



# CONSERVATION COMMISSION

## PUBLIC MEETING

2 Bathing Beach Road  
Nantucket, Massachusetts 02554

[www.nantucket-ma.gov](http://www.nantucket-ma.gov)

Wednesday, March 25, 2019

4 Fairgrounds Road, Training Room – 4:00 p.m.

**Commissioners:** Andrew Bennett(Chair), Ashley Erisman (Vice Chair), Ernie Steinauer, David LaFleur, Ben Champoux, Ian Golding, Joe Topham

Called to order at 4:03 p.m.

Staff in attendance: Jeff Carlson, Natural Resources Coordinator; Terry Norton, Town Minutes Taker

Attending Members: Bennett, Erisman, Steinauer, LaFleur, Champoux, Golding, Topham

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

Agenda adopted by unanimous consent

### **I. PUBLIC MEETING**

#### **A. Announcements**

**B. Public Comment:** Carlson – The next regular meeting is April 10.

### **II. PUBLIC HEARING**

#### **A. Notice of Intent**

1. \*Sconset Beach Preservation Fund – 59-119 Baxter Road (49&48-various) Area SE48-3115

Sitting Bennett, Erisman, Steinauer, LaFleur, Champoux, Golding, Topham

Recused None

Documentation Supporting documents and plans. PowerPoint® presentation.

Applicant Steven Cohen, Cohen & Cohen LP

Representatives Dwight Dunk, Epsilon Associates Inc.

Jamie Feeley, Construction Manager Cottage and Castle Inc

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

Arthur D. Gasbarro, Nantucket Engineering & Survey,

Public Hugh Ruthven, III, Applied Coastal Research and Engineering, for Nantucket Coastal Conservancy

D. Anne Atherton, 48 Squam Road, Nantucket Coastal Conservancy

Emily Molden, Nantucket Land Council (NCL)

Dirk Roggeveen, Quidnet/Squam Association (QSA)

Discussion **Cohen** – We have submitted substantial information supporting our legal stance for a coastal engineering structure (CESP, information on the erosion of the toe of the bank, why this is the best available design, why the structure meets the law, how the mitigation is the most advance, and failure-success criteria. There is no presentation on new and additional information.

**Bennett** – Looking at the surveys of the shoreline, asked if the raw numbers are available.

**Dunk** – The Woods Hole Group (WHG) transferred the raw data to Mr. Carlson. That was part of the monitoring requirement.

**Champoux** – Seeing that this project will not go away, he wants to know if there is another way to stop erosion at this location.

**Ruthven** – There are a number of different approaches such as an off-shore breakwater. The biggest question is if they could be permitted. You have to look at what’s happening adjacent to the CES; those impacts could be significant over a long period of time.

**Champoux** – The alternative of doing nothing is not on the table. Asked if the Board is at the best place they can be and how to condition it appropriately.

**Ruthven** – In the face of rising sea water, going forward you are going to have make decisions that there are places that can’t be saved. Some conditions might be onerous, but the alternative is to allow impacts elsewhere.

**Champoux** – He is very concerned about the sustainability of this project. He wonders how the Board would ensure that this doesn’t end up with no sand and no maintenance and thus becomes a hard-armored structure. Asked if there are legal means to say ConCom deems this a failure and removing it will destabilize the bank and possibly take a home or two with it and keep them from appealing that decision.

**Pucci** – Performance Standards can be put in; if you note those aren’t being met and declare it’s failing and should be removed, they can appeal. You can’t build a condition in the order against an appeal.

**Champoux** – Asked if there is a licensure avenue

**Pucci** – There would be some type of agreement in place through the Select Board because of the Town land involved.

**Champoux** – Asked about the ability to revoke a license.

**Pucci** – Currently there is a license agreement for the current project. Agreements like that are only as good as the parties involved. The Town would make an effort to protect its property interests, but there is no guarantee. Your valid concerns go a little beyond ConCom purview.

**Champoux** – He’s concerned about the future; over time, its exposure will increase requiring more sand, which will get more expensive. We don’t know where the sand will come from as the sea-level rises; and future homeowners might not want to support this.

**Cohen** – It is important to look at the sustainability of this as a long-term project. There is a good legal basis that forbids the ConCom from issuing an order that says it is unappealable; however, this project overlaps Town property and they retain the ability to revoke the license and have required an escrow be in place to cover the cost of removal. The SBPF is more than 25 years old made up of Baxter Road homeowners to whom the value of their homes are substantial investments both sentimentally and financially; that will continue for a long time. Should this be approved, we have a plan to put in place long-term funding solutions. SBPF is not going to undertake this effort without having a long-term financial solution. There is a mis-conception that the geotubes are holding up the bluff; they are protecting the toe from erosion and the bluff would not collapse if they are removed.

**Steinauer** – This a complex situation being permitted through a private non-profit that doesn’t own any of the property the structure is on. The project is on Town land, if it comes apart, asked who is ultimately responsible.

**Pucci** – It is something built into the Town’s contractual process. SBPF has to indemnify the Town against down-drift damage, injury, and removal. ConCom has very limited ability to protect against that. Property owners have signed off on the Memorandum of Agreement.

**Steinauer** – We are concerned that if this fails and there are huge bags sitting on the beach because they are tied up in the removal process, they will end up in the ocean.

**Erisman** – Her concern is the plastic fibers shed from the tubes ending up on the beach and in the ocean causing damage to the marine environment.

**Cohen** – He feels a removal order is outside ConCom jurisdiction; that falls within the purview of the Select Board and is covered by the escrow.

**Erisman** – Asked Mr. Cohen about the plastic fiber in the rolls.

**Cohen** – That would be under ConCom jurisdiction.

**Erisman** – She is glad to hear Mr. Cohen say that plastics fall under our purview. The previous answer by SBPF was that this project is beyond the scope of the Wetland Protection Act (WPA) and Nantucket Wetlands Protection Bylaw.

**Dunk** – The interest of the WPA is damage prevention, flood control, pollution prevention, protection of groundwater, shellfishery, and protection of marine habitat. If the project is placed, installed, and maintained properly, those concerns are protected. The current order of conditions requires an escrow account for removal and the Town has other mechanisms for having funds available for removal to avoid that potential situation. For the purpose of permitting, we are looking at it being properly built and maintained.

**Erisman** – These bags are within the beach. Nutrients are going into the beach from the face of the bag. 7000 square feet of beach is replaced with textiles. Fibers getting into the beach is absolutely an issue and there is no mitigation for that.

**Dunk** – Regulations for coastal bank allows the placement of this CES on the beach; it is the only structure allowed on a beach. As proposed, this complies with the coastal beach and coastal bank regulations.

**Bennett** – Way-back-when, the expansion was proposed as a rock revetment. Asked why they went with tubes.

**Cohen** – A rock revetment has better reflection than the tubes and allow water to flow through; the major problem is that it is expensive to put in and remove because the rocks are 3 to 4 tons. Geotubes are removable in the most sensitive way; they also go in very quickly and more sensitively.

**Topham** – Asked about sand sourcing: off shore, coming in via barge from off Island.

**Posner** – We feel reasonably confident we can find an off-shore source and it is the best route. He doesn’t think a mainland source is a great option; upland Island sources are under consideration. If we can’t find a sand source, we’ve agreed to a bunch of removal stipulations. If we don’t provide sand, we are in violation. We can’t start working on permitting offshore sand if we can’t build this.

**Champoux** – Asked about the forecast for the current sand source.

**Feeley** – Barging sand in would work well for us. There is no compatibility issue and the amount of off-Island sand is substantial.

**LaFleur** – It could take years to get the off-shore permit; asked where sand would come from while the off-shore permit is sought and where are the current access points.

**Feeley** – The access points are shown on the plan and we have three points for over-the-bank delivery of sand.

**Champoux** – Asked if there has been talk about phasing the installation of the project over a few years. You have a structure that is over 3,000 feet long. He’d prefer this be installed in 700-foot sections, which are watched for a year or two before the next section is installed.

**Posner** – He sees it being done all at once; explained the difficulty of mobilizing in phases versus doing it once.

**Champoux** – Feels we are going “full-steam ahead” into a very large project without knowing what the impact would be.

**Cohen** – He believes we do know what the impacts are: cited some of the negative impacts from waiting.

**Posner** – We have five years of actual data from the existing project.

**Bennett** – Asked about the definition of “imminent danger.”

**Pucci** – He would have to look at that.

**Cohen** – That isn't a defined term; it is up to the ConCom to make that assessment. Reviewed how it was determined regarding the discussion about the existing project. We have looked at how close things are to the edge, how far back they could be moved, and how many years that might provide. We feel comfortable that the houses are being protected.

**Dunk** – The dune was protecting the toe of the bank and the dune has retreated southward.

**Cohen** – We've confirmed that the Department of Environmental Protection has all the information submitted and oversees it. The standard used last time was through the Department of Environmental Protection process; they can override the local decision. If you were issuing an order outside the reasonable interpretation of that standard, Department of Environmental Protection is watching.

**Golding** – Referred to a letter dated March 22 about pre-1978 home protection; he stands by his math because three houses have lots on the other side of the road.

**Cohen** – The law supports our position that abandonment and relocation are not a reasonable alternative; they feel anything off the lot is going beyond what State and local laws require.

**Golding** – Asked Town Counsel to weigh in on the idea that moving across the street is a reasonable alternative; prior to 1964, all lots along Baxter Road had contiguous lots across the street for the purpose of retreat. He would also like to know the percentage of the overall footage of gap-lot footage to the structure.

**Carlson** – He can provide the percentage information.

**Bennett** – Gap lots, imminent danger, source of sand are elements we have questions about.

**Carlson** – We are also asking Mr. Pucci if relocating to a lot across the road is a reasonable alternative.

**Pucci** – This would be a good project for an analysis. It appears they are saying they've addressed these issues; we should look at them issue by issue and provide an analysis. He can follow up with a bullet point written opinion.

**Posner** – Two issues we've talked about: we say that once the dune at the toe disappears, everything behind it is in imminent danger; he believes there are only two gap lots in the entire length, one of which is behind the current structures. There are two houses and an empty lot at the north end that are very close to the road which is protectable. On the south end there are two new homes that could be considered protectable as gap lots.

**Cohen** – He wants to know if there are conditions for which the commission would want more information.

**Erisman** – Speaking to the gap lots and road, the State act doesn't protect infrastructure, we have talked about the alternative of moving the road. She has previously asked for identification of locations where the infrastructure is being protected on the southern end versus pre-1978 structures versus gap lots.

**Dunk** – Back in the fall, we have two non-eligible homes identified as gap lots; the idea of the gap lot is to have a continuous extension of the project. On the north end: lots 119 and 117 are now vacant but protect the infrastructure; Lots 115, 113, and 109 are all eligible as pre-1978 homes; Lot 107 is vacant but protects the infrastructure; Lots 105, 101, and 99 are vacant but are eligible for protecting infrastructure; Lot 97 is eligible under the State; Lot 93 is eligible; Lot 91 is a gap lot between two eligible structures; Lots 87 and 85 protect the infrastructure. To the south: Lot 83 is eligible, Lot 81 is new eligible under the State; Lots 79-71 are eligible; Lot 69 is eligible under the State; Lots 67 and 65 are eligible; and Lots 53, 51, 55, and 59 are all State eligible.

**Cohen** – Regarding alternative access, the Town has looked very hard at this; Baxter Road could be moved back 10 feet within the current layout with sewer and utilities moved into yards. It can't be moved to behind the other house without eminent domain; that is not a reasonable alternative. The alternative access agreement in place is only allowed in the event there is permitting for this project and it failure. Abandonment and eminent domain are not reasonable solutions.

**Erisman** – Concerning documentation about the alternative access for Baxter Road, it has been alluded there is an alternative, but we have not seen the documentation.

**Cohen** – We are required to update you on the agreement. He worked on the agreement; it clearly provides the right to use it solely in the event there is a permit for a structure in place and the structure is declared a failure. That agreement only deals with that northern point.

**Pucci** – He would recommend adding that to the list. It came up at the Select Board meeting as well. Our interpretation is different than as represented by SBPF in terms of existing obligations under the terms; we will clarify it and provide our opinion. One thing that came up on this issue is the local bylaw can be more restrictive than the Wetlands Protection Act; what it doesn't say is the Town can have a less-restrictive bylaw. The question is, are you trying to enforce less restrictive aspects in the discussion about gap lots and infrastructure.

**Champoux** – Asked which structures the access would benefit and what the breach trigger would be.

**Cohen** – Polpis Road through private property to the parking lot. At the time it was put in, there was concern the road itself would be considered unsafe; people would have no means to access their homes.

**Pucci** – There is a legal interpretation in place if the alternative access is in place and it is enforceable; that is a legal issue. That's different than a factual issue as to the availability of the alternative access. If there is a breach, the alternative access agreement is in place and enforceable; it is tied to the permitting of the existing structure. If you are thinking about reasonable alternatives to protection of other areas, it is a factual question what area is covered by the alternative access.

**Posner** – We agreed to work cooperatively with the neighbors to find up a back-up plan should this fail, and the road is breached. The alternative available is if the Town decides to remove the structure, this agreement goes into effect.

**Carlson** – Suggest we have that discussion when we have a written analysis from Town Counsel. The alternative access would be for homes north of Bayberry Lane.

**Pucci** – SBPF did put a lot of effort into getting the access and it was part of negotiations for the existing project as a *quid pro quo* for not contesting the betterment tax on the impacted homeowners.

**Atherton** – We have been in communication with the Select Board in discussion various scenarios; The Select Board has said they want to support ConCom in their decision. She would ask if this permit is denied, the Town can withdraw its consent and thus obviate their appeal. She feels some things being told ConCom is being misrepresented.

**Molden** – Wants a sense if this will be continued or if it will be closed.

**Carlson** – Recommended that anyone with comments put them on the record today.

**Ruthven** – There is no guarantee of a structure being authorized; you need to look at the impacts and does this meet those standards of the WPA. He talked to Department of Environmental Protection about gap lots; they don't have written standards, but they have turned down a project with a 200-foot gap between eligible properties. Recommended going through the WPA. The Commission should evaluate the previous order and find ways to make it better and what doesn't work.

**Roggeveen** – If there is a failure to maintain the amount of sand, his clients would suffer damage. On the superseding Order of Conditions page 16, Item 22 informs the State refusing to give a permit and allowing only a temporary structure to protect infrastructure and gap lots.

**Cohen** – Important considerations: construction timeline, giving the Select Board time to negotiate a strong license, and the possibility of losing 1 or 2 commissioners off this Board. Would like a decision very soon; they are willing to keep this open for Town Counsel to provide the requested memo and close the public hearing at the next meeting. We have no new information to submit.

**Carlson** – As soon as the hearing is closed, the commission must issue a decision within 21 days. Part of the question would be how long Town Counsel would need to prepare a memo and time for everyone to read it. The most critical piece of information is the analysis from Town Counsel.

**Pucci** – He's more concerned about being available to attend the hearing.

**Cohen** – Asked for a continuance to April 22.

**Continued to Monday, April 22, 2019 by unanimous consent.**

Motion

Vote

N/A

**III. PUBLIC MEETING**

**A. Other Business**

1. Approval of Minutes 11/05/2018, 11/19/2018, 12/03/2018, 02/11/2019, 03/11/2019: Accepted by unanimous consent.
2. Monitoring Report
3. Enforcement Actions
4. Reports:
5. Commissioners Comment
6. Administrator/Staff Reports

Adjourned at 5:54 p.m. by unanimous consent.

Submitted by:

Terry L. Norton