the benefit of, the Permit Holder and any successor-in-interest of the Permit Holder, or to a subsequent successor-in-control of the Property or portion thereof subject to this Permit should the Permit Holder convey its record ownership of the Property to said successor-in-control, as well as to any contractor or other person performing Work conditioned by this Permit. Within three (3) days of the transfer of an interest in the Property or a portion thereof, any successor-in-interest or subsequent successor-in-control [i.e., subsequent owners or operators] of the Property or a portion thereof shall provide the Division with a letter indicating (1) that the successor is the successor-in-interest of the Permit Holder or the successor-in-control [i.e., current owner or operator] of the Property or a portion thereof, and (2) that said successor will perform the obligations of the Permit Holder as set forth in this Permit. If the Permit Holder determines that the successor-in-control of the Property or portion thereof should be a Homeowners Association, Condominium Association, or the like whose members are the owners of all or a portion of the constructed units, the Permit Holder shall submit to the Division for review of compliance with the terms and provisions of this Permit all proposed documents creating said Homeowners Association, Condominium Association, or the like and defining the rights, powers, and responsibilities of said Association and its members. No such Association's documents shall be signed, recorded, or be deemed legally effective in any manner without the express written approval of the Division. The Division's review and approval of such documents are limited to ensuring compliance with this Permit.
GC 11.	Prior to the initiation of Work, the Permit Holder shall notify the Division in writing of the name, address, email, business and home telephone numbers of the project supervisor(s) and/or contractor(s) responsible for compliance with this Permit. The Permit Holder shall provide updated information in writing to the Division should new or additional project supervisors and/or contractors be hired after Work has commenced. Prior to the initiation of Work, said project supervisor(s) and/or contractor(s) shall be provided a copy of this Permit. Said project supervisor(s) and/or contractor(s) may be held responsible for violations of this Permit performed by said project supervisor(s) and/or contractor(s).
GC 12.	Prior to the initiation of Work, the text of this Permit shall be recorded by the Permit Holder in the Registry of Deeds or the Land Court for the district in which the Property is located so as to become a record part of the chain of title of the Property. In the case of recorded land, the Permit shall be noted in the Registry's Grantor Index under the name of the owner of the Property upon which the proposed Work is to be done. In the case of registered land, the Permit shall be noted on the Land Court Certificate of Title of the owner of the Property upon which the proposed Work is done. The Permit Holder shall submit to the Division a date-stamped and signed copy of said recorded Permit showing the date and book and page of recording within five (5) business days after recording and/or filing, as applicable. No Work shall be initiated on the Property until the Permit is recorded and said recorded copy is submitted to the Division, except as otherwise approved by the Division in writing.
GC 13.	Prior to the initiation of Work, the Permit Holder shall send a summary report to the Division which: (a) demonstrates compliance with all pre-Work General and Special Conditions of the Permit; and (b) requests permission to initiate the Work authorized by the Permit. Unless otherwise authorized by the Division in writing, no Work may be initiated on the Property until the Permit Holder has received written confirmation from the Division confirming compliance with all pre-Work General and Special Conditions and authorizing the initiation of Work. Within three (3) days of the initiation of Work, the Permit Holder shall send a letter to the Division confirming the date upon which Work commenced.

GC 14.	The Project authorized by this Permit shall be completed within five (5) years from the date of issuance. If needed, the Permit Holder shall submit a written request to the Division for an extension of time to complete said Project, and the Division will review the Project pursuant to MESA for any continuing impacts as described herein and for any new impacts to any State-listed species found subsequent to the issuance date of this Permit. Said request shall be submitted to the Division at least sixty (60) days prior to expiration of this Permit, and shall include a summary report demonstrating compliance with all General and Special Conditions of this Permit.
GC 15.	Within (3) months of the completion of Work the Permit Holder shall submit to the Division a written request for a Certificate of Permit Compliance (the "Certificate"), including as-built plans and other supporting materials demonstrating the completion of Work and compliance with all General and Special Conditions of the Permit. The text of the Division-issued Certificate shall be recorded by the Permit Holder in the Registry of Deeds or the Land Court for the district in which the Property is located so as to become a record part of the chain of title of the Property. Unless an extension is granted in writing by the Division pursuant to General Condition #14, the Permit Holder shall record the Division-issued Certificate prior to expiration of the Permit. The Permit Holder shall submit to the Division a date-stamped and signed copy of said recorded Certificate showing the date and book and page of recording within five (5) business days after recording and or filing, as applicable.

H. Special Conditions:

SC 1.	Work Authorized by the Permit: This Permit authorizes the construction of a ±11.50-acre residential development project ("Surfside Crossing") on the Property, as shown on the Project Plan (the "Work"; Attachment 1). All Work shall be confined to the area of the Property within the limits of Work shown on the Project Plan (Attachment 1). The Permit Holder has proposed to perform all tree clearing activities on the Property between August 1 and May 31 of any year, unless otherwise approved by the Division. The Work also includes any other on-site activity required by the Division as a condition of this Permit.
SC 2.	Integration of Dark Sky Design Principles: Unless otherwise approved by the Division, all outdoor lighting associated with the Project shall comply with dark sky lighting design principles as outlined by the International Dark-Sky Association (https://www.darksky.org/our-work/lighting/lighting-principles/) or substantially similar.
SC 3.	Declaration of Restriction: The Permit Holder has proposed to permanently protect ±2.08 acres of land on the Property – labeled "Protected Open Space" (the "Open Space") on the Open Space Plan (Attachment 2) - as open space and habitat for state-listed species through a Division-approved Declaration of Restriction (Attachment 3). The Declaration of Restriction shall run in perpetuity. Prior to the Initiation of Work, the Permit Holder shall provide proof to the Division of appropriate recordation of the approved Declaration of Restriction in the Registry of Deeds or the Land Court for the district in which the Property is located so as to become a record part of the chain of title of the Open Space. Any proposed changes to the text of the Declaration of Restriction shall be submitted to the Division for review and approval prior to recordation. Any violation of the Declaration of Restriction, as approved by the Division recorded, is a violation of this Permit pursuant to General Condition #2.

		The Permit Holder has proposed that a Condominium Association or similar shall have the right, responsibility and obligation to protect and manage the Open Space as native habitat for state-listed species pursuant to the terms and conditions of this Permit and the Declaration of Restriction.
SC 4.		<u>Re-Recording Declaration of Restriction:</u> The Permit Holder shall re-record the Declaration of Restriction no later than thirty (30) years from the date of initial recording and every twenty (20) years thereafter in perpetuity, in accordance with the requirements of G.L. c. 184 §§ 23-30. The Permit Holder and the Division are authorized, jointly and severally, to re-record and file any notices and/or instruments to protect the Open Space in accordance with the provisions of G.L. c. 184 §§ 23-30. Without limiting the foregoing, the Grantor agrees to execute any such notices and or instruments at the request of the Division within thirty (30) days of said request.
SC 5.		<u>Temporary Demarcation of Limits of Work:</u> Prior to the initiation of Work, the limits of Work shown on the Project Plan (Attachment 1) shall be monumented and marked with temporary flagging, silt fencing, and or other similar visual marker sufficient to clearly delineate the area of the Property within which all Work will occur.
SC 6.		<u>Permanent Demarcation of Open Space:</u> Prior to the initiation of Work, or as otherwise approved by the Division in writing, the boundaries of the Open Space shall be permanently monumented and marked with signage as shown on the Open Space Plan (Attachment 2). Said permanent bounds and signage shall be maintained in good condition by the Permit Holder and repaired or replaced, as necessary.
SC 7.		<u>State-listed Species Conservation:</u> In order to provide a Net Benefit to the conservation of the State-listed species impacted by this Project, the Permit Holder has proposed to provide restricted funding in the amount of \$641,796 (the "Funds") for land protection, conservation research, habitat management and or conservation planning to benefit Coastal Heathland Cutworm in Massachusetts. The Permit Holder has chosen to fulfill this obligation by providing restricted funding to an escrow account, subject to an escrow agreement in substantially the same form shown in Attachment 4 (which has been approved by the Division), or through another Division-approved mechanism. Any changes to said agreement, other than typographical or grammatical changes, must be approved in writing by the Division before the escrow is established. Therefore, the Permit Holder shall send written confirmation to the Division of depositing the Funds into an escrow account subject to and according to the terms of the escrow agreement (Attachment 4), including written confirmation of deposit receipts and an electronic copy of the executed escrow agreement. Unless otherwise approved by the Division, the Permit Holder shall have a period of one (1) year from the date of final deposit to use all or a portion of the Funds for the purpose of permanently protecting and or enhancing habitat for Coastal Heathland Cutworm within the Town of Nantucket (the "Habitat Conservation Project"). Said Habitat Conservation Project shall be subject to prior review, approval and any requirements of the Division as a condition of its approval, including but not limited to those specified within the escrow agreement (Attachment 4). Any land or interest in land purchased using the Funds shall be protected in perpetuity as open space and State-listed Species habitat through either (i) an Executive Office of Energy & Environmental Affairs-Division of Conservation Services approved conservation restriction, or (ii) conveyance in fee to a qualified land trust or government entity approved by the Division. Said conservation restriction or deed of conveyance shall be submitted to the Division for review and written approval prior to recordation. If any portion of the Funds remain in the escrow account at the end of said one (1) year period, the Division, and not the Permit Holder, shall have sole responsibility for ensuring that remaining Funds are

	used for land protection, conservation research, habitat management and/or conservation planning to benefit Coastal Heathland Cutworm in Massachusetts.
SC 8.	Habitat Restoration Plan: The Permit Holder has proposed to restore ± 0.10 acres of the Open Space as described in the Restoration Plan (Attachment 5). Any changes to the Restoration Plan shall require prior review and written approval from the Division. Initial restoration activities shall occur prior to and or in conjunction with Work and shall be completed prior to the completion of Work associated with the Project. By the end of the first and second full growing seasons following implementation of habitat restoration activities, a qualified, Division-approved biologist shall prepare and deliver a site evaluation report to the Division and the Permit Holder. Said report shall describe: (i) current habitat conditions (including photographs and detailed descriptions of habitat conditions) within the restoration areas; (ii) an assessment of the success or failure of restoration activities in achieving the desired habitat conditions; and (iii) additional actions recommended to achieve the desired habitat conditions, if necessary. The Permit Holder shall take all reasonable measures necessary to implement the recommendations of the biologist to restore high quality habitats for Coastal Heathland Cutworm, provided that said recommendations are approved in writing by the Division.
SC 9.	Construction Staff Education: All construction, landscaping, and other sub-contractors associated with the Project shall be informed in writing of the likely presence of State-listed species on the Property and <i>what measures should be implemented to minimize direct harm to State-listed Species</i>. Further, no wildlife shall be removed from the Property without approval of a qualified, Division-approved wildlife biologist or the Division except as necessary to receive veterinary treatment in the case of harm during construction.
SC 10.	Observations of State-listed Species: The Division shall be notified, in the form of an NHESP Rare Animal or Plant Observation Form, within ten (10) days of the observation of any State-listed species within or outside the limits of Work. Visit https://www.mass.gov/how-to/report-rare-species-vernal-pool-observations for access to observation reporting forms.

I. Notice of Appeal of Rights:

This Permit is a final decision of the Division of Fisheries and Wildlife pursuant to 321 CMR 10.23. Any person aggrieved by this decision shall have the right to an adjudicatory hearing at the Division pursuant to M.G.L. c. 30A, s.11 in accordance with the procedures for informal hearings set forth in 801 CMR 1.02 and 1.03.

Any notice of claim for an adjudicatory hearing shall be made in writing and be accompanied by a filing fee in the amount of \$500.00. The notice of claim shall be sent to the Division by certified mail, hand delivered or postmarked within twenty-one (21) days of the date of issuance of this Permit to:

Mark S. Tisa, Director
Massachusetts Division of Fisheries and Wildlife
Field Headquarters
One Rabbit Hill Road
Westborough, MA 01581

Any notice of claim for an adjudicatory hearing shall include the following information:

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1. The file number for the project;
2. The complete name, address and telephone number of the person filing the request, and the name, address and telephone number of any authorized representative;
3. The specific facts that demonstrate that a party filing a notice of claim satisfies the requirements of an "aggrieved person," including but not limited to (a) how they have a definite interest in the matters in contention within the scope of interests or area of concern of M.G.L. c. 131A or the regulations at 321 CMR 10.00 and (b) have suffered an actual injury which is special and different from that of the public and which has resulted from violation of a duty owed to them by the Division;
4. A clear statement that an adjudicatory hearing is being requested;
5. A clear and concise statement of facts which are grounds for the proceeding, the specific objections to the actions of the Division and the basis for those objections; and the relief sought through the adjudicatory hearing; and a statement that a copy of the request has been sent by certified mail or hand delivered to the applicant and the record owner, if different from the applicant.



Everose Schlüter, Ph.D., Assistant Director
Massachusetts Division of Fisheries & Wildlife

On this 31st day of August, 2022 before me, the undersigned notary public, personally appeared Everose Schlüter, Ph.D., Assistant Director, proved to me through satisfactory evidence of identification, which was personal knowledge, to be the person whose name is signed on the preceding or attached document, and who swore or affirmed to me that the contents of the document are truthful and accurate to the best of his/her knowledge and belief.

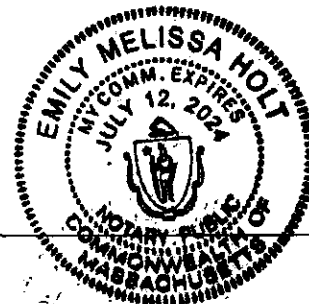


Emily Melissa Holt, Notary Public
My Commission Expires: July 12, 2024

Conservation and Management Permit 022-402.DFW

Issued: August 31, 2022

Expires: August 31, 2027



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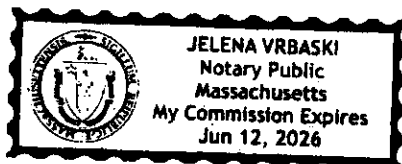
Acknowledgement and Acceptance of all Terms of this Permit

The undersigned below agrees that commencement of any work authorized by and described in this Permit constitutes acknowledgement and acceptance of all terms of this Permit.

Surfside Crossing LLC	
Signatory 1 Organization	J. Threling, Manager

COMMONWEALTH OF MASSACHUSETTS

On this 01 day of 09, 2022 before me, the undersigned notary public, personally appeared JAMES D. FEELEY, proved to me through satisfactory evidence of identification which was MASS DRIVERS LICENSE to be the person whose name is signed on the preceding or attached document, and who swore or affirmed to me that the contents of the document are truthful and accurate to the best of his/her knowledge and belief.



SEAL

Notary Public:

Jelena Vrbaski

My Commission Expires: 06/12/2026

MASSWILDLIFE

Distribution List

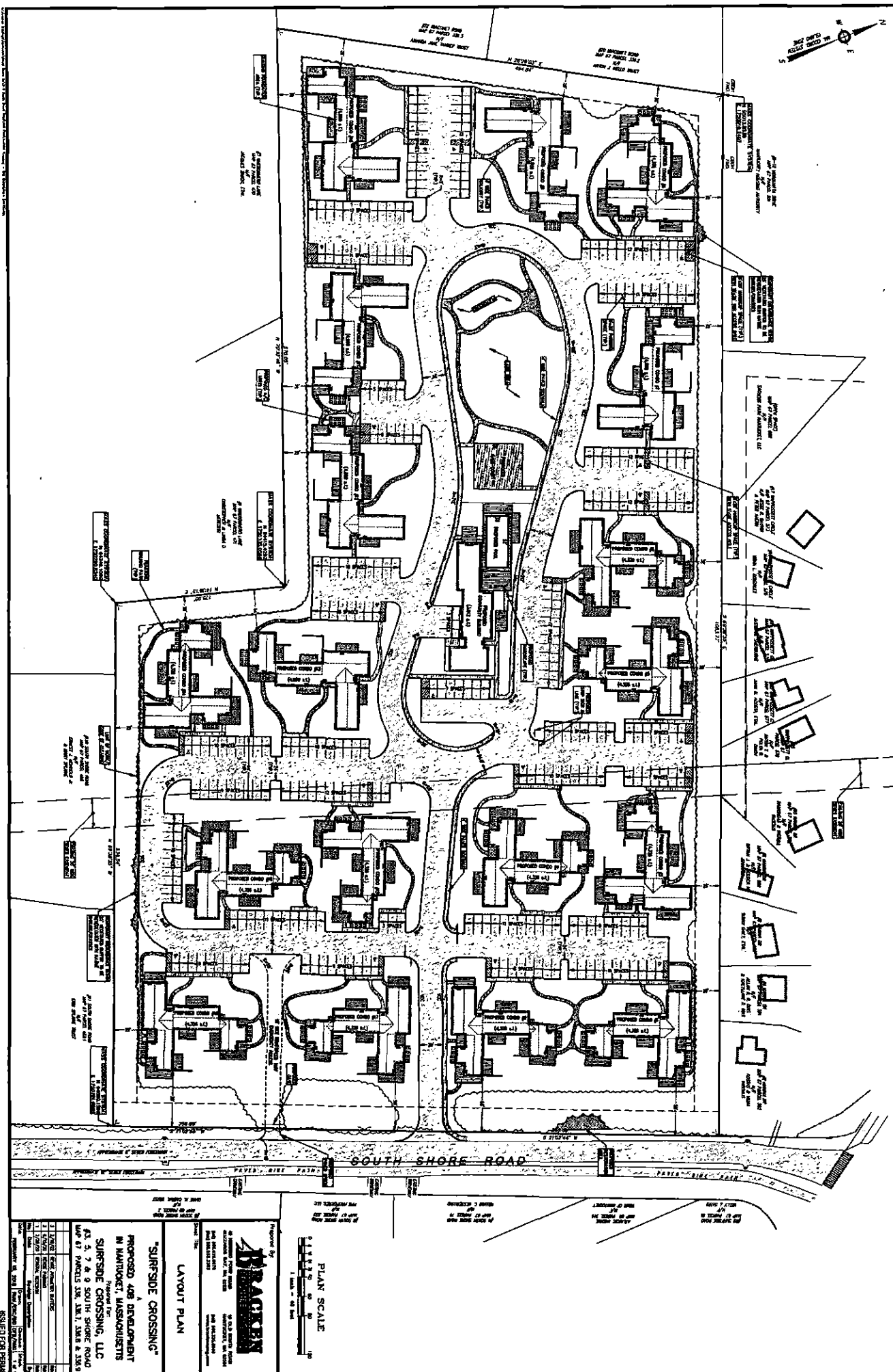
Nantucket Board of Selectmen
Nantucket Conservation Commission
Nantucket Planning Board
Alex Strysky, MA Environmental Policy Act Office
Brian Madden, LEC Environmental Consultants, Inc.

Attachment 1

"Layout Plan" (dated February 15, 2018; revised through February 10, 2022; prepared by Bracken Engineering, Inc.; the "Project Plan"

**STAMPED FOR
IMAGE CAPTURE**

**STAMPED FOR
IMAGE CAPTURE**

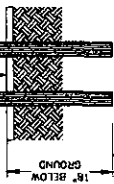


Attachment 2

"Open Space Plan" (dated July 25, 2022; prepared by Bracken Engineering, Inc.; the
"Open Space Plan"

**STAMPED FOR
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Attachment 3

Draft Declaration of Restriction

**STAMPED FOR
IMAGE CAPTURE**

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IMAGE CAPTURE**

Declaration of Restriction
 MAKE ALL CHANGES USING THE TRACK CHANGES FUNCTION OF MS WORD

Copy of draft, Division-approved document; for reference as an attachment to an Authorization issued pursuant to the MA Endangered Species Act. This Declaration of Restriction must be recorded as its own, separate instrument in the Registry of Deeds.

Draft: August 19, 2022; 11 pages
 Grantor: Surfside Crossing, LLC
 Property Address: 3, 5, 7, & 9 South Shore Road, Nantucket
 Grantor's Title: Book 1612 Page 62, Nantucket County Registry of Deeds

DECLARATION OF RESTRICTION

THIS DECLARATION OF RESTRICTION (hereinafter the "Declaration") is made this _____ day of _____, 2022, by Surfside Crossing, LLC, 37 Old South Road, Unit #6, Nantucket, MA 02554 (hereinafter the "Grantor").

WITNESSETH

WHEREAS, collectively, Grantor is the owner of that certain parcels of land known as 3, 5, 7, & 9 South Shore Road (Map 67, Parcels 336, 336.9, 336.8, & 336.7) located in the Town of Nantucket, Nantucket County, Massachusetts (hereinafter the "Premises"), shown on the Open Space Plan, prepared by Bracken Engineering, Inc., dated _____, and recorded in the _____ County Registry of Deeds at Plan Book _____ as Plan _____ (the "Plan"); and

WHEREAS, the Premises are subject to the terms and provisions of the Massachusetts Endangered Species Act (MESA) (MGL. c. 131A) and its implementing regulations (321 CMR 10.00); and

WHEREAS, the Premises contains important habitat for wildlife including but not limited to the Coastal Heathland Cutworm (*Abagrostis benjamini*), which at the time of this recording is listed as a Special Concern species pursuant to the MESA; and

WHEREAS, the Grantor sought authorization from the Natural Heritage and Endangered Species Program within the Division of Fisheries and Wildlife ("Division"), in accordance with the requirements of MESA, to develop the Premises. The Division determined that the development would result in a Take of the Coastal Heathland Cutworm pursuant to the MESA on October 19, 2018 relative to the Premises and the Plan; and

WHEREAS, the Grantor desires and agrees as a condition of Conservation and Management Permit 022-____DFW, dated _____, recorded in the Nantucket County Registry of Deeds at Plan Book _____, Page _____, and as amended (the "Authorization"; incorporated by reference herein), issued

by the Division pursuant to MESA for the project described in the Authorization, to protect *in perpetuity* a total of +/-2.08 acres of the Premises as state-listed rare species habitat as shown on the Plan (the "Open Space"); and

WHEREAS, the Open Space provides actual and substantial benefit to the Grantor as an integral part of the development of the Premises for other conservation purposes. Consequently, the Grantor desires to protect the Open Space by restricting development for the benefit of itself, successors and assigns, including individual successors in ownership of Surfside Crossing, LLC, respectively (collectively, the "Grantor"); and

WHEREAS, Grantor desires and agrees that this Declaration shall run in perpetuity, as implemented in accordance with the requirements of G.L. c. 184 §§ 23-30; and

WHEREAS, Grantor desires and agrees that the Open Space, which in total contains approximately +/- 2.08 acres as shown on the Plan, shall be maintained as habitat and open space, subject to the Prohibited Uses and Reserved Rights set forth below; and

NOW, THEREFORE, Grantor hereby voluntarily declares and imposes in perpetuity upon the Open Space, as implemented in accordance with the requirements of MGL. c. 184 §§ 23-30, the following covenants, conditions and restrictions for the benefit of the Grantor and the Division, and said Open Space shall be held, transferred, sold, conveyed, occupied and used subject to the covenants, terms, conditions, and restrictions contained herein.

1. **Definitions.**

- a. **Hazardous Material**: shall mean any material or substance that, whether by its nature or use, is now or hereafter defined as a pollutant, dangerous substance, toxic substance, hazardous waste, hazardous material, hazardous substance or contaminant under any environmental law, or which is toxic, explosive, corrosive, flammable, infectious, radioactive, carcinogenic, mutagenic or otherwise hazardous and which is now or hereafter regulated under any environmental law.
- b. **Pervious**: shall mean built of materials consisting of unconsolidated minerals such as sand, dirt or gravel, or natural materials such as wood chips or grass.
- c. **Structure**: (whether or not said term is capitalized) shall mean anything constructed or erected which requires permanent or temporary location on, in, over or under the ground or permanent or temporary attachment to something which is erected or placed on the ground and designed, intended or arranged for the housing, shelter, enclosure and/or structural support of persons or animals of any kind, including but not limited to houses, mobile homes, tents, barns, sheds, greenhouses, treehouses, and other buildings of any kind; silos and cribs; swimming pools; playing courts; outdoor riding rings; fences; pads; patios and decks; docks; bridges; roads; driveways and parking areas (whether surfaced with macadam, brick, paving stones, gravel, clay or other material); artificially surfaced walkways; solar panels; satellite dishes and antennae; signs and billboards; storage tanks; windmills and wind turbines; and water, sewer, power, fuel, gas and communication lines, other utility systems and related facilities.
- d. **Passive Recreation**: activities that are non-consumptive uses of resources and do not require prepared facilities like sports fields and pavilions. Passive recreation activities place minimal

stress on the site's resources and are compatible with the conservation values. Examples include hunting, hiking, wildlife viewing, observing and photographic nature, picnicking, walking, bird watching, running/jogging, stargazing, and fishing. Passive recreation excludes mountain bikes, use of motorized vehicles, and horseback riding, unless specified herein.

2. **Prohibited Uses.** Except as to reserved rights set forth in Section 3 below, the Grantor shall not perform or permit others to perform the following acts or uses, which are prohibited, in, on, above or below the Open Space:
- a. **Structures.** Constructing, placing, or allowing to remain any Structure;
 - b. **Extractive Activities and Uses.** Mining, excavating, dredging or removing soil, loam, peat, gravel, sand, rock or other mineral resource or natural deposit, or changing existing topography;
 - c. **Disposal and Storage.** Placing, filling, storing or dumping of soil, refuse, trash, vehicle bodies or parts, rubbish, debris, junk, tree and other vegetation cuttings, waste or Hazardous Material or other substance or material whatsoever, whether or not generated on the Open Space, or the installation of underground storage tanks;
 - d. **Impacts to Vegetation.** Removing, cutting, pruning or destroying vegetation (native or non-native), including, but not limited to trees, shrubs, grasses and ground covers, except as allowed in writing by the Division to remove hazards to users;
 - e. **Pesticides.** Applying or using fertilizers, fungicides, herbicides or pesticides in any quantity;
 - f. **Introduction of Non-Native Species.** Planting, releasing, cultivating, maintaining, or engaging in any other activity that introduces plant or animal species that pose a substantial risk of being invasive or are otherwise detrimental to the native plant and animal community, as determined by the Division. A list of plant species deemed to be invasive is provided in the Massachusetts Prohibited Plant List, which is updated and maintained by the Massachusetts Department of Agricultural Resources;
 - g. **Impacts to Water, Soil and Other Natural Features.** Activities detrimental to drainage, flood control, erosion control, water or soil conservation, archaeological resources or the quality of ground water and wetlands;
 - h. **Domestic Animals and Livestock.** Animal penning or grazing; holding horses, pets, livestock, or domestic animals within a paddock; horseback riding, causing or permitting any domestic or livestock to be unattended or to roam or be at large; and storing or dumping of manure or other animal wastes; any agricultural use;
 - i. **Motor Vehicles.** The use, parking or storage of motorized vehicles, including, but not limited to, trucks, trail bikes, motorized or non-motorized, all-terrain vehicles, dune buggies, boats, trailers, and snowmobiles and parts of these vehicles, except as necessary by the police, fire fighters, ambulance services, or other governmental agents in carrying out their lawful duties; and except for motorized wheelchairs or scooters used by physically challenged parties;

- j. Stone Walls or Markers. Disrupting, removing, or destroying of any stone walls, historical stone monuments, granite fences, granite posts, or boundary markers;
 - k. Docks and Similar Structures. Installing any dock, pier, ramp, jetty or other such structures;
 - l. Subdivision. Subdivision or conveyance of a part or portion of the Open Space (as compared to conveyance of the Open Space in its entirety, which shall be permitted) except as allowed by the Plan and the Authorization;
 - m. Damage or Disturbance. Damaging, disturbing, removing or harming any part or portion of the Open Space or any or resource, real, natural, personal, cultural or historic, except through hunting, fishing, or trapping where permitted and carried out in accordance with regulations issued by the Division pursuant to MGL. c. 130, 101 and 321 CMR, or other written authorization from the Division; and
 - n. Inconsistent Uses. The use of the Open Space for business, residential or industrial purposes, or for more than de minimis commercial passive recreation, or any other use or activity which is inconsistent with or which would otherwise shall not impair the conservation values of the Open Space and the purposes of this Declaration.
3. **Reserved Rights:** The Grantor reserves the right to conduct or permit the following activities in the Open Space, provided they do not materially impair the conservation values or purposes of this Declaration or other significant interests:
- a. Fences. With prior written permission of the Division and after consultation with and consistent with the advice of a professional biologist to ensure such use will not be detrimental to any state-listed species or other wildlife, to erect and maintain sight-pervious, non-enclosing, wildlife friendly fences, such as wooden split rail or other open-faced fences, or low hedges of native species;
 - b. Passive Recreational Uses. To conduct non-commercial, Passive Recreational uses of the Open Space, such as nature study, birding, wildlife observation, walking on existing trails, and similar passive recreation activities, provided such uses do not alter the topography, including, but not limited to the landscape or environmental qualities of the Open Space;
 - c. Monuments and Signs. With prior written permission of the Division, the right to install temporary or permanent boundary monuments and the right to erect and maintain small signs that provide information, including identifying the Grantor, provided that such signage is consistent with the purposes of this Declaration and does not identify the location or existence of any specific state-listed species on the Open Space;
 - d. Vegetation Management. With prior written permission of the Division, the right to remove or control hazardous trees, poison ivy, oriental bittersweet, other invasive or exotic species, insect infestations, diseases, and other types of pests by methods, including but not limited to, the use of spot-applied herbicides, fungicides and pesticides in a manner that minimizes damage to surrounding, non-target species and preserves water quality;

- e. Habitat Management and Restoration. With prior written permission of the Division, the right to monitor, restore, maintain, enhance or otherwise manage biotic communities or habitats for the benefit of native or rare species that include, but are not limited to, application of herbicide, selective planting of native species, removing of brush, selective de minimis pruning and cutting of trees, brush, and grass, prescribed burning or removal of native vegetation, forestry, and modification of soils. All habitat restoration, maintenance or enhancement of rare species habitat shall be done in accordance with the written permission of the Division and applicable Authorization requirements;
- f. Trails. With prior written permission of the Division, the construction of new trails or the relocation of existing trails for Passive Recreation, provided that any trail construction or relocation results in trails that are no wider than four (4) feet. Maintenance of existing trails and construction of new trails may include the installation and maintenance of trail features to protect the conservation values of the Open Space, such as boardwalks, footbridges, railings, steps, or other such features as approved by the Division;
- g. Actions Required by the Division. All actions and activities required or authorized by the Authorization issued by the Division, as it may be subsequently amended and duly recorded within the Nantucket County Registry of Deeds with reference to the Authorization;
- h. Archaeological Investigations and Activities. Archaeological investigations and activities, including without limitation surveys, excavation, and artifact retrieval conducted under the direction of a qualified organization or person, following submission of an archaeological field investigation plan and written approval thereof by (a) the Commonwealth and (b) the State Archaeologist of the Massachusetts Historical Commission, and in accordance with Massachusetts 950 CMR 70.00 with approval of the Town in consultation with the Division; and (c) the Division in accordance with the requirements of MESA; and
- i. Site Restoration. Any work undertaken in conjunction with the reserved rights under Section 3 shall seek to minimize disturbance to the Open Space. Upon completion of any site work performed in conjunction with Section 3, any disturbed areas shall be restored substantially to match the conditions with respect to soil material, grade, and vegetated ground cover that existed prior to said work.

The exercise of any right reserved by the Grantor under Section 3 shall be in compliance with the then-current Zoning By-Laws of the Town of Nantucket and all other applicable federal, state, county and local laws, bylaws, rules and regulations, including, but not limited to Massachusetts Historic Commission regulations and local wetland conservation commission bylaws and regulations. The inclusion of any reserved right in Section 3 requiring a permit from a public agency does not imply that the Division takes any position on whether such permit should be issued.

- 4. Monuments and Signage. The Grantor shall have the right and obligation to maintain in good condition any, bounds, monuments, markers and signs shown on the Plan and demarcating the boundaries of the Open Space, and shall repair and or replace said monuments and signage on an as needed basis.
- 5. Benefited Parties. This Declaration and the protection of the Open Space is hereby intended and declared to benefit the Grantor and the Division. The protection of the Open Space is intended to

benefit the Grantor as a condition of the Authorization and as open space for other conservation purposes that benefit one or more of the parties.

6. **Term.** The intent of this Declaration and its provisions are to restrict the Open Space in perpetuity, as implemented in accordance with MGL. c. 184 §§ 23-30. This Declaration shall run with the Open Space, as shown on the Plan, from the date of recordation in the Nantucket County Registry of Deeds for thirty (30) years and in subsequent increments of twenty (20) years upon re-recording in accordance with the requirements of MGL. c. 184 §§ 23-30.

This Declaration of Restriction shall be binding upon the Grantor and any other party having an ownership interest in the Open Space or claiming to have an interest with respect to the Open Space as tenants, invitees, licensees or otherwise, and all of the respective heirs, successors, grantees, mortgages, assigns, agents, contractors, subcontractors and employees of the foregoing.

In the event that any ownership interest in the Premises, or portion thereof is sold, transferred or conveyed to another party or parties, the Grantor reserves the right to record this Declaration as well as an EEA-DCS approved conservation restriction on the Open Space even after said sale, transfer or conveyance occurs.

Grantor hereby waives all their legal right to and shall forego any action in law or equity of any kind whatsoever attempting to contest the validity of any provision of this Declaration and shall not, in any enforcement action, raise the invalidity of any provision of this Declaration.

7. **Right to Re-Record.** The Grantor and the Division are hereby authorized, jointly and severally, to continually re-record and file any notices and/or instruments in accordance with the provisions of MGL. c. 184 §§ 23-30. Without limiting the foregoing, the Grantor agrees to execute any such notices and instruments upon request of the Division within thirty (30) days of said request.
8. **Enforceability.** The Grantor and the Division, jointly and severally, shall have the authority and right to enforce this Declaration. The Division shall have the right to bring proceedings at law or equity, as may be necessary or appropriate, against any party or parties violating or attempting to violate the terms of this Declaration to enjoin them from so doing and to cause any such violation to be remedied, including but not limited to restoration of the portion of the Open Space adversely affected, after providing written notice to such party or parties and all mortgagees of record if the names and addresses of such parties and mortgagees have been provided in writing to the Division.
9. **Severability.** If any court or other tribunal of competent jurisdiction determines that any provision of this Declaration is invalid or unenforceable, such provision shall be deemed to have been modified automatically to conform to the requirements for validity and enforceability as determined by such court or tribunal. In the event the provision invalidated is of such a nature that it cannot be so modified, the provision shall be deemed deleted from this instrument as though it had never been included herein. In either case, the remaining provisions of this instrument shall remain in full force and effect.
10. **Non-Waiver.** Any election by the Division as to the manner and timing of its right to enforce this Declaration or otherwise exercise its rights hereunder shall not be deemed or construed to be a waiver of such rights.

11. **Access.** The Division, or its duly authorized agents or representatives, shall have the right to enter the Open Space, in a reasonable manner and at reasonable times, and after providing the Grantor with reasonable notice, for the purposes of (a) inspecting the Open Space to determine compliance with this Declaration; (b) enforcing this Declaration; and (c) taking any other action which may be necessary or appropriate, in the Divisions' sole judgment, to remedy or abate any violation hereof, including the right to perform a survey of boundary lines. Notwithstanding this access provision, nothing in this Declaration shall be construed to limit the Division's authority pursuant to MGL. c. 131 §§ 4 and 11 to access the Open Space.

Excluding residents of Surfside Crossing, permitted guests, and/or authorized personnel, this Declaration does not grant to the Town of Nantucket, the general public or any other person or entity any right to enter upon the Open Space except as otherwise provided for herein.

12. **Notice and Approval.** Whenever notice to or approval by the Division is required, Grantor shall notify Division in writing not less than 60 days prior to the date Grantor intends to undertake the activity in question. The notice shall describe the nature, scope, design, location, timetable, MESA File Number and/or CMP Number, if applicable, and any other material aspect of the proposed activity in sufficient detail to permit the Division to make an informed judgment as to its consistency with the purposes of this Declaration and the Authorization. The Division may, at its sole discretion, require the submittal of additional information necessary to evaluate the proposed activity. Within 60-days of receiving Grantor's request and any additional information requested by the Division, as applicable, the Division shall grant or withhold approval in writing. The Division's approval shall not be unreasonably withheld, but shall only be granted upon a showing that the proposed activity shall not materially impair the conservation values of the Open Space and the purposes of this Declaration.

Failure of the Division to respond in writing within 60 days shall be deemed to constitute approval by the Division of the request as submitted, so long as the request sets forth the provisions of this section relating to deemed approval after 60 days in the notice, the requested activity is not prohibited herein, is not in violation of any local, state or federal law, including but not limited to MESA and the Authorization, and the activity will not materially impair the conservation values of the Open Space or the purposes of this Declaration.

Any notice, demand, request, consent, approval or communication that either party desires or is required to give to the other shall be in writing and either be served personally or sent by first class mail, postage pre-paid, addressed as follows:

To Grantor:	Surfside Crossing, LLC 37 Old South Road, Unit #6 Nantucket, MA 02554
To the Division:	Massachusetts Division of Fisheries & Wildlife Natural Heritage & Endangered Species Program 1 Rabbit Hill Road Westborough, MA 01581 Attention: Regulatory Review, CMP No. 022-____.DFW

or to such other address as any of the above parties shall designate from time to time by written notice to the other or, if notice is returned to sender, to an address that is reasonably ascertainable by the parties.

13. **Incorporation Into Deeds, Mortgages, Leases and Instruments of Transfer.** Grantor's successors and assigns shall incorporate this Declaration, in full or by reference, into all deeds, easements, mortgages, leases, licenses, occupancy agreements or any other instrument of transfer by which an interest in and/or a right to use the Open Space or any portion thereof is conveyed. Any such deed, mortgage or other interest purporting to convey any portion of the Open Space without including this Declaration in full or by reference shall be deemed and taken to include said Declaration in full even though said Declaration is not expressly described or referenced therein.
14. **Recordation/Registration.** Grantor shall record and/or register this Declaration with the appropriate Registry of Deeds and/or Land Registration Office upon the later of (a) thirty (30) days of its date of execution, or (b) prior to the initiation of any work on the Premises by the Grantor.
15. **Amendment and Release.** No amendment or release of this Declaration shall be effective unless it has been approved in writing by the Division (hereinafter the "Division Approval") and said amendment or release and the requisite Division Approval has been recorded within the appropriate Registry of Deeds and/or Land Registration Office.

Notwithstanding the foregoing, the release of this Declaration shall be effective at such time as the Grantor has recorded a Division-approved conservation restriction signed by EEA-DCS in the chain of title of the Open Space.

16. **Attachments.**

Exhibit A: Easement Plan of Land showing the Open Space
Exhibit B: Description of Land

*Remainder of Page Intentionally Left Blank
Signature Pages to Follow*

GRANTOR

IN WITNESS WHEREOF, Jamie Feeley, Surfside Crossing, LLC, has caused these presents to be signed, acknowledged and delivered in its name and behalf this ____ day of _____, 20__.

[Name of Grantor and Title if Grantor is corporate entity or Trust – make sure to attach corporate authority or trustee certificate if applicable]

{County} _____, ss. _____, 20__

On this day before me, the undersigned notary public, personally appeared _____ (name), proved to me through satisfactory evidence of identification, which was ☐ photographic identification with signature issued by a federal or state governmental agency, ☐ oath or affirmation of a credible witness, ☐ personal knowledge of the undersigned, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he signed it voluntarily for its stated purpose.

SEAL

 Notary Public
 Commission Expires: _____

ACKNOWLEDGEMENT BY THE MASSACHUSETTS DIVISION OF FISHERIES AND WILDLIFE

This Declaration set forth above by Surfside Crossing, LLC is acknowledged and accepted this _____ day of _____, 20____. The Division acknowledges the reserved rights and obligations of the Division set forth herein.

By: _____

Its: _____

COMMONWEALTH OF MASSACHUSETTS

On this _____ day of _____, 20____, before me, the undersigned notary public, personally appeared _____, proved to me through satisfactory evidence of identification, which was one of the following (check applicable box): ☐ a driver's license; ☐ a valid passport; ☐ personally known to be the person whose name is signed on the preceding or attached document; or ☐ other _____, and acknowledged to me that he/she signed it voluntarily for its stated purpose as _____ of the Commonwealth of Massachusetts Division of Fisheries and Wildlife.

SEAL

Notary Public

Commission Expires: _____

Attachment 4

Draft Escrow Agreement

**STAMPED FOR
IMAGE CAPTURE**

**STAMPED FOR
IMAGE CAPTURE**

ESCROW AGREEMENT

This ESCROW AGREEMENT (this "Agreement") is entered into as of this ____ day of _____, _____ by and between the Massachusetts Division of Fisheries and Wildlife, by and through the Natural Heritage and Endangered Species Program, having a principal place of business at 1 Rabbit Hill Road, Westborough, Massachusetts, 01581 ("Division"); Surfside Crossing, LLC having a principal place of business at 37 Old South Road, Unit #6; and _____ {*escrow agent name*}, having a principal place of business at _____ {*escrow agent address*} ("Escrow Agent"). The Division, Surfside Crossing, LLC and Escrow Agent are referred to herein collectively as the "Parties".

1. Recitals

a. The Conservation and Management Permit No. _____ DFW ("Permit") issued by the Division to Surfside Crossing, LLC contains financial assurance provisions in paragraph #8 of the Special Conditions section requiring that Surfside Crossing, LLC ensure that funds are available in the total sum of \$641,796.00 (the "Funds") for habitat protection, habitat restoration and/or management, and/or conservation planning and research to provide a net benefit to Coastal Heathland Cutworm (*Abagrotis benjamini*) populations in Massachusetts (hereinafter referred to as "Division-approved mitigation activities").

b. The Parties agree the Funds shall be paid by Surfside Crossing, LLC to the Escrow Agent and held in an interest bearing escrow account ("Escrow Account") (further defined in 2 below) and expended pursuant to the terms and conditions described below to mitigate for the "take" of State-listed species and their habitat, as described in the Permit in connection with the Surfside Crossing residential development (the "Project"), located in Nantucket, Massachusetts.

c. Unless otherwise approved by the Division, Surfside Crossing, LLC shall have a period of one (1) year from the date of depositing the final installment of the Funds to permanently protect and or enhance habitat for the Coastal Heathland Cutworm within the Town of Nantucket (the "Habitat Conservation Project"), subject to prior review, approval and any conditions, restrictions, and or approvals required by the Division.

d. Surfside Crossing, LLC shall work with the Division to identify a potential Habitat Conservation Project(s) toward which all or a portion of the Funds may be applied, and must submit a proposal to the Division for prior review and approval. The release of Funds shall be solely under the control and discretion of the Division.

e. If applicable, the Division shall notify the Escrow Agent in writing of any agreements reached with Surfside Crossing, LLC pertaining to release of the Funds for a Division-approved Habitat Conservation Project. The Division shall specifically instruct the Escrow Agent as to where Funds are to be dispersed if any such agreement is reached.

The Parties enter into this Agreement for the purpose of defining the terms and conditions under which the Funds shall be held and disbursed.

NOW THEREFORE, after consideration of the above recitals, Surfside Crossing, LLC, the Division and the Escrow Agent hereby covenant and agree as follows:

2. Escrow Account

a. Prior to the start of Work under the Permit, which is defined as the start of any soil or vegetation disturbance, Surfside Crossing, LLC shall deliver to Escrow Agent fifty (50) percent of the Funds, in the amount of \$ 320,898.00. Additional funding to the escrow account via the Escrow Agent shall occur on the following schedule: (i) twenty-five (25) percent of the Funds, in the amount of \$160,449.00, shall be deposited within six (6) months of the initiation of Work under the Permit; (ii) the final twenty-five (25) percent of the Funds, in the amount of \$160,449.00, shall be deposited within twelve (12) months of the initiation of Work under the Permit.

b. All funds delivered by Surfside Crossing, LLC to the Escrow Agent shall be deposited by the Escrow Agent in a high yield, interest bearing savings account or held in obligations by the US Government at one or more banks ("Depository Bank"), said account(s) to be at all times insured by the Federal Deposit Insurance Corporation and which shall pay interest on the Funds at a reasonable rate. The Escrow Agent shall ensure that all such account(s) are in the name of the Surfside Crossing, LLC only. In addition, the taxpayer information, including tax identification number, provided by the Escrow Agent to the Depository Bank shall be for the Surfside Crossing, LLC only. The Depository Bank shall be entitled to charge the Escrow Account for services related to maintenance of the Escrow Account at a rate not exceeding the Bank's standard charges to other customers for similar services, notwithstanding the minimum balance requirement of Paragraph 2(a).

c. The Escrow Account shall be opened by the Escrow Agent and funds may be withdrawn only by the Escrow Agent and no other person. Disbursements shall be made from the Escrow Account only in accordance with the terms of this Agreement.

d. The Escrow Agent shall maintain a record of all deposits, income, disbursements, and other transactions of the Escrow Account. By January 15th of each year and upon request, the Escrow Agent shall provide to the Parties a written accounting of all transactions. The Parties shall have the right to inspect all books and records of the Escrow Agent relating to the Escrow Account at reasonable times upon request. Escrow Agent's computation of the Funds is correct in the absence of manifest error.

e. The Escrow Agent shall keep possession of the book(s) and bank statements of the Escrow Account until such time as it is terminated in accordance with the terms of this Agreement, or until a successor Escrow Agent is appointed as provided herein.

3. Disbursements

a. From time to time, the Division may, on or before the date which is 10 years from the date of this Agreement, request in writing that the Escrow Agent to deliver all or portions of the Funds, plus any interest thereon, to be used for Division-approved mitigation activities. Upon receipt of such written request, the Escrow Agent shall deliver the requested portion of the Funds to the Division or any party designated in writing by the Division within ten (10) business days of receiving said written request. Delivery of the Funds in accordance with the terms of this Agreement shall be made by cashier's check, or by federal funds wire transfer, at the option of the payee.

b. If, at the end of 10 years from the date of this Agreement any portion of the Funds is

still held in escrow, then the Division shall, within six (6) months after such 10 year date, develop a plan for the use of any remaining Funds by the Division or any party designated in writing by the Division for the implementation of Division-approved mitigation activities in accordance with such plan. The Escrow Agent shall release any remaining Funds to the Division or any party designated in writing by the Division in accordance with such plan.

4. Termination of Agreement

This Escrow Agreement shall terminate, and the Escrow Agent shall be relieved of all liability, after all funds in the Escrow Account have been properly disbursed in accordance with the terms and conditions of this Agreement. When the Escrow Account is terminated, the Escrow Agent shall provide a final accounting of all transactions hereunder to the Parties.

5. Duties and Liabilities of Escrow Agent

a. The sole duty of the Escrow Agent under this Agreement is to receive funds from Surfside Crossing, LLC and to hold the funds for disbursement according to Section 3 above. The Escrow Agent shall be under no duty to pass upon the adequacy of any documents, to determine whether any of the Parties are complying with the terms and provisions of this Escrow Agreement, or to determine the identity or authority of any person purporting to be a signatory authorized by Surfside Crossing, LLC or the Division.

b. The Escrow Agent may conclusively rely upon, and shall be protected in acting on, a statement, certificate, notice, requisition, order, approval, or other document believed by the Escrow Agent to be genuine and to have been given, signed and presented by a duly authorized agent of Surfside Crossing, LLC or the Division. The Escrow Agent shall have no duty or liability to verify any statement, certificate, notice, request, requisition, consent, order, approval or other document, and its sole responsibility shall be to act only as expressly set forth in this Agreement. The Escrow Agent shall not incur liability for following the instructions contemplated by this Agreement or expressly provided for in this Agreement or other written instructions given to the Escrow Agent by the Parties. The Escrow Agent shall be under no obligation to institute or defend any action, suit or proceeding in connection with this Escrow Agreement, unless first indemnified to its satisfaction. The Escrow Agent may consult with counsel of its choice including shareholders, directors, and employees of the Escrow Agent, with respect to any question arising under or in connection with this Agreement, and shall not be liable for any action taken, suffered or omitted in good faith. The Escrow Agent shall be liable solely for its own willful misconduct.

c. The Escrow Agent may refrain from taking any action, other than keeping all property held by it in escrow if the Escrow Agent: (i) is uncertain about its duties or rights under this Escrow Agreement; (ii) receives instructions that, in its opinion, are in conflict with any of the terms and provisions of this Agreement, until it has resolved the conflict to its satisfaction, received a final judgment by a court of competent jurisdiction (if it deems such action necessary or advisable), or it has received instructions executed by both Surfside Crossing, LLC and the Division.

d. Escrow Agent is acting, and may continue to act, as legal counsel to Surfside

Crossing, LLC in connection with the subject transaction, whether or not the Funds are being held by Escrow Agent or have been delivered to a substitute impartial party or a court of competent jurisdiction. *{If the preceding sentence is not applicable, then use the following sentence}* Escrow Agent is not acting as counsel to Surfside Crossing, LLC in Escrow Agent's capacity as escrow agent.

e. Each of the Parties admits, acknowledges and represents to each of the other Parties that it has had the opportunity to consult with and be represented by independent counsel of such party's choice in connection with the negotiation and execution of this Agreement. Each of the Parties further admits, acknowledges and represents to the other Parties that it has not relied on any representation or statement made by the other Parties or by any of their attorneys or representatives with regard to the subject matter, basis or effect of this Agreement.

6. Escrow Agent's Fee

a. Payments for services provided by Escrow Agent shall not be made from Escrow Funds.

7. Investment Risk

a. In no event shall the Escrow Agent have any liability as a result of any loss occasioned by the financial difficulty or failure of any institution, including Depository Bank, or which holds United States Treasury Bills, or other securities, or for failure of any banking institution, including Depository Bank, to follow the instructions of the Escrow Agent. Without limiting the generality of the foregoing, in no event shall the Escrow Agent incur any liability as the result of any claim or allegation that the Escrow Agent should have invested the escrow funds in United States Treasury Bills rather than hold same on deposit at the Depository Bank, or vice versa.

8. Notices

a. All notices permitted or required by this Agreement shall be in writing and shall be deemed duly provided when deposited in the United States mail, postage prepaid, certified or registered mail, return receipt requested, to the other Parties at the addresses set forth in the first paragraph of this Agreement. The Party providing notice may choose alternate methods, including hand delivery, Federal Express, or other recognized overnight courier. Notices provided by hand delivery; Federal Express or other recognized overnight courier shall be deemed duly provided when received at the addresses set forth in the first paragraph of this Agreement.

b. All notices, certification, authorizations, requests or other communications required, or permitted to be made under this Escrow Agreement shall be delivered as follows:

To the DIVISION:

Division of Fisheries and Wildlife
Natural Heritage and Endangered Species Program
ATTN: Regulatory Review, CMP 022-____.DFW

1 Rabbit Hill Road
Westborough, MA 01581

To the Responsible Party:

Surfside Crossing, LLC
37 Old South Road, Unit #6
Nantucket, MA 02554

To the Escrow Agent:

Company, Address, & Contact numbers

or to such other place or to the attention of such other individual as a Party from time to time may designate by written notice to all other Parties.

9. Resignation, Removal, or Successor Escrow Agent

a. If, for any reason, the Escrow Agent is unable or unwilling to continue to act as Escrow Agent, he/she shall give written notice to the other Parties of his/her inability or unwillingness to continue as Escrow Agent. The parties shall agree upon a successor agent, formally appoint the successor agent, and provide written notification to the Escrow Agent of the subsequent appointment within ten (10) business days. The Escrow Agent shall then, within three (3) business days after receiving notice of subsequent appointment, deliver to the successor escrow agent all cash and other property held by the Escrow Agent under this Escrow Agreement. Upon such delivery, all obligations of the Escrow Agent under this Escrow Agreement shall automatically cease and terminate. If no successor escrow agent is designated within the prescribed ten (10) day period, or if notice of subsequent appointment is not received within such period, then the Escrow Agent may, at its option at any time thereafter, deposit the funds and any documents then being held by it in escrow into any court having appropriate jurisdiction, and upon making such deposit, shall thereupon be relieved of and discharged and released from any and all liability hereunder, including without limitation any liability arising from the Funds, or any portion thereof so deposited.

b. The Escrow Agent may be removed at any time by a written instrument or concurrent instruments signed by the Division and Surfside Crossing, LLC and delivered to the Escrow Agent.

c. If at any time hereafter, the Escrow Agent shall resign, be removed, be dissolved, or otherwise become incapable of acting, or the position of the Escrow Agent shall become vacant for any of the foregoing reasons or for any other reason, the Parties hereto shall promptly appoint a successor Escrow Agent. Upon appointment, such successor Escrow Agent shall execute and deliver to his/her predecessor and to the Parties hereto an instrument in writing accepting such appointment hereunder. Thereupon, without further act, such successor Escrow Agent shall be fully vested with all the rights, immunities, and powers, and shall be subject to all the duties and obligations of his/her predecessor, and the predecessor Escrow Agent shall promptly deliver all books, records, and, other property and monies held by him/her hereunder to such successor Escrow Agent.

10. Interest

a. All interest income accrued on funds in the Escrow Account shall become part of the Escrow Account and shall remain in the Escrow Account. The Surfside Crossing, LLC has the responsibility to pay federal and state taxes on the accrued interest on its funds in the Escrow Account, and the Escrow Agent may disburse funds from the Escrow Account for such purpose. Said disbursement may be made by the Escrow Agent only after receiving a written confirmation from Surfside Crossing, LLC, with a copy sent to the Division, of all itemized federal and state tax liabilities incurred by interest accrued on the Escrow Account.

11. Miscellaneous

a. This Escrow Agreement shall be binding upon, and shall inure to the benefit of the respective Parties hereto and their successors and assigns.

b. This Agreement shall be governed by and be construed in accordance with the laws of the Commonwealth of Massachusetts.

c. This Agreement shall be interpreted as an instrument under seal.

d. This Agreement may be executed in any number of counterparts, each of which shall constitute an original, and all counterparts shall constitute one Agreement.

e. This Escrow Agreement may not be amended, altered, or modified except by written instrument duly executed by all of the Parties hereto.

f. If the term, condition or provision of this Agreement, or the application thereof to any circumstances or party hereto, ever shall be held to be invalid or unenforceable, then in each such event the remainder of this Agreement or the application of such term, condition, or provision to any other circumstance or party hereto (other than those as to which it shall be invalid or unenforceable) shall not be thereby affected, and each term, condition and provision hereof shall remain valid and enforceable to the fullest extent permitted by law.

g. Each individual and entity executing this Agreement hereby represents and warrants that he, she or it has the capacity set forth on the signature pages hereof with full power and authority to bind the party on whose behalf he, she or it is executing this Agreement to the terms hereof.

12. Effective Date

a. This Agreement shall take effect on the latest date of execution by the Division, Surfside Crossing, LLC, or Escrow Agent.

[SIGNATURE PAGES FOLLOW]

IN WITNESS WHEREOF, the parties have caused this Escrow Agreement to be duly executed as of the day and year first written above.

FOR THE MASSACHUSETTS DIVISION
OF FISHERIES AND WILDLIFE:

Name:

Title:

COMMONWEALTH OF MASSACHUSETTS

_____, ss

_____, 20__

On this ___ day of ___, 20___, before me, the undersigned notary public, personally appeared _____, and proved to me through satisfactory evidence of identification, which were _____, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he/she signed it voluntarily for its stated purpose.

Notary Public

My commission expires:

FOR Surfside Crossing, LLC:

By: _____.

By: _____

Name: _____

Its: _____

COMMONWEALTH OF MASSACHUSETTS

_____, ss

_____, 20__

On this __ day of __, 20__, before me, the undersigned notary public, personally appeared _____, and proved to me through satisfactory evidence of identification, which were _____, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he/she signed it voluntarily for its stated purpose.

Notary Public

My commission expires:

FOR THE ESCROW AGENT:

Company Name

By: _____

Name:

Title:

COMMONWEALTH OF MASSACHUSETTS

_____ ss. _____, 20__

On this __ day of __, 20 __, before me, the undersigned notary public, personally appeared _____, and proved to me through satisfactory evidence of identification, which were _____, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he/she signed it voluntarily for its stated purpose.

Notary Public

My commission expires:

Attachment 5

“Revegetation Planting Plan” (dated August 9, 2022) and “Revegetation Planting Plan Narrative” (dated August 16, 2022) (collectively, prepared by LEC Environmental Consultants, Inc.; the “Restoration Plan”

**STAMPED FOR
IMAGE CAPTURE**



LEC Environmental Consultants, Inc.
www.lecenvironmental.com

NHESP File No. 12-31035
 Surfside Crossing
 Nantucket, MA
 8/16/22

Revegetation Planting Plan Narrative

Purpose

Habitat revegetation and enhancement is proposed on-site within four (4) specific areas to benefit the Coastal Heathland Cutworm (*Abagrotis benjamini*) as depicted on the *Revegetation Planting Plan*, prepared by LEC, dated August 9, 2022.

Two revegetation/enhancement areas (740± sf) will be temporarily disturbed for regrading needs associated with the project. Furthermore, revegetation/enhancement is proposed within two existing encroachment (non-habitat) areas; 1) a gravel turnout area adjacent to South Shore Road (615± sf) and 2) a former paddock area along the southerly property boundary (3,100± sf). The revegetation/enhancement areas will be planted with a combination of Beach Plum (*Prunus maritima*), Black Cherry (*Prunus serotina*), and Shadbush (*Amelanchier canadensis*) and a native seed mix containing Pennsylvania sedge (*Carex pensylvanica*), little bluestem (*Schizachyrium scoparium*), and/or switchgrass (*Panicum virgatum*).

Beach Plum has been identified as the larval host plant for Coastal Heathland Cutworm and is lacking on-site. Coastal Heathland Cutworm are suspected to feed on Black Cherry and Shadbush. The planting of Beach Plum, Black Cherry, and Shadbush within these restoration areas will therefore enhance on-site potential habitat for Coastal Heathland Cutworm.

Monitoring

The revegetation/enhancement areas will be monitored for a period of at least two (2) years. A NHESP-approved botanist shall conduct monitoring site inspections during the first two growing seasons. Monitoring shall focus on evaluating survivorship of the plantings. The plantings shall be appropriately irrigated as necessary and as recommended by the botanist. A summary report shall be submitted to NHESP at the end of the first and second growing seasons documenting the health and vigor of the revegetation/enhancement areas and any recommendations.

Invasive Species Management

Invasive species will be managed as site conditions dictate utilizing Best Management Practices recommended by the NHESP-approved botanist. Small concentrations of invasive species shall be dug up, bagged, and brought to an approved facility (e.g., Madaket Landfill solid waste digester) for proper disposal. Larger concentrations may require herbicide treatment following recommendations from the NHESP-approved biologist and written approval from NHESP.

