



CONSERVATION COMMISSION

SPECIAL MEETING

2 Bathing Beach Road
Nantucket, Massachusetts 02554

www.nantucket-ma.gov

Wednesday, June 30, 2021

4 Fairgrounds Road, Training Room – 5:00 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 5:00 p.m. and announcements by Ms. Erisman

Staff in attendance: Jeff Carlson, Natural Resources Director; Joanne Dodd, Natural Resources Coordinator
Attending Members: Erisman, Golding, LaFleur, Topham, Engelbourg, Phillips, Beale
Town Representation: Greg Berman, 3rd-Party Review; Dawn Hill Holdgate, Select Board Chair

Adoption of agenda

I. PUBLIC MEETING

A. Public Comment - None

B. SBPF 2020 Annual Review

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

Sitting Erisman, LaFleur, Golding, Topham

Recused None

Documentation Supporting documents and plans.

Applicant Dwight Dunk, Epsilon Associates Inc.

Representatives Josh Posner, 77 Baxter Road, Chairman 'Sconset Beach Preservation Fund

Public Emily Molden, Executive Director Nantucket Land Council, Inc. (NLC)

Hugh Ruthven, III, Applied Coastal Research and Engineering, for NLC

Burton Balkind, 10A Scotts Way, Nantucket Coastal Conservancy (NCC)

Dennis Murphy, Legal Counsel for Greenhills at 8 & 16 Hoicks Hollow

Rick Atherton, 48 Squam Road, NCC

Discussion **Carlson** – In our annual review of the 2019 report and 2020 report, we were catching up on the fact that there was a deficit in the sand as required in the permit as well as other issues.

Phillips – In reviewing everything in the packet, this boils down to if should we give the SBPF another chance. There has been a sand deficit for a number of years. Do we spend time to figure out the best way to add in the deficit with the on-going required nourishment? The option is not to do that. It's hard for her to see where it would be helpful for the environment to provide another chance. There is also an on-going monitoring problem; SBPF has not self-reported the shortfalls or provided an adequate explanation for those shortfalls; they also seemed to be of the opinion that sand shortfalls would not be enforced. Instead of applying for an amended order, SBPF did their own version of adaptive management without prior approval; that shows a lack of respect for MADEP, who signed off on the requirements, the Town, and ConCom. They never adopted any of Mr. Berman's suggestions. At this point she fails to find a reason to keep going forward with this and hoping things will change; that means this kind of failure and disrespect we need to seriously consider removal.

Erisman – She agrees with Ms. Phillips about the two choices: extend the plan or require removal based upon the level of failure.

Golding – Read into the record and excerpt from Hill Law dated June 17, 2021. He feels we are wasting commission time going forward with this.

Beale – He echoes the opinion that we can't give the application more chances given the lack of cooperation. They haven't shown cooperation; they and the project have failed.

Engelbourg – He agrees with what's been said. Feels the permit holder deserves time to speak. He wants to know if they are willing to pick up any of the adaptive sand delivery or have other proposals in place. Over the course of these meeting and public forums, it is his understanding that the permit holder isn't willing to put down the required amount of mitigation sand. The applicant has repeated refused to meet the required sand mitigation and stated publicly that they aren't willing to comply. We should order the removal unless there is some change he's not aware of.

Topham – He agrees. He was upset by Mr. Posner's statement that SBPF management doesn't want to meet the requirements of the Order of Conditions. Everyone is watching the project and then find out the applicant doesn't want to comply.

LaFleur – He agrees with his fellow commissioners.

Engelbourg – This is a pilot project and there was an opportunity for the applicant to make a statement and make an example of how geotubes could work. The Order of Conditions of this pilot has not been filed and not meeting performance standards they abided to. If SBPF wants to come back with another plan, we'll consider it.

Erisman – Also agrees. During the March 22nd meeting, she had asked the SBPF representative to come up with a plan to make up for the sand shortfall; on March 29th received an email from Mr. Posner stating that they were not going to make up the deficit and we need to accept them recovering tubes when they became exposed. She was disheartened by that. Asked Mr. Dunk if they have come up with a plan.

Dunk – We appreciate the commission rescheduling the hearing for tonight. Read into the record a letter from Steven Cohen, Cohen & Cohen Law P.C. into the record dated May 25; there is a link to it in the digital packet. The SBPF is ready and willing to work with the Town to find the right solution for this project to address 'Sconset Bluff erosion and protect homes and the road and a remediation program which bring sand volume in compliance with the DEP. Willing to create a multi-year program to make up for the shortfall and protect 'Sconset Bluff.

Erisman – Asked if he has started talking to any entities about a plan.

Dunk – We put that forward in the letter to the commission but not started talks. We want it on the record that we are working with the Town and staff on a plan.

Erisman – Appreciates willingness to bring this into compliance; but we get mixed messages from SBPF. If this were her project and she knew she was out of compliance, there would be an urgent need to get it into compliance. Given the history of this project and 5 enforcements over time, it is unacceptable.

Phillips – She read Mr. Cohen's letter with some amount of confusion that the suggestion is that not SBPF put together a plan but for our over-worked staff and Town independent reviewer to help with this. No other applicant has proposed they be helped with Town resources; that is an odd way to go about this. The problem was not created by the ConCom. The applicant did not come forward with applications to amend the requirements. Mr. Cohen also ties this to the expansion project. She was very clear that this is not about the expansion project; it's about this project. An offer to use Town resources is not acceptable by a group that has multiple experts and lawyers.

Dunk – Mr. Cohen's letter doesn't ask Town Staff to prepare a plan but to help develop a plan with feedback from Staff on what would be acceptable by ConCom.

Phillips – She was saying that SBPF's inability to produce a plan on their own with their own experts was a shock and that they wish to tap into Town resources as well as Mr. Berman.

Erisman – SBPF wants to work with the Town; however, we don't usually have applicants who want Staff input.

Berman – SBPF's proposed arrangement would speed up the process of coming up with a plan.

Carlson – It's not outside our practice to review for ideas and aspects for projects. We're happy to provide whatever assistance we can and are directed to provide.

Engelbourg – He was hoping the permit holder would have a plan ready for the commission to review today. We asked for a plan in March, this is July; it would be an additional 2 or 3 months that the deficit is being pushed down the road.

Golding – We're up to enforcement number 5 and they haven't shown they are able to abide by the original Order of Conditions; wonders if we would be looking at enforcement 8 this time next year.

Posner – This has been a long process with a pilot project they hoped would show the effectiveness of geotubes and lead to a full-length project as original described in the 2013 Memorandum of Understanding (MOU) with the Town. We can only protect the pilot project in the terms of a feasible and sustainable long-term plan. We want to be in compliance and would be very happy to bring this pilot project into compliance with a useable plan in the context of a sustainable system. The Town has hired the ARCADIS Group; we were hoping it will lead to a consensus for a long-term project. It is still our hope we can find a broad sustainable protection system everyone can live with; maybe ARCADIS will bring that about.

Molden – She submitted a letter dated June 17th which includes an attachment of a proposed remediation plan created by Trey Ruthven, Applied Coastal Research and Engineering, and David Kriebel, PhD, Coastal Analytics, LLC. On May 17th, the commission unanimously voted that the project is out of compliance with sand deficiency, which has been going on for the past 5 years. ConCom has the right to require removal of the project. The proposed plan would still take 4 years to bring the project into compliance. Asked the Commission to take specific action tonight, either order removal or adopt a remediation plan. If a remediation plan is brought forward, asked that the applicant be required to meet benchmarks as outlined for mitigation and if those are not met, the project will trigger immediately removal. Asked the Commission also to recognize the need for on-going monitoring requirements. All data sets should be made more available and accessible; our consultant has repeatedly requested access and it has not been made available. The near future isn't soon enough; the applicant has had months to come up with a plan but failed to provide anything or meet mitigation requirements. It's been over 5 years and will take over 4 years to bring into compliance; we are wasting time.

Ruthven – For a remediation plan to be successful, it depends upon the commitment to follow through. Though the plan he and Mr. Kriebel developed is doable, he has not seen any commitment on the part of the applicant. We considered everything Mr. Cohen mentioned in his letter; we considered everything SBPF has failed to consider. The data should be publicly accessible; it's critical to making a plan.

Balkind – We’ve spent a lot of time on SBPF’s violations of the Order of Conditions. ConCom has given this applicant more leeway than any other applicant; but SBPF hasn’t done what they were required. That doesn’t negate the functionality of the geotubes. Asked ConCom to vote for removal of the geotube.

Murphy – The Commission jurisdiction is covered by statute as laid out in the Order of Conditions, which spells out the consequences of noncompliance. The only path available to the Commission is to vote for removal under Paragraph 36 of the Order of Conditions.

Dunk – Harking back to Mr. Cohen’s letter, the plan presented by Mr. Ruthven and Mr. Kriebel, a 4-year plan makes sense and would like to work out the details with Staff and present the plan to the commission to bring the project into compliance.

Erisman – We are looking at the project on the ground, not the expanded plan.

Dunk – This is the first part of a long-term plan as outlined in the MOU.

Atherton – One thing that’s clear is that the applicant is not really agreeing to meet the conditions of the current project. Feels they are employing a delay tactic.

Posner – He’s trying to be straightforward. Getting into compliance can only happen in the context of a full, sustainable project. If we hadn’t been prevented from delivering the Polpis sand in January 2020, we would have been caught up.

Erisman – We are dealing with the current permit; if bring it into compliance depends on a separate project tied up in court, we can’t work with that. We appreciate that it’s privately funded, but the current permit is what we are charged to uphold.

Dunk – If ARCADIS develops a sustainable plan to move forward with, the remediation plan can move forward.

Topham – SBPF is playing the long game; the short game is we’re at violation 5. Feels they should never want to be in front of ConCom but staying in compliance, especially if they want to get the extension project.

Engelbourg – when you sign an Order of Conditions, you agree to meet the conditions for the life of that permit; right now, you are required to supply mitigation plan. He understands this is the most complex project on the Island, but independent of any agreement with the Town, SBPF is required to meet the Order of Conditions through ConCom to maintain the permit and compliance. Even if the expansion project happens, it is not relevant to the project and Order of Conditions in front of us now.

Posner – If we can get the compliance process sorted out, we will remain in compliance until such time as we decided we can’t maintain the project and terminate it.

Motion **Based upon prior findings that SBPF failed to meet requirements for sand mitigation, move to enforce the removal protocol outlined in Paragraph 36 of the Order of Conditions.** (made by: Engelbourg) (seconded by: Phillips)

Roll-call vote Carried 6-1//Beale, Engelbourg, Erisman, Golding, Phillips, and Topham-aye; LaFleur opposed

Carlson – A protocol for removal needs to be drafted and discussed.

Erisman – Asked if the applicant is willing to come up with a proposal or do they want to just back away.

Carlson – He will draft something after consultation with Mr. Berman and MADEP. He will try to have something ready at the July 8th meeting.

Beale – Asked if it would be helpful to list all 5 violations in the decision.

Carlson – He’ll put together a sheet of findings.

Golding – Asked if there is a legal way for Mr. Topham to have input in the findings as his tenure ends at midnight tonight.

Carlson – He will clarify how and if Mr. Topham is able to participate.

Engelbourg – Asked Mr. Carlson to include relevant sections from the Order of Conditions.

Topham – He will help out anyway he can.

Golding – Asked for a provision that SBPF provide all the data in a GIS-friendly fashion. There’s a whole subset of plans we were hoping to get from this.

Carlson – He will look into conditioning that into the process.

Phillips – It would be a tragedy to lose the value of all that research. Hopes SBPF would look to doing that; it makes this experiment something useful for the rest of the Island. Regarding the Escrow Fund for removal, it needs to be found and the amount in it identified; , if there are no money in the fund, that doesn’t absolve them of paying for the removal.

Golding – He’s disappointed that this is the end result; it’s been a complex decade. He’s got the original application from 2007. He doesn’t know how we arrived at this point where is such a deficit and so many violations. Hope to move forward with a new application and a new design. It’s an important issue for the Island.

Erisman – We’ve spent a lot of time trying to keep and get the project into compliance. The hope had been the project would be consistently compliant. Sustainability of the group to maintain the sand amount wasn’t possible.

Carlson – He has enough information to put a draft together.

Erisman – The discussion will continue at the July 8th meeting.

C. Amended Order of Conditions

1. Snowdon – 11 Massachusetts Avenue (60-80) SE48-3148

Sitting Erisman, Golding, LaFleur, Topham, Engelbourg, Phillips, Beale
Documentation Draft Order of Conditions.
Staff Condition 20 addresses material of the walkway; Condition 21 requires photo monitoring. Conditions 22 and 23 requires written notification of installation every year. We can remove 22 and 23 and add Finding 3 about the reasons for no rail.
Discussion (6:20) **Erisman** – The Order of Conditions was sent out today.
Golding – We were poised at 3-3 whether or not to approve the handrail with Ms. Erisman as the swing vote. He hasn't changed his opinion about there being no handrail.
Erisman – In a context with avian life in the area, she saw a seagull get clothes-lined by a wire. We are trying to design them in order that people won't see them, but the question is whether or not a bird would see them.
Engelbourg – One way to get water birds not to land is to put in small-gauge wire. Given the marsh is such a productive area for water birds, this is a huge issue and impacts the habitat.
LaFleur – Thanked Mr. Engelbourg for his explanation; it's important to protect the area and changes his stance.
Topham – His concern was more spooked deer; it would cause some impact. Thanked Mr. Engelbourg for the additional information.
Engelbourg – Protecting wildlife is one of our protected interests; we should call that out as a reason or finding.
Golding – He wants wetland scenic view added to the Finding.
Phillips – There was talk about a rope; asked if that would be as bad as the metal cables.
Engelbourg – Rope is relatively equivalent; cited two projects where cable and rope impacted wildlife the same.
Motion **Motion to Approve as amended.** (made by: Beale) (seconded)
Roll-call vote Carried unanimously//Beale, Engelbourg, Erisman, Golding, LaFleur, Phillips, and Topham-aye

D. Adjournment

Motion **Motion to Adjourn at 6:32 p.m.** (made by: Golding) (seconded)
Roll-call vote Carried unanimously//Beale, Engelbourg, Erisman, Golding, LaFleur, Phillips, and Topham-aye

Submitted by:
Terry L. Norton