



CONSERVATION COMMISSION

PUBLIC MEETING

2 Bathing Beach Road
Nantucket, Massachusetts 02554

www.nantucket-ma.gov

Wednesday, March 31, 2021 – 4:00 p.m.

*This meeting was held via remote participation using ZOOM and YouTube,
Pursuant to Governor Baker’s March 12, 2020 Order Regarding Open Meeting Law*

Commissioners: Ashley Erisman (Chair), Ian Golding (Vice Chair), David LaFleur, Joe Topham,
Seth Engelbourg, Maureen Phillips, and Mark Beale

Called to order at 4:01 p.m. by Ms. Erisman

Staff in attendance: Jeff Carlson, Natural Resources Director; Terry Norton, Town Minutes Taker
Attending Members: Erisman, Golding, Engelbourg, Phillips, Beale
Absent Members: LaFleur, Topham

I. PUBLIC MEETING

A. Announcements

B. Public Comment

Carlson – Burton Balkind said he’s concerned Steven Cohen, Cohen & Cohen Law P.C. said the mitigation sand in front of the geo-tubes as a red herring. Asked if there is no condition that states mitigation sand must cover the geo-tubes; this was said during the 2019 reporting review of SBPF projects. He will email Mr. Balkind answers to his questions.

C. Order of Conditions – Nantucket Land Bank – 160 & 162 Orange Street (55-62.1&62) SE48-3405

Sitting Erisman, Golding, Engelbourg, Phillips, Beale
Documentation Draft Order of Conditions
Staff This is the Ottison property moving a house toward Orange Street. Conditioned no fill.
Discussion (4:08) None

Motion **Motion to Approve as drafted.** (made by: Beale) (seconded)
Roll-call Vote Carried 5-0//Beale, Engelbourg, Erisman, Golding, and Phillips-aye

D. Certificate of Compliance – Fayerweather N.T. – 3,4&5 Sheep Pond Road (63-25,1&26) SE48-2058

Sitting Erisman, Golding, Engelbourg, Phillips, Beale
Staff This was for a house relocation away from an eroding coastal bank. Structure is relocated in compliance and recommend issuance as is.

Discussion (4:09) **Phillips** – It’s amazing to see the site plan from last year and now where the bank is now at their deck. Asked if there is any necessity to reflect that there has been such a drastic change. They are teetering on the 100.

Motion **Motion to Issue.** (made by: Engelbourg) (seconded)
Roll-call Vote Carried 5-0//Beale, Engelbourg, Erisman, Golding, and Phillips-aye

II. PUBLIC HEARING

A. Amendment of Town of Nantucket Conservation Commission Wetland Protection Regulations

Sitting Erisman, Golding, Engelbourg, Phillips, Beale
Documentation Draft regulation revisions
Public R.J. Turcott, Nantucket Land Council, Inc.
Raymond DeCosta
Peter Kaizer
Tobias Glidden

Discussion (4:13) **Erisman** – Our packet had information we reviewed previously as well as some new information.

1. Hydraulic Dredging and Mobile Gear:

Carlson – It might be helpful if Mr. DeCosta provided a summary on the gear types and their impacts on habitats around the Island.

Golding – He’d like to see photos of the damage they’ve done in New Jersey.

DeCosta – Hydraulic dredging is for sea clams; they pump water into the sand blowing the sand up then, with a net that follows, scoops the clams up. It makes the water deeper allowing larger wave force to hit the island. In Provincetown the ban was passed for that reason. His main concern is our bottom is important when it comes to squid; they come to Nantucket to spawn – squid anchor the squid mops to the bottom. Most of the sound is 30 feet deep; as you drag along, you’re ripping up the squid mops. If you walk the beach in the early spring, you can find the squid mops that washed up. We’ve gone to the State, but they move very slowly; also, the fisheries can throw lobbyists at them while we’re just a couple of fishermen. 95% of Massachusetts towns regulate this type of fishing; we’re the last spot that doesn’t have this protection. We fought the herring fisheries for 20 years in the State house; it was finally enacted last year.

Kaizer – He’s been hired to do the survey work off ‘Sconset so he gets to see firsthand how beautiful the bottom is. What goes against the grain is municipalities have the right to protect against mobile gear; us and the back side of the Vineyard don’t have that protection. Mobile gear interacts with the bottom. Years ago, the Town set up to regulate how many dredges could operate and when. New Bedford, Boston, and Gloucester rejected our request for protection; they have year-round protection of their waters, but they are the same fisheries coming here. What we’ve seen with the presence of sea clambers, is massive erosion. A film just came out, “Seapiracy”, on YouTube showing the percentage of fish left and the habitat. Just east of here, is a habitat management area from Chatham to the tip of Monomoy and out 20 miles declared.

Erisman – Asked for before and after photos of the bottom.

Golding – Asked about Boston, New Bedford, and Gloucester opposing Nantucket’s request.

Kaizer – The State commission is stacked with a lot of commercial draggers.

Golding – Asked why Town Counsel won’t go to bat on behalf of the Town against this obstruction.

Carlson – State politics are very different. All things fishing at the State House come through Gloucester and New Bedford; if you impact their fishing, they oppose it. You would probably need a professional lobbyist to go against them.

Decosta – The worse year we saw was they took around 19m pounds of squid in a 10-mile area off the back of the Island. They drag between the Vineyard and Nantucket and use the bottleneck between Muskeget and Tuckernuck to funnel squid into their nets. We are trying to limit what happens inside 3 miles to give those squid a chance to reproduce.

Kaizer – Explained how hydraulic dredgers work. They have fished out all of Jersey. They drag the dredge across the benthic community, which is 6” to 8” deep. The dredger leaves a trench about 8” deep; everything is gone. Hoses emulsify the bottom with high pressure; that kicks the clams up where the nets pick everything up.

Golding – He was thinking how come a marine biologist hasn’t told the State how damaging this is. He doesn’t see how it can be sustainable. He’d like to move forward as quickly as possible.

Erisman – Asked if Mr. DeCosta and Mr. Kaizer looked at the Provincetown regulations; she’d be happy to copy-paste those as our own.

Beale – He’s unsure of the authority we have over land under the ocean out to three miles.

Erisman – Going to the State is a separate issue from us adding this to our bylaw. We can regulate land under ocean out to three miles under our own authority.

Kaizer – We’re looking at habitat, not the fishery. The gear type destroys that habitat.

Engelbourg – He’s for moving forward with this regulatory update. We need Mr. DeCosta, Mr. Glidden, and Mr. Kaizer to look at the Provincetown language to ascertain if special language is necessary to meet local needs. Asked if they are looking at seasonal restrictions or year-round restriction.

Kaizer – He will get a map to Commissioners showing what towns have what type of restrictions. We should not allow the gear types that damage the bottom.

Erisman – We are with you and want to get regulations in place. Thinks our ban should be year-round.

Carlson – He will send his adaptation of the Provincetown regulations to Mr. DeCosta, Mr. Glidden, and Mr. Kaizer for their comments. He sent it to Town Counsel as well. If they can provide more information, that would help. We’re at a good starting point.

Phillips – Agrees that we need to support habitat protection. Looking at the Provincetown regulations, what we need is to have findings supported by science in order for the regulations to meet any legal challenge. That gets away from lobbying and gets it under our regulations. The fact there are millions of pounds of squid being taken is because we left squid unprotected; they squid fishers have moved here from where they are prohibited. Once the regulations come into place, there would be some reduction of habitat destruction. We need more facts and maps and photos that will support our regulations.

Glidden – There were appeals made against Provincetown’s regulations. Gregg Corbo, K&P Law PC, wrote the Provincetown regulations; turn to him and the expertise he has.

Engelbourg – The only other information that would be helpful is if they are aware of equally damaging alternative methods, let us know now.

Glidden – An alternative would be a hook and line for squid fishing only.

DeCosta – Asked if it would help if they show the type of bi-catch these fishermen take. They are in about 20 feet of water with a net going from bottom to surface; they pull up everything in that area.

Erisman – That would be helpful.

Kaizer – Bi-catch is public Federal information; it’s an indiscriminate harvesting method. The squid mops need to be attached to the bottom up to 30 days; if they are disturbed, that is 100% mortality for the mops.

Erisman – We want to include all gear that is damaging and pulls up bi-catch as well.

Phillips – When we do the regulations, we want to use the general term “indiscriminate harvesting method” then have a list “including but not limited to” all the gear we know.

Golding – Asked how communities enforce their regulations.

Kaizer – The word gets passed around; the information goes to the Division of Marine Fisheries, who pass it along further. You can have the harbormaster go out there; any boat 65 feet or larger has to have AIS

(automatic identification system). You can go on line and see what boats are fishing where. Some municipalities use drones with lat-long and date-time stamps.

Erisman – We would count on boaters reporting violators and use the harbormaster, NRD, and Coast Guard to go out. Right now, we need to focus on getting the regulations written then deal with enforcement and fines.

DeCosta – It is hard to determine if a boat is within 3 miles; a density map uses the AIS and shows exactly where the boats are. He can get the AIS information on his phone. Asked if it would be helpful to have a scientist draft a letter on the impact of this type of fishing (yes).

Carlson – Burton Balkind had a question if the discussion was about squid, clamming, or both. He told him it is more about damage to land under the ocean habitat.

Kaizer – The Vineyard went through the process of saying no to Vineyard Wind dredging for their cable. Suggested contacting the Edgartown ConCom for details.

Carlson – They issued a negative Order of Conditions to Vineyard Wind. He can speak with them and get more information on their denial.

2. Filing Fees and Fines:

Erisman – Asked for an update on Town Counsel issues from our last regulatory meeting.

Carlson – Sent around a proposal for an updated fining structure; Town Counsel said that structure is not a legal approach. A filing fee structure could be used to deal with it as well; a category system could include after-the-fact filing fees.

Erisman – Asked if we have a sample of how that would be structured. In cases where we have someone in violation and they aren't planning to file, asked how to get fines from them.

Carlson – We would have a set penalty for failure to respond to an enforcement action of say \$300 a day until they appear before the Commission.

Phillips – Our packet had Barnstable's fee structure; it looks great; asked if that is the way we would go.

Carlson – The State Act works that when you pay your fee, activities are grouped by category. Explained Barnstable's fee structure. Not all violations are equal.

Engelbourg – For people coming in with after-the-fact work, even if it is a mistake, the fee should be at least double.

Erisman – Agrees about the filing fees being higher, especially for filing in response to an enforcement action.

Golding – It surprises him that we have no discretion; why can't we fine up to 5 or 10 times the normal fee in the event of an egregious violation.

Carlson – The non-criminal code is written to try to prevent prejudice. If everyone is supportive of the proposed fee concept, he'll write up a draft of the revised fees structures before the next meeting. Barnstable includes a "redocketing fee"; that would allow us to charge every time the staff has to go out for a reinspection. We would also like to be able to issue a specific ticket for sites in disarray; we chase after a lot of folks to get them to fix their silt fences. It would be nice to be able to fine them when they don't correct issues; at least once or twice a week we are telling someone to fix their silt fence.

Phillips – A symptom of how careful people are being is how they maintain their silt fence. This isn't about making a lot of money; it's about the time Mr. Carlson and Ms. Dodd have to spend chasing these down. We need to have numbers that get people to pay attention.

Golding – Suggested making it cube footage or square footage of the property size.

Carlson – That runs into the same problem as the other one.

Erisman – Asked if there are any new regulatory additions.

Golding – He didn't see a reference to increase undisturbed area between the 20 and 25 feet. Ten or 8 years ago, our amendments were printed in a different color, so we would have context.

Erisman – She'd like to have language for coastal properties that when a structure hits the 50-foot mark from a resource area that is an automatic trigger to come before the Commission.

Carlson – He thinks you'd have to deal with it as new construction or a set starting date. You could say that when a structure gets within 50 feet, they have to file a retreat plan.

Engelbourg – He has two buffer zone issues to look at. First, identify a similar percent disturbance number in the 25-foot area. Second, he'd like to prohibit cultivars within the 100-foot buffer; the waiver option of no adverse impact would still exist with the burden of proof on the applicant.

Erisman – Agrees with Mr. Engelbourg 100% on that.

Phillips – About the retreat plan, that concept is something we should look at; people would have to spend money on creating that plan.

Beale – Agrees with Mr. Engelbourg on no cultivars within the 100-foot buffer.

Erisman – She's always surprised at how small 50 feet is. We could regulate some activities better but worries about opening ConCom up to appeals. Asked if we can regulate structures being farther back than 50.

Carlson – As long as it's tied to the impact, ConCom could try to pursue that.

Erisman – The development pressure on our wetland resources is greater than other communities.

Golding – He agrees. Asked if it would be worth consulting Town Counsel.

Carlson – The easier way would be to draft the regulations and have Town Counsel review it.

Engelbourg – He supports examining the idea of moving structures farther from resource areas. He thinks there should be discussion about the definition of primary and ancillary structures. Structures that are critical, he'd be more willing to let them be closer to the resource area; if a structure isn't required for living, it should be farther away from the resource area.

Beale – Patios within the 25 of 50 is a concern because it causes runoff that could go in the wrong direction.

Erisman – Hopes we'll redefine patios as structures in this update.

Phillips – Primary and secondary structure is the usual terminology. We should have a reason for doing this rather than being arbitrary. Properties subject to sea-level rise would be subject a clear impact. Looking at other jurisdictions, look at what they use as a rationale for making something stricter. Regulations are stronger with more records and data behind them. Start with properties subject to sea-level rise as being more limited.

Erisman – She's been curious about flooding from rainstorms; asked if we have data on wetland buffers moving farther out.

Engelbourg – The regulations are resource-area specific.

Erisman – Asked if we need to discuss an update in more detail.

Carlson – He's back on track now and has new issues to consider. You have to be able to tie the impact of a structure to the interest being protected. The concepts are sound enough. The next step is to incorporate suggestions from tonight; he'll hold off on the land under the ocean piece. The rest can be discussed at a public hearing.

Erisman – It would be great to add language that people need to update their properties with ConCom.

Turcotte – He'd like to reiterate Nantucket Land Council comments. He neglected to attach research papers to his letter; he'll forward them to Mr. Carlson. Beach-stair landings and Saltmarshes are critical.

Erisman – We will keep those two items at the front of our attention.

Engelbourg – Asked if protected interests are set by the Special Act or can we add to those.

Carlson – ConCom can add to the interests; we should have clear grounds as to why we are adding those. If Commissioners have suggestions, send them to him so he can see if they might be included. Discussion about which date to continue this discussion.

Continued to April 22.

Motion

Roll-call Vote N/A

III. PUBLIC MEETING

E. Other Business

1. Approval of Minutes: None
2. Commissioners Comment
 - a. None
3. Administrator/Staff Reports
 - a. Town is undertaking a project to codify all regulations, so they look similar to the Town Code.

F. Adjournment

Motion **Motion to Adjourn at 6:09 p.m.** (made by: Golding) (seconded)

Roll-call Vote Carried 5-0//Beale, Engelbourg, Erisman, Golding, and Phillips

Submitted by:

Terry L. Norton