



CONSERVATION COMMISSION

SPECIAL MEETING

131 Pleasant Street
Nantucket, Massachusetts 02554
www.nantucket-ma.gov
Wednesday, August 11, 2021

*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, Seth Engelbourg, Maureen Phillips, Mark Beale, and Linda Williams

Called to order and announcements at 4:06 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, Williams

Absent Members: LaFleur

Town Counsel: George Pucci, K&P Law P.C.

I. PUBLIC MEETING

A. Public Comment

B. Enforcement Action Update

1. 'Sconset Beach Preservation Fund (SBPF) – 87-105Baxter Road (49&48-various) SE48-2824

Sitting: Erisman, Golding, LaFleur, Engelbourg, Phillips, Beale, Williams

Recused: None

Documentation: Supporting documents and plans. PowerPoint® presentation.

SBPF Rep. Steven Cohen, Cohen & Cohen LP

Public speakers: Mary Wawro, 3 Eat Fire Spring Road
Dennis Murphy, Legal Counsel for Greenhills, 8&16 Hoicks Hollow

Discussion: **Carlson** – Updated the Commission on the process since the June 30 Enforcement Order vote.

Pucci – Select Board wants to be on same page with ConCom on the status of the project; they don't see it as an adversarial position. The vote on June was to seek counsel in crafting the removal order of the geotube structure. The Select Board is the executive body under §3.5 of the Town Charter and have a lot of policy interests under their authority. Town Counsel policy is published and approved by the Town; our purpose is to ensure impartial and legal advice to all Town entities. He's here as Town Counsel made available by the Select Board to ConCom. He is to help ConCom reach an acceptable solution to try and bring the project back into compliance.

Erisman – We sent the Select Board a very detailed letter regarding the deficiencies of the SBPF project and asked for their input; we never received a response. Asked if the Select Board has explained their inaction.

Pucci – They are looking at what's before you and them now. There was never communication to him that they were neglecting information coming from ConCom. They are now seeking to get on top of this and made a request to SBPF to come up with a viable plan to get back into compliance.

Erisman – When a regulatory body says they have amassed a number of failure criteria, the Select Board should trust that board's opinion. Asked if the Town has looked at its own memorandum of understanding (MOU) with SBPF to ensure they are in compliance with it.

Pucci – The MOU was amended, there's a license agreement, and an agreement regarding Baxter Road. SBPF is tying their obligations of maintaining the structure to the expansion project to help them continue financially supporting the project; if they can't bring other property owners in to engage in the financial obligations, they will have to turn it over to the Town. There are long-term, good-faith contingencies built into those agreements. SBPF is taking the position that they are in compliance with the order and complying with all the Town agreements.

Golding – Asked Mr. Pucci why the Select Board is taking the part of SBPF and ignoring our regulatory/environmental situation. Asked how he can serve two masters.

Pucci – The Select Board is offering ConCom Town Counsel to confer with but not represent ConCom. He's here to provide advice. They are not taking SBPF's position; they are trying to protect the neighborhood and asking ConCom to consider a plan to bring the project into compliance.

Williams – She voted against the request for legal counsel but was not on the commission to vote on the original enforcement order; she would have voted against the enforcement order.

Engelbourg – He understands Mr. Pucci's role at this time. If there is future litigation in which Concom is a defendant to a case in an adversarial position to the Select Board, asked if that would require special counsel for ConCom.

Pucci – There is an exception under §4.2(d-10) part of which provides for a board as a defendant and Town as plaintiff to provide special counsel for the board. Right now, ConCom doesn't have that situation. The

Select Board is trying very hard to establish general Town policies and goals and not get in adversarial positions with its boards and commissions.

Engelbourg – He brought it up, so everyone knows that provision exists. Asked the status of the Town as a property owner if SBPF brings up the case.

Pucci – Would rather not answer a hypothetical.

Phillips – The issue we are struggling with is that it seems the Select Board's conduct has been to do their best to provide guidance and actions that don't help us follow the laws we are sworn to enact. SBPF had a lot of choices about filling amendments, providing information about the sand sooner than they did, putting Mr. Gregg Berman's suggestions into action; they did none of that. After much agony, years of failure to act to the regulatory standard, they decided to get the Select Board to hire a consultant to look at this stretch of coastline and get the Select Board to use the ARCADIS report to that end. They waited until we lowered the boom, and it came to the situation where we are now being asked to take back our decision. This was months of deliberations and thousands of pages of records. SBPF has admitted that they were not in compliance for years and have refused to bring the project into compliance unless we permit the extension. We have been told to look at the projects as separate. The Select Board is supporting SBPF in their quest to get us to change our mind and ignore the laws we are obligated to uphold and undo our Enforcement Order. She disagrees with Mr. Pucci's character of almost everything.

Beale – He finds it troubling; we know the Town wants us to reverse our order and that is where Select Board is trying to lead us to do that. He feels ConCom is not getting properly represented. Echoes Ms. Phillips comments about the length of time spent on the series of violations. Feels ConCom should have its own representation.

Pucci – The ARCADIS process was not generated by SBPF; they were unhappy with the Town's delays in taking over the structure. The Select Board wanted a reputable company to listen to all parties and experts and give their good-faith recommendations on short-term and long-term recommendations. He advised ARCADIS against talking to ConCom because SBPF is under your jurisdiction. It is not unprecedented to reverse a decision. You're being asked to look at the plan to see if it will bring the project into compliance.

Erisman – She appreciates the Town contracting ARCADIS to do coastal planning; but it is a separate process from the SBPF project in place. Also, ConCom has worked to resolve enforcement issues and failure criteria. Asked when failure criteria are actually failure criteria. This has gotten to the level of a project failure. We have tried to work with the applicant, but they have not worked with us. Their proposal is contingent on an expansion; if they don't get that expansion and haven't made up the deficit, it falls back on ConCom.

Pucci – You could go ahead with the Enforcement Order crafted in the form with conditions of compliance. There is nothing in bad faith being presented to ConCom.

Williams – Cited a situation where Zoning Board of Appeals was up against the Select Board and it was mediated. Feels the Town has stepped up to ownership in hiring ARCADIS. Thinks jumping to the request for removal might come at the wrong time. The Select Board has no right to tell ConCom what to do; they are asking us not to go forward with the enforcement order at this time.

Engelbourg – An Enforcement Order is required whether for removal or to bring back into compliance. We can't do either without forcing compliance. There are 3 recorded Enforcement Orders prior to this one. We have to consider how the permit holder is going to hold their good faith in the face of an Enforcement Order. It is clear the applicant is only interested in bringing this into compliance if the expansion project is approved. We need to stay our course and let SBPF come back to the table in the Fall with a different project. The current project doesn't meet the Performance Standards and is not in compliance and won't be in compliance in the near future.

Erisman – Opened to public comments; asked comments pertain to tonight's discussion only.

Wawro – Asked if KP, Law considered itself the attorney for both the Select Board and ConCom.

Pucci – We are Town Counsel in accordance with the Select Board provisions. We represent named parties as authorized by the Select Board.

Wawro – Expressed concern regarding rules of professional conduct for Massachusetts attorneys and that Mr. Pucci and KP, Law have never been lawyers for ConCom.

Pucci – He's here to follow up on the Select Board vote as articulated to ConCom; he's not going to get into professional conduct. Pointed out that ConCom can completely disregard his recommendations.

Wawro – Continued her concerns that KP, Law is not representing ConCom. SBPF has related the expansion to the existing project; the Town by joining SBPF, is taking an adversarial position to ConCom. Asked if the Enforcement Order abuses ConCom's discretion or is arbitrary and capricious.

Pucci – The Select Board is seeking to bring this into compliance.

Cohen – ConCom is considering an Enforcement Action; feels it is unprecedented to consider removal without considering an available remediation plan. It's the Commission's job to bring things into compliance with what would approve.

Murphy – There have been half-a-dozen enforcement issues connected with this project; cited those issues. This proceeding started several months ago. The commission has a regulatory role following the data and science and warned against following the politics. Because of what's happening here, we've had almost 8 ½ months with no sand mitigation going onto the project and the deficiency is growing. If the Commission chooses to reconsider its votes and new commissioners are going to participated. David Kriebel is available to

explain the effects of continued non-compliance. 310cmr 10.08 supports ConCom issuing the Enforcement Order. The one thing not discussed is the 2-year statute of limitations; if action isn't taken now, in the future, the Commission could be barred from taking enforcement action on that. Town Counsel was very clear on the current procedure, but his takeaway is that any Enforcement Order is appealable only to the court; if ConCom is a defendant, it will be provided counsel. Asked that any reconsideration of the vote should be done in public.

Erisman – Asked Mr. Carlson’s recommendation

Carlson – You can make a motion to reconsider; if your do that, you could condition that reconsideration to involve the Select Board.

Erisman – We can motion to reconsider or continue and ask that an Order of Removal be drafted.

Phillips – What she feels unprecedented is that we would reconsider because “remediation options are available”. Those options have been available to SBPF since the 1st report of any problem.

Williams – She agrees with the sentiment the commission should be punitive. Made a motion to reconsider; not seconded.

Engelbourg – He would entertain a continuance.

Beale – Asked if there is a time consideration having voted for the removal.

Carlson – In this case, no. We have time to craft the order and issue it out properly. He has a draft and can send it to the commissioners. If there is other information the commissioners are looking for, this is a good forum to request it.

Pucci – Suggested the new SBPF remediation proposal be looked at before adopting the removal order. In the event you look at crafting an order that brings this into compliance, he has been authorized to confer with the Commission on that.

Phillips – She has repeatedly asked where the escrow account is that was intended to pay for removal as required by the original Order of Conditions; she has seen no information on that. It is relevant for us to have.

Carlson – He will have that for the next session.

Cohen – That should have \$100,000 and is held by the Town.

Carlson – He will pull together a number of optional dates between regular meetings to choose from. If commissioners think of something they need, email him.

Continued to a date TBD

Motion

Roll-call vote

N/A

Adjournment:

Motion

Motion to Adjourn at 5:53 p.m. (made by: Beale) (seconded by:)

Roll-call vote

Carried unanimously// Beale, Engelbourg, Erisman, Golding, Phillips, and Williams

Submitted by:

Terry L. Norton

