



CONSERVATION COMMISSION SPECIAL MEETING

131 Pleasant Street
Nantucket, Massachusetts 02554
www.nantucket-ma.gov
Thursday, September 2, 2021

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

Called to order at 4:08 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

Agenda adopted by unanimous consent

I. PUBLIC MEETING

A. Announcements

B. Public Comment – None

C. Enforcement Action Update

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

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

Recused: None

Documentation: Supporting documents and plans; correspondence; draft Order of Conditions

SBPF Rep’s: Steven Cohen, Cohen & Cohen LP

David Bailey, 100 Baxter Road, for Sconset Civic Association (SCA)

Margaret McQuade, 97 Baxter Road

David Golden, 70 Baxter Road

Meridith Moldenhauer, 71 Baxter Road

Public speakers: Dennis Murphy, Hill Law, counsel for the Greenhills

R.J. Turcotte, Nantucket Land Council, Inc

Discussion: **Carlson** – We heard at the last hearing the role Town Counsel will play in this.

Williams – Her preference has been for a formal joint meeting with the Select Board; they have a bigger picture of the situation on Baxter Road. She doesn’t support this enforcement action. She doesn’t see a detriment in a delaying the vote on issuing the order; feels the problems cited in the enforcement order are minor and correctable. We should read the letter asking for a meeting and work out a solution with SBPF. Asked how SBPF would respond to ConCom formally should the Enforcement Order to remove the array be issued. Contends the project has not been detrimental and some of the violations are minor: reporting violations, ramp issues, sand mitigation.

Erisman – We were denied an opportunity to participate in the Select Board executive session. SBPF has been in violation of their Order of Conditions for years. This is the one project to her knowledge which has amassed enforcement issues and met the failure criteria. We’ve worked for years with this applicant and the violations are not minor; they meet failure criteria. If the vote to issue the Enforcement Order passes, SBPF can file a new application for a project.

Carlson – With submission of a new application, there would be rehearing questions regarding similarity. Any applicant can file a new application. The Order of Conditions (SE48-2428) is still valid; any change in sand delivery would require a modification.

Erisman – Asked Mr. Carlson to review the draft Emergency Order for removal.

Engelbourg – He sees 3 findings; he thought there was a 4th relater to violation of the Cease-and-Desist (C&D) Order.

Carlson – That was wrapped up in 12/11.

Golding – To Mr. Engelbourg’s point, wonders if it should be considered as another violation; what’s listed as Violation 3 was listed as Violation 2 in the letter and Violation 3 in the letter references photos or work done in violation of C&D Order. It has nothing to do with the contaminated material referenced in Violation 2.

Phillips – She has read the Emergency Order and concurs on the correction Mr. Golding outlined. She reviewed this for all facts and findings on what has happened regarding the original order and violations; this is an excellent summary of many years of work. She would move that this Enforcement Order be issued.

Carlson – Explained there was no formal enforcement, but he added a note regarding violation of the C&D Order.

Williams – Asked why it is necessary to do this today rather than waiting for the ARCADIS report or a joint meeting with Select Board.

Erisman – We’ve waited 2 months and we need to finish what we started. The ARCADIS report doesn’t speak to our regulations. In her opinion, ConCom has waited a 1½ year for the Select Board, which did not respond;

ConCom reached out to them in April 2020; they didn't respond, and violations continued to pile up. This project has been kept in compliance. A letter from SBPF stated they did not want to keep it in compliance until they got the expansion of the tube approved. If this drags on, it could still be out of compliance when the next storm season hits. Other areas along the shore have complained about damage to their properties. This project stands alone; it is not tied to an expansion project.

Engelbourg – It is important to remember this Enforcement Order is also related to improper sand nourishment material. A discussion with Select Board regarding a long-term planning process is warranted and reviewing the ARCADIS report is also warranted; however, neither is related to the situation at hand. The question now is whether or not the permit holder is in compliance; they are not.

Erisman – Regarding other options put before us, including the option received after our June vote, asked for thoughts on those options in order to get the project back into compliance.

Williams – It is incumbent upon us to consider those options as well as the letter.

Carlson – Clarified the process, the Commission found SBPF is in deficit for the current amount of sand. Playing catch up would be through issuing a specific order. Any adjustment to the nourishment volume is an amended order.

Erisman – Looking at the proposal to catch up on sand, she's concerned about the discrepancy between SBPF's proposal and other proposals; SBPF's proposal is half the sand. Their order of conditions doesn't reference a "sand year" but a calendar year. She would look at the higher volumes proposed.

Golding – The amounts referred, by SBPF's representative Mr. Berman (sic) is 26,636 cubic yards (cy); Mr. Ruthven suggested 46,537cy; and Dr. Kriebel referenced 47,450cy. There is a significant discrepancy.

Engelbourg – Mr. Dunk is SBPF's representative, not Mr. Berman. Reviewed what would have to be done for him to accept an alternate plan. Condition 32 requires 22,000cy of sand per year, not "sand year."

Golding – Mr. Berman was working with the definition of a sand year, which contains 22 months. 22 months is over 38,000cy of sand.

Phillips – ConCom has a stated process that has worked for decades. What's being proposed here does not follow that stated process, SBPF has never filed for a modification or amendment to their Order of Conditions; they have not followed the rules and conditions laid out. To her, it makes no sense to upend a useful regulatory scheme because of one applicant's decision that the Order of Conditions need not be attended to. This is unprecedented in terms of putting together a new rule book for this one applicant.

Erisman – Mr. Carlson sent out a draft letter that asks to meet with the Select Board; asked if there is any discussion on that. Issuing the letter would require a vote to reconsider the June vote.

Williams – She's in support of that letter.

Erisman – This letter should have a deadline for the meeting to minimize further delays.

Engelbourg – Communication is warranted but he doesn't understand the purpose of this letter; if it is just to request a meeting.

Carlson – The letter's intent is to get the structure on the ground and permitted by SE48-2428 back on track and in compliance or settle on removal.

Engelbourg – By sending this letter and requesting the meeting, we would delay further why we're here today. Asked if the meeting with the Select Board would address the Wetland Protection Act or would it include discussion of concerns and purview of the Select Board.

Erisman – We would look at the project as a whole and all aspects of non-compliance and the Select Board licensing agreement. That would delay us issuing the Enforcement Order at this time.

Carlson – The letter talks about reviewing the licensing agreement and coming together to ensure there are no other outstanding issues and requirements covered by the licensing agreement or the permit.

Engelbourg – If the discussion focused on non-compliance, he would support this. He doesn't want the discussion to devolve into aspects which are Select Board jurisdiction.

Phillips – She shares some of Mr. Engelbourg's concerns. She wants outside independent counsel to look at the letter first. She doesn't want ConCom to end up in a position where ARCADIS becomes relevant to this mess and what we specifically deal with. It muddies the waters regarding the extension request currently in Superior Court. SBPF and Mr. Posner have made it clear that they align this with the expansion project and that if they don't get what they want, they will abandon the existing array. In her opinion, that tactic is abhorrent and makes it difficult to consider other aspects beyond what's before us. The Town is the property owner; she feels the Select Board hasn't worked with ConCom on this; cited as an example the Select Board executive session when they voted to ask ConCom to reconsider and voted that paying our legal fees is not appropriate.

Williams – If the Enforcement Order goes forward, it will result in further litigation. It took the Town a while to buy into the process, and ConCom shouldn't turn them down. ConCom doesn't have the right to dictate what will and won't be discussed in the meeting; she's not willing to support any restrictions on the meeting. Enforcing the local and State laws regarding wetlands is based upon whether or not it is detrimental to the natural resources; she fails to understand how leaving the array in place is detrimental to the resource area.

Erisman – We have received data regarding damage to down-drift beaches due to lack of compliance with the mitigation sand volume. The Massachusetts Department of Environmental Protection (DEP) had the same sand volumes in their superseding order; sand volumes can't be left out of compliance.

Beale – The Select Board is worried about Baxter Road. We'd be remiss if we didn't have a joint meeting. We should do it promptly to limit any delay.

Golding – The apparent ignorance of some members of the Select Board astonishes him; if they had read the 2/4/2020 DEP appeal, they wouldn't have made some of the comments they made. Now they want us to walk back on our wetland regulations. Valid points have been made today; however, he feels the Select Board is not supporting ConCom as a Town commission. He's willing to speak to them after the Enforcement Order is issued.

Erisman – She'd like to have an open discussion with the Select Board. She had made herself available to speak to them at their executive sessions, but she wasn't allowed; also, our request for independent counsel was denied. It is possible to issue out the Enforcement Order with the potential of rescinding it based upon a joint meeting with the Select Board.

Carlson – That is an option; his concern would be SBPF starting the appeal process.

Engelbourg – He'd be opposed to the option of issuing the Order with the option of rescinding it later.

Phillips – This gets more complicated as we talk; she feels ConCom needs its own counsel. She'd meet with the Select Board once ConCom engaged its independent counsel.

Williams – We all work for the Town and have a common goal; she doesn't see us as adversaries and hostile toward each other. The Select Board is not considering our jurisdiction and we aren't considering theirs; that's where a joint meeting would help.

Erisman – We've been very clear about our support of the State Act and the permit; we are well within our grounds to do what we're doing. She feels the Select Board is not recognizing the work done by a Town regulatory board and they have left their "lane" in an effort to get us to rescind our vote.

Engelbourg – The processes are independent; we both have our charges to uphold. There are times when it becomes difficult to maintain both sides, such as now. We need to work our processes independently. Long-term planning is important but that's not our job; the Select Board can do that independent of us. It's our job to listen to what they have to say; it's also our job to ensure projects are compliant with the Order of Conditions.

Erisman – Opened discussion to the public

Cohen – Thinks ConCom is going down a path they shouldn't. The Emergency Order notes the violations and imply there is an aggregate; this project had a test period after which we would return with improvements. While SBPF is clear that some sand is deficient; we came out publicly with that information. Mr. Posner indicated he was less inclined to fix the situation until he understood the global issues. Feels ConCom made a decision without a public hearing on the plans to bring the project into compliance; thinks a compliance order would be more appropriate. It seems the Commission is taking a punitive approach rather than fixing the problem. Removing the tubes wouldn't solve the problem but in fact create greater problems to include massive erosion and damage to the Bluff from the removal process. Contends that the Enforcement Order was issued without allowing the applicant a public hearing in which to present a compliance plan. There was never a time the geotubes were not covered; the template always had enough sand to recover the tubes. The commission should reconsider if there is any actual harm here and if termination will lead to greater environmental problems.

Murphy – A factual clarification, the letter submitted in June calculated the deficit at the end of June 2020; we are now approaching a 3-year deficit. SBPF holds the permit; they have promised and suggested that if they don't get what they want, they will turn the project over to the Town; if that happens a joint meeting would be warranted. However, all that is politics; this is a regulatory question. What we're here for today is to memorialize votes and actions the board has already taken. ConCom had public hearings on this in May and June 2021. The longer this goes on, the more harm happens. The permit expires in 30 days; if ConCom wouldn't vote to renew that, the question is why they wouldn't vote to remove it.

Bailey – In conjunction with development of the Sønset area plan, the SCA sent out a questionnaire to Sønset residents; one question was if the Town should prevent erosion to the bluff; the overwhelming majority voted yes. It is SCA's view that we wait for the result of ARCADIS study before taking action on the array.

McQuade – I love my location but have already had to move half of my house; the consequences are painful and the SBPF geotubes have allowed me to remain where I am. Real people are affected by any decision made today. Taking out the geotubes will hurt many people and the Island. If there's no willingness to talk, that is inappropriate. Removal would be a man-made destruction of something that has worked for 8 years; efforts should be made to come to a good conclusion. Urged the ConCom to give whatever time is necessary because destruction of the geotubes is not a solution.

Erisman – We realize this is impacting real people but we're in a difficult situation. Not everyone will be happy with the Commission's decision or direction.

Engelbourg – Asked about the permit holder; if the applicant and property owner are different parties and the Order of Conditions is issued, both parties are the permit holder.

Carlson – When someone applies for an NOI, they are required to get the property owner's signature; a copy of the Order of Conditions is provided to the applicant, the property owner, and the Registry of Deeds where it is put against the title for future owners. In this case there are a number of property owners, not just the Town.

Golden – He is on the western side of the road; he's witnessed the "saga" of the geotube project. When it was first approved, it seemed a good test project to see if it would work. The initial permit gave them 5 years in which to evaluate and decide if it should be extended. The array's purpose has been to stop erosion to the bank, and it has worked in that regard. The leading sentence of ConCom's mandate includes protection of the

resources of the Town. Rationality would suggest the Select Board is looking for a holistic solution to rising sea levels, not just for Baxter Road.

Moldenhauer – Hopefully we can all agree to work together to preserve the Island; she hopes the parties can find a way for the project to be brought into compliance. Storms are increasing in frequency and intensity, which is frightening for Islanders. A solution is already in place here in ‘Sconset; the tubes have protected Baxter Road from being shut down for the past 8 years. Removal creates problems for which there are no solutions.

Turcotte – As a Commission, ConCom has a narrow purview; the Commission has the information needed from experts supporting that this project is failing. ConCom needs to issue the Enforcement Order; anything else will create chaos. Pointed out the SBPF didn’t submit their compliance plan until after the June 2021 vote. Walking back on that vote will create problems for every Town regulatory board.

Williams – She takes exception to the use of the word failing; there is no evidence the project has failed.

Erisman – It has met failure criteria as outlined in their permit. SBPF is out of compliance and met failure criteria.

Engelbourg – It has been recorded that the project has met failure criteria. Taking exception to the use of “failure” is a grammatical argument.

Carlson – Mary Wawro asked for a copy of a document, which he emailed to her.

*Discussion on Ms. Williams motion to issue the letter requesting a joint meeting with the Select Board:

Engelbourg – We need to meet with the Select Board either way. The motion needs to clarify if the letter is sent prior to or after determination of issuing.

Williams – She wants the letter to go to Select Board either way. Asked if it would be appropriate to make a motion to draft an order demanding sand compliance.

Carlson – We could draft that order.

*Discussion on Ms. Williams motion to draft an order requiring compliance (motion withdrawn):

Phillips – The number of motions is getting confusing; we should meet with the Select Board.

Engelbourg – It’s his understand that in order to do anything related to the original removal order, it would have to be a vote to amend that order after the vote on the removal order is taken.

Carlson – If you are going to change direction, you have to change the original vote.

Golding – The 1st order of business is to address why this meeting is taking place – to vote for or against removal. We would have to rescind the prior vote before we amend the Order of Conditions. Under Robert Rules of Order, it states a reconsideration can only be made on the day the vote was taken or the immediately succeeding day; a motion to rescind, repeal or annul a vote can be made by any member.

Engelbourg – We still need to vote on issuing the removal order.

Beale – Suggested adding to the letter that a vote on removal will take place at our next meeting.

Erisman – The next regular meeting is September 9th. It’s a little tight to do that with the holiday on Monday.

Phillips – Her motion would be to send a letter stating that a joint meeting is a good idea but before doing so, we request outside counsel due to the far-reaching implications.

Carlson – Added a sentence to the letter stating a joint meeting with the Select Board be held prior to September 17th to allow a vote on September 23rd.

Golding – Doesn’t see how meeting with the Select Board will change our purview. He doesn’t support the letter but supports opening a dialogue with the property owner after voting on the Enforcement Order. He doesn’t want to vote on a letter until after a vote on the Enforcement Order.

Motion Motion to send the letter to the Select Board to meet with them by September 17th to allow a final vote on September 23rd. (made by: Williams) (Not seconded)

Roll-call vote N/A

Motion **Motion to Issue the Enforcement Order as amended.** (made by: Beale) (seconded)

Roll-call vote Carried 5-1//Beale, Engelbourg, Erisman, Golding, Phillips-aye; Williams-nay

Motion **Motion to respectfully request the Select Board provide ConCom with outside counsel in advance of a joint meeting, to be held once ConCom has had an opportunity to meet with higher counsel on this issue.** (made by: Phillips) (seconded)

Roll-call vote Carried 4-2//Beale, Erisman, Golding, Phillips-aye; Williams and Engelbourg-nay

*Further discussion about meeting with the Select Board regarding SBPF SE48-2428 and whether or not ConCom should have independent counsel prior to and during that meeting.

II. ADJOURNMENT

Motion **Motion to Adjourn at 6:33 pm.** (made by: Williams) (seconded)

Roll-call vote Carried unanimously//Beale, Engelbourg, Erisman, Golding, Phillips, and Williams

Submitted by:
Terry L. Norton