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CONSERVATION COMMISSION **SPECIAL PUBLIC MEETING**

131 Pleasant Street
Nantucket, Massachusetts 02554

www.nantucket-ma.gov

Thursday, January 11, 2024 – 5:00 p.m.

This meeting was held via remote participation using ZOOM and YouTube.

<https://www.youtube.com/watch?v=DUDc02aOCpE>

Commissioners: Ian Golding (Chair), Seth Engelbourg (Vice Chair), Mark Beale, Tim Braine, Mike Misurelli, Joe Plandowski, and Linda Williams

Called to order at 5:00 p.m. by Chair Golding

Staff in attendance: Will Dell’Erba, Conservation Agent; Jeff Carlson, Natural Resources Director
 Attending Members: Golding, Engelbourg, Beale, Misurelli, Plandowski, and Williams
 Absent Members: Braine

Chair Golding called for public comments for items not on the agenda. There were no public comments.

I. PUBLIC HEARING

Public Hearing – Discussion of Revision and Potential Adoption of the Town of Nantucket Wetland Protection Regulations (Chapter 390)

Sitting:	Golding, Engelbourg, Beale, Misurelli, Plandowski, and Williams
Representative:	
Public:	None
Documentation:	Site and topographical plans, photos, requisite departmental reports and correspondence.
Discussion: (00:02:30)	Misurelli - Raised questions regarding the two-foot separation to groundwater requirement mentioned in previous discussions. - Admitted to not fully understanding the requirement and suggested its placement and application might be unusual. - Welcomed further discussion or consideration for its removal from the Wetland Protection Regulations. Williams - Expressed support for removing the two-foot separation requirement, citing that further investigation by Jeff or Will did not reveal a substantial reason for its inclusion. - Recalled discussions about possibly applying this requirement selectively, based on neighborhood or proximity to specific projects relative to wetlands, but noted that the conversation had not progressed beyond that point. Jeff Carlson - Mentioned efforts to gather information on engineering practices concerning high groundwater and its impact on structures. The feedback highlighted concerns over groundwater effects on buildings. - Suggested that the regulation's current application to bordering vegetated wetlands might need reassessment, especially considering comments about groundwater changes due to sea level rise. - Recommended ensuring consistent determination of groundwater depth and proposed considering whether to address the separation requirement as a separate performance standard, depending on its relevance. Engelbourg - Emphasized the regulation's foresight in managing the impacts of climate change and sea level rise on groundwater levels. - Advocated for maintaining the regulation to prevent future development impacts, highlighting the upward mobility of freshwater due to sea level rise.

	- Stressed the importance of the regulation for coastal resiliency and resource protection, regardless of its original intent. Williams - Suggested that the requirement might need adjustment based on specific circumstances. - Proposed that in some cases, more than two feet might be necessary due to sea level rise, while in others, the standard two feet might not be relevant. - Called for a more nuanced approach to applying this regulation. Engelbourg - Further elaborated on the challenges of implementing variable regulations, citing the difficulties in understanding and enforcing them. - While theoretically agreeing with Williams on the need for adaptability, recommended maintaining the current two-foot requirement for consistency and simplicity. - Suggested keeping the regulation as is, with the possibility of future revisions based on observed environmental impacts. - Addressed public concerns about potential changes leading to non-conforming lots and regulatory impacts on existing developments. - Clarified that changes to regulations would not be retroactive, meaning pre-existing uses would not be affected. - Acknowledged that while stricter regulations or expanded buffer zones might limit future development opportunities on certain lands, such changes are a standard aspect of land use planning and are not unique to the Conservation Commission. - Emphasized that rules and regulations concerning land use evolve regularly across various boards, including the Historic District Commission (HDC), Planning, and Zoning. Williams - Recalled a previous meeting's consensus to remove the setback requirement from the current update. - Cited personal notes indicating agreement, if not by formal vote, then by general sentiment. Plandowski - Corroborated Williams' recollection, adding that the commission had discussed seeking a UMass study for scientific support for any proposed changes. Misurelli - Remembered the discussion slightly differently, crediting Engelbourg with the willingness to proceed with the regulation change by removing the setbacks, as part of a broader update. Engelbourg - Clarified his stance, expressing openness to forego the enhanced setback discussion for now to expedite the rest of the updates, given their prolonged development over five years. However, emphasized his strong commitment to revisiting the buffer zone enhancements in future planning processes. Golding - Highlighted Nantucket's lag behind other Massachusetts communities in implementing minimum setback requirements for wetlands protection. - Referenced several towns with established setback policies and advocated for Nantucket to adopt similar standards, citing a comprehensive scientific study supporting wetland buffer zones. - As chair, Golding expressed a desire to address buffer zone regulations promptly, suggesting the division of regulatory updates into two phases to ensure progress. Carlson - Acknowledged the value of discussing enhanced setback requirements, suggesting the commission review materials and studies used by other communities as benchmarks. - Noted the timely mention of draft changes to Massachusetts DEP wetland regulations, particularly concerning stormwater management and coastal
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	adaptation strategies, which were released just before the Christmas break. These proposed changes emphasize green infrastructure over traditional engineering solutions for stormwater issues, aligning with the direction the commission has been considering. - Recommended ensuring that Nantucket's regulations do not diverge from the state's proposals, highlighting the need for a comprehensive review to align local regulations with DEP's direction. - Additionally, raised concerns about the practicality of implementing new setback requirements, suggesting that the commission explore regulation adjustments and transitional measures for existing structures to facilitate clear application and the possibility of setting performance standards instead of relying on waivers for pre-existing sites. Engelbourg - Emphasized the clear scientific consensus on the benefits of expanded setbacks for wetland health and wildlife protection, referencing numerous studies and contributions from the Nantucket Land and Water Council. - Highlighted the extensive research in the field of riparian and wetland buffers, underlining the obligation of the commission to consider such evidence in their regulatory updates. - Addressed the practical challenges of implementing these changes in Nantucket, acknowledging the need for a clear and actionable approach for applicants. - Reinforced the view that adopting expanded setbacks aligns with the commission's duty to protect Nantucket's natural resources. Steven Cohen - Provided feedback on both the groundwater separation and buffer zone topics. - Highlighted the lack of scientific basis and performance standards in the current groundwater separation rule, suggesting the regulation be improved to include clear criteria for when waivers might be granted. - On the buffer zone issue, urged a science-based approach to any expansions, noting that the appropriateness of buffer sizes may vary depending on the specific wetland resource. - Expressed concern over the potential impact of a blanket increase in buffer zones, recommending the commission assess the potential effects on land use and develop clear performance standards to guide decision-making. Golding - Supported the idea of staggered buffer zones but emphasized the commission's environmental focus, suggesting that the impact assessment on lots is beyond the commission's purview. Plandowski - Agreed with Golding, stating that the assessment of lot impacts should be the responsibility of other parties, not the Conservation Commission. Peter Brace, Chairman of the Coastal Resilience Advisory Committee, - Expressed support for the commission's efforts to incorporate coastal resilience into the bylaw amendments. - Emphasized the importance of recognizing the risks of sea-level rise and climate change and proposed the specific inclusion of the term "coastal" before "resiliency" to clarify the focus on coastal areas. - Highlighted concerns about the proliferation of swimming pools in vulnerable areas and the potential impacts on wetland and coastal resilience. Golding - Reassured that the commission had already considered many of the suggestions made by Brace and is open to further discussion. - Responded to Daly's concerns by highlighting the commission's efforts to balance environmental protection with community interests, emphasizing the importance of staying true to the commission's regulatory mission while acknowledging the challenges presented by Nantucket's finite resources.
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	Frank Daly, Builders Association, President - Expressed surprise at the meeting's occurrence and noted a missed opportunity for collaboration between the Conservation Commission and the Builders Association. - Highlighted recent Mass DEP regulations and advocated for a similar process of public engagement by the Commission. - Emphasized the challenges of enforcing numerous new regulations simultaneously without integrated stakeholder input. - Expressed the necessity of collaboration among industry stakeholders, state entities, and the Commission to ensure the practicality and enforceability of regulations. - Cautioned against broad regulatory changes without considering Nantucket's unique land availability and urged the Commission to assess the impact of proposed buffer zone expansions thoughtfully. - Raised concerns about the potential retroactive impact of regulations, calling for clear definitions to guide enforcement and compliance. - Stressed the importance of the Commission's role in guiding sustainable development on Nantucket, balancing environmental protection with the island's housing and development needs. Golding - Emphasized the commission's awareness of the challenges Daly outlined, reiterating their commitment to balancing these issues with their fundamental mission of environmental protection. Carlson - Provided a detailed explanation regarding the impact of new regulations on previously permitted activities and structures. - Clarified that lawfully permitted developments cannot be required to conform retroactively to new regulations. - Emphasized that once something is constructed or permitted in compliance with existing regulations, it retains its lawful status unless it falls out of compliance, diverging into enforcement issues. - Elaborated on the challenges that arise when buffer zones are altered, potentially placing existing developments into future non-compliance. This situation, he noted, often leads to perceptions of retroactivity among property owners, who may find their previously compliant properties now at odds with new rules. - Highlighted the importance of preparing for discussions around how modifications to properties, which now do not conform to updated regulations, can be managed. - Stressed the need for clear mechanisms to allow property owners to adjust or modify their uses within the new regulatory framework. - Addressed the concerns of property owners seeking to make modifications under the new regulations, underscoring the necessity of providing clear guidance on how to navigate these situations. Cohen - Highlighted the practical implications of changing buffer zones beyond the designation of properties as pre-existing non-conforming. - Pointed out that such regulatory changes could significantly restrict property owners' ability to develop or modify their properties within newly adjusted buffer zones. - Emphasized that the consequences extend beyond mere compliance with new setback requirements; they can effectively freeze the current state of properties, preventing any future expansions or modifications that were previously permissible. - Mentioned concerns like the "no new habitable space" rules that could lock existing houses in their current configurations, placing a burdensome limitation on property owners.
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	- Argued that these changes do more than shift regulatory lines; they impose restrictions that could prevent homeowners from making additions or improvements, such as adding a bedroom. - Urged the commission to weigh the impact of such regulatory adjustments against the environmental benefits they aim to achieve, considering the varying significance of different wetland resources. Engelbourg - Addressed the proposal of implementing variable buffer zones for different resource areas, acknowledging the necessity of such an approach. - Emphasized that while the commission's regulations are science-informed, they cannot be purely science-based due to practical limitations. For instance, he noted that optimal buffer zones for vernal pools, based strictly on scientific data, would require distances as extensive as a thousand feet to ensure the full annual lifecycle success of certain amphibians found on Nantucket, which is impractical. - Acknowledged the need to differentiate buffer zones based on the type of wetland resource, suggesting that areas like bordering vegetated wetlands or salt marshes might warrant larger buffer distances than coastal beaches or dunes. However, he also recognized that in some cases, the ideal buffer size for maximum protection of species and habitats might exceed feasible limits. - Advocated for finding a balance between scientific recommendations and realistic regulatory practices. - Stressed the importance of making science actionable within the context of Nantucket's unique environmental and land-use challenges, suggesting that some compromises might be necessary to achieve a balance between environmental protection and practicality. Beale - Expressed concern regarding the potential expansion of buffer zone boundaries and highlighted the flexibility within the regulatory framework for waivers. - Pointed out that even if the buffer zones were expanded, the commission could still consider waivers for property owners without reasonable alternatives for development or modification within these new boundaries. - Suggested that this approach could help alleviate concerns from homeowners affected by the changes. - Clarified that while the establishment of new boundary lines might be broad-reaching, the commission has historically exercised discretion in granting waivers for compelling reasons, such as hardship or the lack of feasible alternatives. Carlson - Shared his perspective on the use of waivers within the regulatory framework, emphasizing that waivers should be exceptional rather than routine. - Believes that if waivers are granted frequently, it may indicate a need to reevaluate the regulations themselves and possibly incorporate more specific performance standards. - According to Carlson, waivers are intended for extraordinary circumstances where compliance with performance standards is unfeasible, not for accommodating a multitude of pre-existing conditions through individual exceptions. - Argued that relying heavily on waivers could undermine the integrity of the regulations, as each exception could diminish their overall effectiveness. - Suggested that developing clear performance standards could both enhance resource and buffer zone protection and provide property owners with predictable guidelines for project planning. Williams - Suggested deferring the specific topic of buffer zones and waivers to a later date. - Recognized that the complexity and significance of the issues raised would not be resolved in the current meeting. - Noted that several stakeholders had communicated their inability to attend the meeting due to the date not being clear to them and expressed a desire to avoid making a decisive judgment on this critical aspect without broader participation.
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	- Acknowledged the value of the points raised during the discussion but emphasized the importance of taking more time to consider everyone's input and to ensure a more inclusive decision-making process. Engelbourg - Introduced the concept of mandatory mitigation as a potential solution to address concerns regarding the expansion of no-build setback lines. - Explained that this approach would allow for development within newly established buffer zones under the condition that developers undertake wetland mitigation or restoration efforts. - Suggested that if the no-build setback line were extended from 50 to 75 feet, developers could still proceed with their projects within the 75-foot zone by compensating for the impact through wetland restoration. This compensation could be quantified based on the square footage of the proposed structure, with a mitigation ratio of one and a half to two times the footprint of the structure being considered. - For example, a 100 square foot structure built within the 75-foot buffer might necessitate the restoration of 150 to 200 square feet of wetland area within the same buffer zone. - Stated that such a policy would allow for continued development while simultaneously ensuring additional wetland benefits through mandatory mitigation. This approach would also naturally limit the size of projects to what can be feasibly mitigated by the developer or push the development outside the 75-foot buffer zone, hence providing a balance between property development and wetland conservation. - Highlighted that this strategy offers greater flexibility for property owners and builders, while still significantly benefiting wetland protection efforts. Burton Balkind (Comments read by Dell'Erba) - Urged the Commission to proactively error on the side of larger buffers as water is rising. Daly - Commended Engelbourg's proposal as an innovative solution for Nantucket's complex regulatory challenges, suggesting it could lead to better outcomes and should be incorporated into the regulations. - Noted the need for clearer regulation drafting and urges the commission to allow more time for thorough development and integration with state-level efforts by Mass DEP, aiming for well-defined regulations and positive, coordinated environmental progress. Carlson - Proposed a structured approach to address the buffer zone issue and other regulatory concerns. - Suggested compiling all relevant information and previously discussed mitigation ideas for existing properties into a comprehensive package for review. - To facilitate a focused discussion on buffer zones, organizing a workshop meeting is recommended, inviting key stakeholders such as the Builders Association, regular applicants, and using various communication channels to ensure broad awareness and participation. - Mentioned the need to align with the Mass DEP regulations. - Proposed that staff complete a comparison between the DEP's regulations and the commission's proposed changes. The goal is to prepare a clean copy of the regulations with proposed amendments, accompanied by a summary of changes, for potential adoption in an upcoming meeting. Misurelli - Noted that the DEP is currently emphasizing regulations related to velocity zones and coastal banks. - Expressed openness to further discussions on setbacks within these specific areas, suggesting a focused review of DEP's proposals.
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	Cohen - Supported Engelbourg's suggestion of incorporating impact mitigation and resource improvement as part of the regulatory approach, highlighting its potential to enhance wetland conditions while naturally limiting development impacts. - Proposed considering a dual system for mitigation, similar to practices used by the planning board, where if direct mitigation on a property owner's land is not feasible, a greater amount of mitigation could be performed elsewhere. - Suggested exploring opportunities for contributions toward environmental restoration projects, such as eelgrass restoration, as a form of off-site mitigation. - Recommended that Jeff and Will further evaluate its feasibility and integration into the regulatory framework. Engelbourg - While agreeing in principle with Mr. Cohen's suggestion about preferring on-site to off-site mitigation and requiring a higher level of mitigation for off-site activities, expressed uncertainty about the legal feasibility of such an approach under the Wetland Protection Act. - Mentioned his understanding that the Act mandates all mitigation activities to occur on-site and suggest that this point may have been discussed previously. - Recommends consulting with staff or seeking an opinion from Town Council to determine whether off-site mitigation could be considered an option within the framework of the Conservation Commission's regulatory practices. D.Anne Atherton - Asked what the process was for updating the Wetland Regulations. Carlson - Explained the process for updating wetland regulations and clarified the distinction between state laws, local bylaws, and the commission's regulations. Here's a summary of the key points: - State Wetland Protection Act: The Nantucket Conservation Commission operates under this act, which does not permit alterations by the commission. However, the act allows the commission to adopt local wetland bylaws. - Local Wetlands Bylaw: Initially adopted through a town meeting, any changes to this bylaw also require town meeting approval. - Regulations to Implement Bylaws: The local wetlands bylaw includes provisions that permit the Conservation Commission to draft and promulgate regulations to ensure the bylaw's effectiveness. These regulations are enacted solely by the Conservation Commission's adoption. - Process for Changing Regulations: - Requires a public hearing with a specific notice requirement. - Changes must be advertised with a set effective date, typically needing at least a month due to a 21-day advertisement requirement. - Scope of Changes: - Broad, novel concepts might necessitate revisions to the bylaw itself, requiring a town meeting vote. - Adjustments focused on managing the bylaw's effectiveness can be made through the commission's regulatory process. - This explanation delineates the procedural steps and distinctions between amending bylaws (which need town meeting approval) and adjusting regulations (which the Conservation Commission can adopt directly following a structured public process). Atherton - Inquired about the last update to the wetland regulations, which Jeff confirms was in 2013, making it 11 years since the last revision. - Appealed to the Conservation Commission, emphasizing the urgency of updating the regulations without further delay.
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	- Highlighted recent environmental challenges, such as erosion and inundation on the Southshore, to underscore the necessity for prompt action from the Commission to protect wetland resources. - Acknowledged potential pushback from the development community, suggested that it is possible to work collaboratively to formulate balanced regulations. - Urged the Commission to act swiftly to address these matters, stressing the importance of not postponing these updates any longer. Carlson - Before proceeding with motions and votes on the proposed updates to the wetland regulations, recommended ensuring clarity by voting on a non-redlined, clean copy of the document. - Suggested that while the redlined copy, which shows all the amendments, should still be provided for reference, a clean copy with the changes incorporated should be the version officially adopted. - Assures that preparing this clean copy will not be a lengthy process but proposed continuing the hearing until the next regular meeting to allow sufficient time for assembly. Williams - Supported the decision to delay action until February 1st, noting Will's upcoming attendance at a seminar on DEP updates. This delay will allow time to review how DEP's new regulations compare with their current proposals and potentially adjust their approach based on this new information. - Emphasized the importance of not rushing the process, suggesting that the additional insights gained from the seminar could influence revisions in certain sections of the regulations, underlining the value of waiting to ensure all aspects are thoroughly considered before making final decisions. Beale - Expressed uncertainty regarding the specific language of the regulations concerning pools within flood zones, particularly how these regulations would apply to pools that are elevated or raised above ground level. - Emphasized the importance of carefully reviewing the wording to ensure it adequately addresses different types of pool installations, including those that are flush-mounted or have specific elevation standards. Carlson - Clarified that the current draft of the regulations proposes a complete prohibition of pools within designated flood zones. This prohibition applies irrespective of the pool's elevation within that zone. Whether the pool is at a lower elevation or significantly higher, if it is located within the mapped flood zone, the regulations would prohibit its construction. - Stated that the meeting scheduled for February 1st will address all topics except for the buffer zone issue, which has been extensively discussed. The purpose of this meeting is to finalize other pending matters while planning to revisit the buffer zone topic at a later date, once the other regulatory updates have been addressed.
Action:	Continued to February 1, 2024.

II. PUBLIC MEETING

Discussion of Request for Independent Legal Counsel Pertaining to SBPF NOI

Sitting:	Golding, Engelbourg, Beale, Braine, Misurelli, Plandowski, and Williams
Public:	None
Discussion:	Golding - Emphasized the urgency of engaging independent legal counsel for the commission, especially in light of regulations outlined in Chapter 136, Section 1363C of the Wetlands regulations, which authorizes the commission to require an applicant to cover the costs of expert consultants necessary for application evaluation. - Referenced a previous request made two months prior for the Town Council's opinion regarding two houses involved in a stalemate with SBPF (Siasconset Beach Preservation Fund). - Highlighted the complexity of the situation, particularly with the town being a co-applicant with SBPF, underscoring the need for independent counsel to address several issues, starting with the Memorandum of Understanding (MOU) dated March 23, 2022. This MOU stipulates that the board and SBPF would collaborate to bring the existing project into compliance with the compensatory sand requirement of the orders of conditions before proceeding with the NOI (Notice of Intent). Carlson - Acknowledged the commission's discussion on the need for independent legal counsel, expressing willingness to draft and submit a request if desired by the commission. - Cautioned against delving into detailed aspects of the specific application due to the ongoing public hearing, emphasizing that while a request for legal assistance is appropriate, discussing substantive details could be problematic. - Suggested that questions regarding the applicability or enforceability of decisions from other boards might be more suitably addressed directly with those boards. - Mentioned that further discussion on this matter could take place during the regular session on the 25th, indicating a structured approach to handling the request for independent counsel while navigating the complexities of the active public hearing process. Williams - Clarified her perspective on the type of assistance needed by the commission, distinguishing between legal counsel and the need for technical expertise. - Suggested hiring an expert for a peer review—an engineer with expertise relevant to the commission's applications—rather than focusing solely on legal representation. - Emphasized the importance of having an independent engineering review to thoroughly assess the technical aspects of the application in question. - Expressed concern that seeking advice from Town Council might limit the commission's ability to secure an independent engineering review, indicating a preference for technical over legal expertise at this stage. Golding - Clarified that his suggestion to seek expert legal opinion does not mean excluding other types of expert advice. Williams - Expressed concern about securing funding for independent expertise, recalling past challenges in obtaining financial support. - Stated her concern that requesting funds for legal counsel might jeopardize their chances of also receiving funding for an independent engineering review. Beale - Emphasized the urgency of sending out a request for independent legal counsel as soon as possible, noting that time is already advancing regarding the Notice of Intent (NOI). - Expressed a strong preference for having their own counsel to feel more comfortable and adequately supported in navigating the process.

	Misurelli - Advocated for a more targeted approach in their requests to ensure that, at the very least, they receive specific legal advice on critical matters currently facing the commission. Golding - Emphasized the unique situation presented by the Notice of Intent (NOI) involving the town and SBPF, highlighting the necessity for independent legal counsel given the complexity and time-sensitive nature of the case. - Unlike other NOIs where town counsel's opinion could be relied upon without urgent time constraints, believes that legal counsel will be essential for navigating this particular NOI. - Advocated for arranging independent legal counsel proactively, before delving deeper into the NOI process, to avoid potential delays. Engelbourg - Clarified that the bylaw section referenced allows the commission to hire any consultant deemed necessary, historically used for biological or engineering reviews. However, see no restriction against hiring a legal consultant under this provision. - Differentiated between a legal consultant, who provides legal opinions, and a representing attorney, who officially represents the commission. - Supported pursuing legal consulting to aid in decision-making and address the commission's needs for legal insight, highlighting the importance of understanding the distinction between consulting and representation in this context. Golding - Acknowledged the importance of legal preparation for potential litigation involving decisions made by the Conservation Commission. - Referenced Section 4.2, specifically 4.2 D10, of the Town's bylaws, which outlines the town manager's authority regarding litigation and the circumstances under which a board, such as the Conservation Commission, may choose to be represented by special counsel, funded similarly to Town Counsel. - Emphasized the need for groundwork with a legal consultant to ensure the commission is prepared to invoke this provision if challenged in court. RJ Turcotte - Highlighted the conflict of interest when the municipality itself is an applicant, the speaker states the impossibility of using Town Council under such circumstances. - Stated that he was willing to providing examples of other towns that have sought independent counsel for their boards by the specified deadline, reinforcing the argument that regulatory boards and applicants cannot share legal representation due to their fundamentally different roles and interests.
Motion:	Motion to ask staff to draft a letter requesting legal counsel for the assistance with the SBPF application. (Made by: Beale) (Seconded by: Plandowski)
Vote:	Carried: //7:0 – Braine, Engelbourg, Misurelli, Plandowski, Williams, Golding (aye)

Adjournment:

Motion:	Motion to adjourn. (Made by: Williams) (Seconded by: Plandowski)
Vote:	Carried: //7:0 Engelbourg, Golding, Braine, Misurelli, Plandowski, Williams (aye)

Submitted by:
Elaina Cano