



CONSERVATION COMMISSION

SPECIAL MEETING

131 Pleasant Street
Nantucket, Massachusetts 02554

www.nantucket-ma.gov

Thursday, December 15, 2021

Remote Participation Via ZOOM – 5:00 p.m.

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

Called to order at 5:00 p.m. by Ms. Erisman

Staff in attendance: Jeff Carlson, Natural Resources Director; Vincent Murphy, Coastal Resiliency Coordinator; Terry Norton, Town Minutes Taker

Attending Members: Erisman, Golding, Engelbourg, Beale, Williams, Misurelli, and Plandowski

Late Arrivals: Williams, 5:06 pm.

Agenda adopted by unanimous consent

I. PUBLIC MEETING

A. Announcements

B. Public Comment

1. **R.J. Turcotte**, Nantucket Land Council – In August or September we discussed the in-Town stormwater structure not being up to task and not being properly serviced. That has not been addressed.

Carlson – We'll put it on next week's agenda or the 1st meeting in January.

II. PUBLIC HEARING

A. Notice of Intent

1. Sconset Beach Preservation Fund – 41-119 Baxter Road (multiple) SE48-3598

Sitting Erisman, Golding, Engelbourg, Beale, Williams, Misurelli, Plandowski

Documentation NOI supporting documents and plans, correspondence, Arcadis Report, Coastal Resiliency Plan, and Town-SBPF Memorandum of Agreement.

SBPF Dwight Dunk, Epsilon Associates Inc.

Representatives Gary Ronan, Goulston & Storrs
Merideth Moldenhauer, 71 Baxter Road

Town Jennifer Lachmayr, Arcadis

Representatives Matt Fee, Select Board

Public R.J. Turcotte, Nantucket Land Council
Dennis Murphy, Hill Law, attorney for the Greenhills
Richard Atherton, 48 Squam Road

Discussion **Erisman** – First and foremost we must discuss the hearing limit and if we can proceed.

Beale – Asked if there has been any action on ConCom's independent counsel. He's concerned about conflicting legal views and not having counsel.

Erisman – As far as she's aware, the Select Board has not discussed the issue, despite their statement that they would bring the issue up at last night's meeting. We have some questions that are of a legal nature. and she would prefer to have representation.

Plandowski – His concern is the same as Mr. Beale's. He'd make a motion to adjourn; he doesn't understand the legalese and feels it will be very difficult to have a discussion without counsel. Both Town and SBPF are well lawyered up.

Erisman – We can still have productive discussion about material changes; but agrees we need legal counsel. With a project of this nature, it's surprising that the Town wouldn't want ConCom to have its own legal counsel; it would provide two views when looking at the information.

Williams – Said she's quite familiar with the issue of repeat applications between the ZBA and the Planning Board. She's inclined to go forward on this and wants to hear from Town Counsel; she doesn't agree with Attorney Dennis Murphy's letter at all. SBPF was never denied, and she is in favor of going forward with a different scope of the project.

Carlson – He thinks there will be disagreement whether or not the bylaw provision applies here. The secondary standard indicates that if it does apply, it can be overcome by material changes that allow it to be heard. Some of those changes will need to be applied.

V. Murphy – He's not here with any legal representation and has no opinion from Town Counsel. He could seek their opinion.

Erisman – As SBPF has legal counsel at this meeting and the Town is a co-applicant, you do have legal representation. However, it might be better to have Town Counsel, but ConCom should have its own independent representation.

Golding – Read a letter from Hill Law dated December 12. No one currently on this commission has a law degree, and he mirrors Mr. Plandowski's concerns about reviewing this NOI.

Erisman – Thinks we'll have a difficult time coming to a conclusion about the rehearing limit this evening. However, we can use the time wisely to have the applicant provide evidence that they have made significant material changes.

Engelbourg – The hearing limit isn't relevant since it can be overcome by the finding there are sufficient material changes. We should focus on whether or not there are material changes; if we find there are not, we can close the hearing.

Williams – Confused about the purpose of this meeting; she understood there would be no hearing on the merits but only whether or not we want to hear this.

Erisman – SBPF must present the material changes from the permit upon which the enforcement was issued. We should discuss if they meet the threshold for a rehearing; then we vote on whether we rehear it or not. This meeting was scheduled with the hope that we would have counsel, which we don't; she wants to discuss the changes.

Fee – It was not on the Select Board agenda last night; his understanding was that there would be parameters on ConCom's request for Counsel. Town Counsel could weigh in on this as ConCom asks but Mr. V. Murphy is concerned about tainted opinions. Town has counsel on behalf of all of us; if we get to a point where we're at odds, then we can get ConCom independent counsel. We don't need to be adversarial at this point.

Erisman – We sent a letter outlining all our reasons for why we feel we need independent counsel. The Town is a joint applicant; from the perspective of the application, SBPF and Town are working together. We are trying to move forward in a non-adversarial way.

Golding – The Town is a co-applicant so he would like ConCom to have independent counsel; doesn't see how Town Counsel can advise both sides of the application. We sent a letter outlining what we would consider including no extension of the current array; that was ignored by the Town. That's why we need separate counsel.

Plandowski – He's read these documents; it's clear SBPF and the Town are "joined at the hip" on this. We can work together but we are a separate entity from the Town for the purpose of the application.

Carlson – Whether the rehearing limit applies or not, we still have to analyze whether or not the NOI application is substantively different to warrant review. Recommends moving on with a discussion whether or not the application is different enough from the previous application.

Dunk – The plain reading of Section 133 F is that the most recent application was for the NOI submitted in 2018; the most recent action was on the currently installed geotubes. Asked to have Attorney Ronan respond to Mr. D. Murphy's letter then have Ms. Lachmayr describe the differences.

Plandowski – We should ignore the attorney letters at this time and concentrate on the NOIs.

D. Murphy – This arises only under ConCom's bylaw; whoever drafted Nantucket's wetland bylaw used the State bylaw as a template. The 1st part of the analysis is the legal applicability of the section. The 2nd is the factual determination of specific material changes. He highlighted the one on Page 4 of the proposal; it's a continuation of the existing. You don't have to decide tonight; but watch the clock and be mindful of the 21-day requirement. His last point is that the person who wrote the local wetlands bylaw made specific comments different from the state; the local bylaw references a permit, not an application.

Engelbourg – Both factual and legal sides must be acted upon; we can take on the factual side tonight. ConCom should have independent counsel in the event there is a conflict of interest with the Town. He'd like Staff to look into possible court cases where a Town was the applicant and shared counsel with their ConCom; he doesn't feel such cases will be found. None of the speakers retained by the Town will be reporting on behalf of ConCom. Right now, by definition, we and the Town are on different sides of an application with separate interests.

Misurelli – Everyone's had plenty to say about legal counsel. We should move forward to the factual aspect.

Ronan – Suggested he and Mr. D. Murphy present the factual information and also provide comments about the legal aspect so that independent counsel would have the benefit of those comments.

Erisman – Asked the SBPF representatives to make their presentation.

Lachmayr – It's been about 1 year since Arcadis was hired to do the analysis for Baxter Road. We came away with a safe alternative that keeps the tubes in place until road relocation is ready to go. The tubes stabilize the toe of the bluff from higher intensity storms. Both the NOI and Baxter Road relocation were cited in the Arcadis report.

The material changes include the Memorandum of Agreement (MOU) between Town and SBPF and Town's understanding, as a result of previous ConCom hearings, that there needs to be Town oversight on the project with a plan submitted. The Town has secured the monies for the cost of removal. The Town is a co-applicant because it feels there is a civic benefit in protecting Baxter Road. The worse erosion is at the north end and threatens utilities as well as the road. Access to the beach has been improved. There are more nature-based solutions identified in the Coastal Resiliency Plan (CRP).

V. Murphy – The project would be structured in a way to not be as impactful as the current structure. Reach 4 would start as coir with a trigger that would indicate it should go to the next level; Reach 5 is almost all nature based.

Ronan – It's important to recognize what we are comparing. The context is that you can still hear the application if there are specific and material changes from the enforcement. The existing geo-tube project is the subject of the court decision. The project covered by the NOI is 3-times bigger and includes some softer solutions in addition to geotubes. There is a difference in the application as the Town is co-applying with SBPF. The only

way they aren't different is that the proposed project includes the existing array. The fact the geotubes are included in this NOI doesn't make it the same.

Erisman – Her point is that the permit acted upon is for the 947' of 5 geotubes, and now SBPF and Town are proposing the same structure within that space. She finds that problematic with the extension exasperating the concerns ConCom acted upon regarding the 947'. Our ruling and the judges are that the geotubes be removed.

Beale – His question to an attorney for ConCom would be what to do with the enforcement order – ignore it, rescind it, or enforce it.

Erisman – The enforcement issue will come up on January 12th. This does add to the confusion. If we favorably approve this NOI, which includes the 947', that approval would make the Enforcement Order moot.

Engelbourg – He doesn't think the question of how the 947' plays in is a merit question. It's non-compliant and should be removed because it doesn't meet the standards of the Wetland Protection Act. That being said, it doesn't mean the application can't be heard. There are some substantial changes in material.

Plandowski – Reading through the document, the issue that pops up is that of sand and sand source; the project won't work without sand. The reason we're in this situation is because of the lack of sand.

Golding – Regarding Attorney Ronan's comparison of the NOI to a meal, he argues that if people get sick, it's still bad a meal.

Misurelli – He sees differences in the application: a co-applicant and 5 different areas with triggers. Asked the last date the last SBPF application was heard.

Ronan – It was filed January 2018 and was denied June 20, 2019.

D.Murphy – Going back to Section 133 F, it says the significant material changes should be in the circumstance upon which the previous action was based. You're being asked what has changed from the application against which the Enforcement Order was issued; Mr. Plandowski is correct about the removal order being based upon the lack of sand. This has the same sand per linear feet; it doesn't talk about pathways, relocation of the road, and MOU; it says it's a continuation of the pilot project. If they could identify a source for sand, that would be a significant material change.

Moldenhauer – Arcadis and Mr. V. Murphy outlined 15 differences; she noted 6 that apply to changes from the existing. There are substantial changes in circumstances. The relationship with the Town as a co-applicant is a result of the Enforcement Order. Other changes include: collaborative drafting, new Town oversight, checks & balances, public recreation space, monitoring, analysis from Arcadis, sand calculations and sourcing, nature-based solutions, and triggers.

R.Atherton – Explained why the issue of rehearing is important. Those are not substantial changes and the 1000' is not changing.

Fee – The Town is involved to support ConCom and address concerns. The intent was always positive and to include oversight. He thinks that's a substantial change in circumstances.

Turcotte – The Commission is being asked to approve the geotubes at the toe of the bluff. He feels the Reaches are a foot in the door to expanding the geotube. Arcadis doesn't recommend expansion. Asked when the appeal of the 2018 NOI was withdrawn. The Land Council letter indicates the Select Board and ConCom need to get on the same page; the Town has an interest to relocate Baxter Road.

Erisman – The appeal was dropped in September 2021.

Dunk – Mr. Engelbourg made some excellent points in the difference in the applications and moving forward. Some discussion since then has regarded technical merits. The discussion has gone beyond the material difference. The current NOI references the Arcadis report and takes it into account; that's a circumstance that has changed – this is a medium-term action to allow the Town to move forward on a long-term action.

Erisman – Asked commissioners to discuss the changes. If we had Counsel, they would help keep us on track. She's stuck on the 947 feet and enforcement of that permit; she doesn't see circumstances changing and it exasperates the current situation. The Town is a co-applicating because it is a property owner for the array.

Williams – The underlying situation doesn't have to be removed or ignored but can remain within the new application. The material change is that it no longer is a stand-alone structure.

Golding – He agrees with Ms. Erisman. Reading Section 133 F, he doesn't see the circumstances as having changed. We are being asked to trust an applicant to provide sand that they haven't provided before.

Carlson – If you feel it's significantly different, you need to make that determination and proceed with the hearing; that determination doesn't impact ConCom's final decision to approve or deny the application.

Plandowski – Looking at the plan, he doesn't understand the breakpoints between the Reaches.

Williams – Asked if ConCom would continue this discussion to January 12th because we don't have Town Counsel.

Golding – He wants an opinion from counsel that represents ConCom alone, not Town Counsel

Engelbourg – He believes this Board doesn't need every change to be significant, just one significant material change; he'd like a legal opinion on that.

Beale – Asked if we would be approving the geotubes as they stand and then they would come back for any changes up within the Reaches or would we essentially be approving for them to change up to geotubes for the full length when a trigger activates.

Carlson – Past practice is you can discuss how triggers activate; we can include a provision in the Order of Conditions that they come back to the commission before they act upon the triggers.

Beale – The 5 Reaches express a possibility for expansion of geotubes. There was no note in the NOI indicating they would come back for any changes, but it would be a *carte blanche* approval.

Carlson – That’s why we have the Order of Conditions.

Golding – He reads the Section as material changes in the circumstances; the circumstances haven’t changed.

Misurelli – If we elect to go on to hear this, we would have to discuss each section and phase.

Lachmayr – As a civil engineer working with the Town and imminent failure of Baxter Road, her concern is the impact to the resource areas in the event the road fails. Asked if there’s a way to bring the Select Board and ConCom together for a technical discussion.

Erisman – If the Select Board wants to meet with us, they can make that request.

Engelbourg – He’s 100% in favor of meeting with the Select Board; he has a broad understanding of possible solutions he’d like to share. However, the process is we hear applications and base them on merits. We each have a different idea of what would be ideal in protecting our interests. There are many more alternatives that aren’t considered for this and he feels the alternative analysis is inadequate.

Ronan – The issue isn’t whether or not it’s a good project, it’s just about hearing this NOI. He understands there are people with strong feelings about geotubes and past management of this project. Please listen to what we have to say and hear the application.

Plandowski – He wonders how different this discussion would have been if the past few years could be erased.

Golding – He takes the point about how much has been done on this plan. There has been an awful lot of work on this from many parties.

Fee – His understanding is when the Select Board asked to meet ConCom, there was no application. He’d be happy to have a joint meeting, but it shouldn’t slow this process up. He’ll asked the Select Board if they want to send a letter about having that conversation.

Erisman – What’s slowing us down is the lack of independent counsel.

Beale – A sit down with the Select Board would be very hopeful.

Engelbourg – We’re at the point where no more substantive information will be entered into the record. We should ask the applicant if they want to continue the hearing.

Williams – The Select Board has made an application to us; therefore, we would have to meet with them within our regular hearing process.

Erisman – She would want counsel’s decision on that but tends to agree.

Carlson – You can post a meeting for discussion on the application with the Select Board and have a broader discussion. He knows our staff and Town staff can assemble a topic list to be circulated. Asked if everyone is okay with Staff looking for a date for a joint meeting with the Select Board.

Erisman – She’s wondering if the applicant would be willing to request a continuance of this hearing to a date certain; the 21 days would start from that date certain.

Dunk – On December 1st, ConCom voted to start the days upon submission of NOI; the day it was submitted started the 21-day count with merits discussion on January 12th. Would consent to a continuance to January 12th.

Motion **Continued to January 12, 2023.**

Roll-call vote N/A

B. Orders of Conditions

1. None

C. Other Business

1. Discussion about a joint meeting with SB.
2. Adjournment

Motion **Motion to Approve at 7:00 pm.** (made by: Golding) (seconded by:)

Roll-call vote Carried 7-0//Beale, Engelbourg, Erisman, Golding, Misurelli, Plandowski, and Williams

Submitted by:
Terry L. Norton