



# CONSERVATION COMMISSION

## PUBLIC MEETING

2 Bathing Beach Road  
Nantucket, Massachusetts 02554

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

Monday, April 22, 2019

4 Fairgrounds Road, Community 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 4:05 p.m.

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

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

Absent Members: None

Late Arrivals: None

Earlier Departure: None

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

Agenda adopted by unanimous consent

### **I. PUBLIC MEETING**

#### **A. Announcements**

#### **B. Public Comment – None**

### **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.

Arthur D. Gasbarro, Nantucket Engineering & Survey

Jamie Feeley, Construction Manager Cottage and Castle Inc

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

Public Dirk Roggeveen, Quidnet/Squam Association (QSA)

Emily Molden, Nantucket Land Council (NCL)

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

Maureen Phillips, Nantucket Coastal Conservancy

Burt Balkind, 10A Scotts Way

D. Anne Atherton, Nantucket Coastal Conservancy

Karen Warren, Nantucket Coastal Conservancy

Discussion **Cohen** – This project can be boiled down to two questions: can erosion protection be effective in this location and does it meet the legal standard. Explained why all the land in this area is protectable to include the so-called gap lots. We have clearly demonstrated the structures are in danger. Feels it beneficial to allow more land to be retained in the area to maintain the shape of the bluff. Explained why the geo-tube coastal engineering structure (CES) is the most appropriate in this location; reviewed the pros and cons of the geo-tubes per the “Berman Report.” No one really wants this, but it is a question of installing it or abandoning the properties. The Commission’s decision should be based upon meeting the legal standards and the standards of the Act. We don’t intend to submit further information. Our preference is to close the public meeting (sic) unless the Commission needs further information

**Steinauer** – Asked Mr. Pucci if he agrees the roads and utilities are not public infrastructure but part of the home

**Pucci** – At the last hearing, a number of legal issues came up for which there was a request for a written opinion from Town Counsel. In connection with the history of this project and his working with ConCom over the past 9-10 years, he is concerned about providing a legal opinion for or against a project before there has been any deliberation or discussion about the Commissioners’ leanings. For legal issues noted, it would be more appropriate for the proponent to provide legal support, the opponent should have the opportunity to respond to those. For the record, he has never lost a Nantucket ConCom case, which is a compliment of the Commission’s level of consideration and application of performance standards. Suggested that if there are unanswered questions on legal issues by the Commissioners, responses should come from the project proponent. A threshold issue is how to analyze this project; the State does not protect infrastructure. There are some comments about the Massachusetts Department of Environmental Protection (MaDEP) decision he doesn’t know where they came from. The local bylaw does protect infrastructure; a local Bylaw and regulation

can be more restrictive than the Wetlands Protection Act. Noted that protecting infrastructure is less restrictive than the State; that speaks to the area of lots that solely protect infrastructure, not pre-1978 buildings. Your analysis should not consider infrastructure. Under local regulations, you also appear to be more restrictive than the State regarding pre-1978 structures that have been substantially improved since 1978. He does not read “substantially improved” as the same as “reconstruction”, but he sees that as expansion of the footprint; that analysis should come from the proponent. There is a question if there is a legal requirement to protect not only the building but also the infrastructure and/or utilities necessary to occupy the building; that legal support should come from the applicant. He has not seen that addressed in the record. He recommends that the public hearing should be kept open to have the project proponent can provide legal analysis on these issues. There should be further submission on that; if they insist on closing the hearing, the Commissioners will have to close within the required time period without it.

**Dunk** – We have presented into the record how the project was designed to meet the performance standards: the two most important: to protect the bank from wave action and the sand template program to provide sand into the littoral system. The discussion of the pre-1978 homes, we’ve provided, in a letter dated April 19, in which we address at length the legal right to protect the homes under local and State regulations. There are 612 feet of vacant lots where the project is meant to protect the infrastructure, which is required for a home to be habitable. 205 feet are made up of “gap lots”, across which the CES is needed to maintain a contiguous structure. We have 500 feet between lot 81 that and 69 are all pre-1978 homes. The evaluation of the length of the project to protect infrastructure is also addressed. Under the State Act, the MaDEP superseding order of conditions found there were a number of vacant lots in front of which they allowed the 3-tier system to be installed for (infrastructure) to maintain the habitability of the pre-1978 homes. The precedent set in that order of conditions allows for infrastructure to be protected for the pre-1978 homes. Feels that standard should be applied to this project.

**Erisman** – That order talks about imminent threat; we have a lot of information from the Department of Public Works (DPW) about what that meant to the road. With the installation of the existing project, that has been abated. She wants to know where DPW stands regarding imminent threat: what that is, where that is, what has to be moved.

**Cohen** – All that information is in the record. The DPW under Rob McNeil hasn’t taken a position. About not falling into the trap of taking sides during the hearing, he agrees with Mr. Pucci. If your Bylaw says you can protect infrastructure, you can’t decide it isn’t legal but must ascertain what that means as it pertains to the protectable structures. How to determine that is evidenced in the DPW superseding order of conditions. There isn’t a lot of case law on this but there are a lot of permits that have been issued for similar situations. If the Commission wants more on it, he will provide that but thinks all the information is provided for the Commission to make a decision.

**Pucci** – He was concerned about protecting public infrastructure; if we interpret the regulation that is valid, he thinks there would be instances where coastal banks are protected under the bylaw that don’t qualify under the Act. There is still a troubling aspect about protecting infrastructure related to pre-1978 buildings. A superseding law is not case law; administrative case law issued by MaDEP would be a persuasive authority. The MaDEP order is troubling in that it clearly talks about relocating the roadway in a 3- to 6-year period; that doesn’t mean there aren’t other valid agreements in place. It would serve the Commission if the applicant looked at this in more detail to ascertain how their project supports that position.

**Cohen** – If you look at the MaDEP emergency order then the subsequent order, the issue with the road was scaled back and the alternate access plan is in place. There is a situation where a structure can be permitted under local law and not needed the State law. Infrastructure could be definitional about the structures themselves. When you issue this order, MaDEP will review it to ensure it complies with the State Act; it can also be appealed. Reiterated he doesn’t think the commission needs more legal memos to move forward.

**Bennett** – You had talked to MaDEP about the mitigation; asked if there was any written information on that.

**Cohen** – We floated the idea of adaptive sand mitigation, which was verbally accepted as reasonable.

**Golding** – It seems to him that Town Counsel has advised us to have that in writing from the applicant.

**Cohen** – We will get a legal opinion on that issue. One problem with the superseding order is it was done in a vacuum; you can’t really move utilities. We can address the idea of protecting the pre-1978, the land, and infrastructure.

**Steinauer** – Protecting public infrastructure was to allow time to move the road, utility, and the structures; to now say that isn’t the case feels like a bait and switch.

**Roggeveen** – His clients’ concern is that the structure will go beyond protecting eligible houses. The superseding order actually denied the geo-tube structure permanently; a lot of the arguments being made now about why there should be permanent protection was included in the applicant’s file to MaDEP. The emergency permit was issued to allow relocation of the road; an emergency permit has a 30-day limit with no mechanism to extend it.

**Molden** – We’ve repeatedly brought to the commission’s attention performance standards that haven’t been met: protection of the bank as a sediment source, protection of the coastal beach, and eligibility of all the lots. We don’t believe all lots are eligible under the local or State laws. One of the first things the commission should deliberate is meeting waiver requirements, which we believe the proponent has not met. She wants to bring up

again the sand and sediment source; a permissive order should require documentation from the applicant that they have a volume of compatible sediment source to meet a 3-year need at least.

**Ruthven** – The meaning of gap lot is critical to know how they relate to the Wetland Protection Act; there are numerous cases where MaDEP has turned down gap lots, because they aren't there to protect the pre-1978 houses. Mitigation, the formula is fine but how but it's how it is applied and if erosion rates were calculated correctly; he feels they are under mitigating. The Commission should look at whether or not this will work without adverse impact.

**Dunk** – We've discussed this topic for many months, the idea the sand on the template face gets washed away during a storm is correct; the sand on top is a stockpile to be pushed down to cover the tubes for the following storm. That is how the system is design.

**Erisman** – During the March 2018 storms, the tubes couldn't be covered; it didn't work.

**Dunk** – We discussed what happened and the timeframe; about 25 linear feet were contributed off the template during that season. Most systems in the Commonwealth are a one-time distribution of sand; this has the stockpile to allow quicker replacement of the sand.

**Cohen** – The problem we see repeatedly is looking at the emergency order, not the superseding order. Your order details what we are protecting; you and the State have considered and seen that. The existing project meets all the standards and shows that the system works. There is no such thing as a CES that constantly supplies sand during a storm. Not all sand is accessible during a storm; it's there to be available to cover the tubes before the next storm. His request is to get to the decision-making process soon. He thinks he can get the legal decision to the board by the May 22 regular meeting or set another special meeting date for that information and to close the hearing.

**Bennett** – We can aim for the May 22 regular meeting.

**Phillips** – We reviewed the SBPF annual report; Mr. Berman is to review that as well; we would like that made available before deliberation starts.

**Cohen** – We can try to get the legal memo in by May 1<sup>st</sup> and close the hearing at that time.

**Pucci** – Suggested one more hearing session.

**Bennett** – Tentatively we are looking to continue to May 6.

**Balkind** – He has three points for denial: eye test, where is the emergency that requires mitigation; the current project has provided a lot of data but it's inconclusive data regarding down-drift impact; Town Coastal Resiliency Plan is being developed to identify areas that need to be protected and requires our resources.

**Atherton** – Three talking points: clarification, adverse impacts, and reasonable alternatives. There are five points in need of clarification: a) current structure was intended to be temporary; b) alternate access to northern Baxter Road is not predicated on permitting the expansion; c) number of days or tide cycles the geotubes were uncovered remains unknown; d) number of days and tide cycles walkable beach maintained remains unknown; e) rate of erosion has increased since geotubes have been installed. Expansion would have adverse impacts, here are four: a) public beach will narrow and eventually disappear – the science is irrefutable; b) three additional acres of beach habitat will be destroyed upon construction; c) end scour will continue, resulting in a need to extend the installation; d) the beach will become a continual construction site requiring maintenance and mitigation forever. There are four reasonable alternatives: a) soft structures; b) relocation of structures westward into the Town-owned road layout; c) implementation of shovel-ready plans for relocation of northern Baxter Toad; d) planning for relocation for the entire length of Baxter Road is now underway. This is not just any beach; it is a historic beach, a legacy to the inhabitants of Nantucket from the proprietors; many believe this stretch of beach should be declared a marine sanctuary.

**Warren** – Read into the record a letter from Barbara Bunn, Nantucket Coastal Conservancy, about her concern, the quantity of sand that would be required and the impact on the Island.

**Gasbarro** – He monitors many erosion control projects; none of the beaches are walkable during storms. The photos show the beach is passable most of the time. The sand that is contributed maintains the beach.

**Steinauer** – The agreement we negotiated contains the notion that these are walkable during normal tide conditions. The concern is that if the beach erodes, it will become unwalkable during normal tide cycles. There were times during normal tides the beach was not walkable.

**Cohen** – Argues Ms. Atherton's points are red herrings. We will provide the information requested on legal issues. Requested a continuance to May 6

Staff

If you have a Town-designed coastal bank, you could apply the bylaw in its entirety.

He spoke to MaDEP, they said they are withholding their opinion until there is an appeal.

He has two questions:

a. an issue that came up at the last hearing was relocating structures because some lots have common ownership on both sides of the street;

b. it may be interesting to include a set timeframe for installation or upgrade that takes away the need for a CES.

Once the public hearing is closed, the Commission has 21 days to issue the order.

May 6 and May 13, two Mondays between the regular meetings, are available for another hearing.

Motion

**Continued to May 6 by unanimous consent.**

Vote

N/A

**III. PUBLIC MEETING**

**A. Other Business**

1. Approval of Minutes 3/25/2019: HELD

Adjourned at 6:08 p.m. by unanimous consent.

Submitted by:  
Terry L. Norton