



# CONSERVATION COMMISSION

## PUBLIC MEETING

2 Bathing Beach Road  
Nantucket, Massachusetts 02554

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

Monday May 20, 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 4:16 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

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; Epsilon slide presentation; correspondence

Applicant: Steven Cohen, Cohen & Cohen LP

Representatives: Dwight Dunk, Epsilon Associates Inc.

Glenn Wood, Rubin & Rudman, LLP

Jamie Feeley, Cottage and Castle

Public: Emily Molden, Nantucket Land Council (NCL)

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

Dirk Roggeveen, Quidnet/Squam Association (QSA)

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

Discussion: **Cohen** – Reviewed documents submitted resulting from comments at the prior hearing and post-hearing requests. Mr. Pucci raised questions about legal standards under State and Local bylaws regarding the gap lots; we contend we are legally on solid ground. We scaled back the north end of the project at 117 and 119 Baxter Road so that the return is in front of 117 Baxter Road. We think the design of the project is better in its ability to provide protection and lessening adverse impact. It is our intent to close the hearing today.

**Dunk** – We believe we’ve addressed all comments and the project complies with Performance Standards; reviewed concerns that they have addressed. The waiver request is noted in the NOI. The gap lots we’ve addressed in writing. Reviewed the site plan showing the reduction in length. Almost all the homes have been moved as close to the road as possible and they continue to be in danger of erosion of the coastal bank. Indicated the areas of continued bank erosion and slope failure, which exposes substrate. Explained the calculations used to ensure the structure is covered with sand and that there is sufficient on-site stockpile to recover the tubes.

**Wood** – He was asked to look at the concept of gap lots and look at precedence. The reality is there aren’t that many, and they don’t come up that often; there is no case decision in Massachusetts Law. The few we found were a narrow gap between pre-1978 properties. One appeal allowed a revetment to span the gaps; the finding was they were to protect the adjacent qualifying properties. The lessons learned, with the existing structure, show a lot of guidance on how the gap lot protects public infrastructure as well as pre-1978 buildings. When the Department of Environmental Protection gets a request for a coastal engineered structure (CES), they study the conditions and watch it closely. He is assured Department of Environmental Protection will not appeal this to themselves since what is proposed is necessary.

**Bennett** – There was discussion at the last hearing about how the protection of the road was to be temporary until an alternate access was established. The Department of Environmental Protection letter was clear that they did not consider it permanent.

**Wood** – He didn’t read their decision that way at all.

**Cohen** – The Department of Environmental Protection gave directions on mitigating imminent danger. They didn’t have the time to make that decision; we looked at that hard. As a result, there is an agreement for access should there be a breach in the structure. The Order of Conditions issued provides for protection of these lots. We need to look at what we’re applying for here, pre-1978 houses and what is around them. A 50-foot gap in the structure would cause excessive end-scour damage. We think the existing structures and the project as a whole justify what’s proposed.

**Dunk** – The Superseding Order of Conditions (SOC) also identified a future request for an extension. We also have a written record that the geo-tube extension of this is allowed under the state and local bylaw. We’ve had discussion about the eligibility of all the lots; the vacant lots are eligible for protection of infrastructure.

**Bennett** – Opened discussion to the public for new information only.

**Molden** – Reviewed an additional letter submitted to the file. The applicant says they are in compliance with all performance standards; we contend they are not in compliance with a number of performance standards. Based on submission of the new plan, the southern extent of the expansion and presence of coastal dune, we have documentation that coastal dune has been eroding; the commission should employ a coastal geologist to ensure that erosion isn’t due to the existing structure. Applied Coastal also submitted a letter.

**Ruthven** – For clarification the beach nourishment project was withdrawn, which is important. You aren’t seeing gap-lot cases because they aren’t permissible. Reiterated that the original project was permitted to allow time to relocate Baxter Road and utilities. In the plans, the cross section shows a 2007 and 2008 lighthouse survey; the existing structure is shown seaward of the bank, in some places up to 20 feet. Pushing the structure out from the bank increases deflection. The erosion numbers indicate the rate is still 20 to 30 feet a year when they are saying they don’t have further erosion; we are seeing quicker erosion in the area of the existing structure now than in the past.

**Roggeveen** – If this project is permitted, the neighbors to the north are concerned that it has sufficient sand mitigation, and that it will not be larger than it needs to be. The letter with the superseding order of conditions explains what they mean by temporary. If you permit a CES in front of properties without qualifying houses, you are setting a precedent. Suggested ConCom deny this and let Department of Environmental Protection make the argument. That would not be setting a ConCom precedent.

**D.A.Atherton** – We made our final comments at the last hearing. We want to draw attention to the written Town Counsel opinions sent to Attorney Cohen that points out the alternative access is not predicated upon permitting this project; the date is April 25. Asked that a settlement agreement met by parties in 2017 be inserted into the record; the final clause is relevant given information recently submitted because it recognized no precedent or pre-conditions for future ConCom actions. The November 5, 2013 letter from Dr. Young is in the record because that contains the basic planning and comment that the CES will cause the beach to disappear. We have asked the applicant to provide their estimated life-expectancy for this project; we want that entered into the record, but it was never provided. If the hearing is closed, we want to understand the process going forward; wants to ensure there will be no one-on-one communications between the applicant and commissioners.

**Pucci** – There is nothing that precludes a member from having a conversation with someone; however, this is a quasi-judicial hearing and recommends no communication with the project proponent and no discussion outside the hearing. Clarified that he isn’t confirming if there has been any communication between commissioners and the applicant.

**Cohen** – It’s easy to cherry-pick this apart and argue numbers. At the end of the day, he believes this CES is justified to protect pre-1978 houses and it is done to the best level possible to meet the performance standards. Requested the hearing be closed.

**Golding** – You referred to a decision where a pre-1978 house was demolished and replaced and afforded pre-1978 protection.

**Wood** – Yes; the question was if there was a pre-1978 structure on the property. Department of Environmental Protection has issued the permit.

**Golding** – Asked Mr. Pucci if he could address that and houses that were more than 20% expanded.

**Pucci** – If your local bylaw were more restrictive, you could deny this on that basis. You want to be careful about the other lot to ensure it is in your records. He recommends a final, more stringent standard. The State regulations are different in that they do allow reconstruction of pre-1978 homes.

**Wood** – Under your bylaw, the Easton house would not be analogous; it wouldn’t be permitted under your bylaw without a waiver.

Staff                    Once the hearing is closed, no further information will be entered into the record.  
Have everything needed to close.

Motion                **Motion to Close.** (made by: LaFleur) (seconded by: Steinauer)

Vote                    Carried unanimously

### III. PUBLIC MEETING

**Staff** – Now that the hearing is closed, no new information is permitted. The commission must now issue a decision within 21 days. If the commissioners have question of legality, ask Mr. Pucci.

**Steinauer** – On the gap lots, our commission needs to look at the lots; if we had a different situation, we would have proposed options like the Wilkinson array, which isn’t considered a structure.

**Golding** – He stands by his original list compiled. The owners of Lots 79 & 77 also own vacant lots across the street; asked if they are in imminent danger if the houses can be moved to those lots.

**Pucci** – ConCom should get a formal opinion on that from me.

**Golding** – Reviewed his research of properties that had more the 20% improvements since 1978 and lots not eligible for protection and gap lots. By his calculations, only 5 houses are eligible for statutory protection. Review of applicable local regulations and performance standards.

**Bennett** – Reasonable alternatives has come up frequently and whether or not moving a structure to a new site is considered reasonable.

**Champoux** – The gap lots could be conditioned to have a less robust structure in front of them. If this were on a single lot, the returns would be on that lot. Asked if anyone believes coir logs will last. He believes that maintaining coir logs could be more invasive than the geo-tubes.

**Erisman** – She believes coir logs will last; they have held up on other beaches and act more like a natural bluff. The geo-tubes have a potential to cause huge damage to resource areas.

**Golding** – Asked Town Counsel how it could be claimed any properties south of Bayberry Lane are in imminent danger; asked how that is defined.

**Staff** – Any positive order would address imminent danger for qualification.

**Pucci** – You can use any dictionary definition of imminent danger; you have to look at the erosion record to ascertain what will cause a catastrophic impact on the bluff. Recommended looking at applicable performance standards and which lots qualify.

**Steinauer** – We have some lots that qualify and many that don't; we're being forced into an all up or all down for the whole thing. The non-qualifying lots should come in with individual applications. He thinks in some ways these bags are among the worst solutions; they take up a huge amount of public beach and they are hard and smooth so probably exacerbate deflection.

**Staff** – There's the possibility of finding a lot doesn't qualifies under local bylaw, we have the option of issuing two separate order of conditions: one against the State Act and one against Town bylaw. You can make findings on individual lots as to which requirements they do or do not meet in order to support a determination.

**Pucci** – He recommends the lot-by-lot evaluation approach. You could then find that certain lots don't qualify and decide if that provides a compelling reason supporting an extended project area.

**Bennett** – We discussed listing the properties individually rather than as a whole applied to the corporation.

**Staff** – Any time we issue an order of conditions, it is to the property impacted by the project. Since most of this is on Town property, they had to provide with the application was the property owners who would benefit from this. When the order of conditions runs with property included in the application; the order would run the transfer of a property.

**Steinauer** – We could look at our original NOI denial and see if we still agree or disagree.

**Staff** – He can provide all prior decisions on the existing structure.

Commissioners review what information they would like staff to send them for review prior to the next meeting.

**Champoux** – We might not have fully considered the performance standards as they relate to the southern end. He'd like to know the triggering mechanism for the road relocation.

**Pucci** – There are contracts on that; those can remove any ambiguity. He'll confirm which one would be best to make available.

**Golding** – If this is denied, would the SOC for Phase I still be enforceable.

**Pucci** – He'd have to look at that permit.

**Staff** – The SOC was issued; then SE48-2610 was issued replacing the SOC.

**Bennett** – About the diagram of the beach in front of the bank, he thinks that was corrected; the tubes should be shown at the toe of the bank.

**Erisman** – They don't want to disturb the existing bank, so the structure is out from it.

**Bennett** – We need to discuss failure criteria. The ends are the weak point; at what point do we decide the returns aren't working. We need failure criteria for them.

**Erisman** – She believes the returns should be softer and that isn't what's proposed.

Discussion about a date for the next meetings: May 30, June 4, with possibly June 10.

Discussion about the format for the information Staff is to send to the Commissioners.

Motion **Motion to Continue the discussion to May 30, 4 p.m.** (made by: Champoux) (seconded by: Topham)  
Vote Carried unanimously

**C. Other Business**

1. Approval of Minutes 05/06/2019: Held
2. Monitoring Report
3. Enforcement Actions
  - a. None
4. Reports:
  - a. None
5. Commissioners Comment
  - a. None
6. Administrator/Staff Reports
  - a. None

Adjourned at 6:10 p.m. by unanimous consent.

Submitted by:  
Terry L. Norton