



CONSERVATION COMMISSION

PUBLIC MEETING

2 Bathing Beach Road
Nantucket, Massachusetts 02554

www.nantucket-ma.gov

Tuesday, June 4, 2019

10 Surfside Road, NHA Cafeteria– 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 4:00 p.m.

Staff in attendance: Jeff Carlson, Natural Resources Coordinator; Joanne Dodd, Natural Resources Office Administrator

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. Orders of Conditions

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

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

Documentation State and Local Performance Standards

Discussion **Carlson** – Recapped the commissioners’ requests at the last meeting.

Bennett – He had been focusing on the coastal beach and erosion but land under the ocean also applies, according to the State. He has no concerns for the circulation and quality of the water.

LAND UNDER THE OCEAN

Champoux – The original order of conditions, 9/30/2015, has the original findings: land under the ocean, coastal beach, coastal dune, and coastal bank.

Golding – Asked for some ability for the commission to respond if a negative impact on the land under the ocean and water quality is noticed.

Carlson – You can condition that that source sand for the nourishment component must comply to those condition and if the source changes they still have to comply with the permit.

Steinauer – His concern for land under the ocean is there is a critical habitat for nursery fish; based on what we’ve heard, the sand coming off the bank is changing, and we don’t know the impact on that habitat. We need to be concerned about it.

Bennett – He felt that the initial agreement should have had more points for the monitoring site; there are a lot more in front of the project than to the sides where littoral drift would carry the sand. We would definitely require more monitoring for this.

Champoux – His concern is a smother affect; there is nothing about survival of species that would be dependent upon the natural substrate entering the ocean.

Erisman – Her concern is the pit sand will change the land under the ocean environment.

Golding – He shares Ms. Erisman’s concern; pit sand doesn’t match the make-up of the bluff, which includes cobble. It should truly replicate what would come out of the bluff.

Carlson – The Massachusetts Department of Environmental Protection (DEP) and Coastal Zone Management (CZM) have provided guidance that focuses on compatible grain size; when you get into the percentage of cobble, that isn’t something they consider or provide help for.

COASTAL BEACHES

Bennett – Reviewed the performance standards for coastal beaches.

Carlson – The State regulations have two categories for coastal beaches; you need to decide which to apply.

Erisman – In her opinion, this beach is important to the marine fisheries and wildlife habitat.

Consensus agrees.

Golding – He felt the survival of the benthic mer-fauna and micro-fauna of the beach was not adequately addressed; they focused on the macro-fauna. He wants to ensure there is a condition for monitoring the mer- and micro-fauna to ensure they are recovering.

Bennett – One of the independent studies of the beach indicated the populations were not robust in certain areas due to the high energy.

Erisman – Number 3, this project certainly changes the demeanor of the beach, especially the end scour.

Carlson – The purpose of conditioning, whether through monitoring or litigation, is to keep them within the performance standards.

Champoux – We can keep the “... not have an adverse effect by increasing beach erosion”; that’s the whole idea of the sand nourishment.

Erisman – In her opinion there is no way to condition this project to improve the release of sand during a storm.

Golding – He still thinks coir bags are a reasonable alternative since those release sand during a storm with less side effects.

Champoux – We have to look at the adverse effect of increased erosion over the long term; that could help us answer this question.

Steinauer – They are proposing to cut the mitigation sand way back.

Continued discussion about the possible adverse impact of erosion due to lack of mitigation sand and whether or not adaptive mitigation will work, especially in the event of a serious storm and/or a series of storms.

Bennett – We are in agreement that nourishment is a concern.

Steinauer – The way these are constructed, they take up an enormous amount of beach; that is a direct loss of our beach.

Erisman – That is 67,000 square foot of beach that is covered by the proposed project. There are other aspects of the coastal beach that are impacted aside from erosion.

Bennett – Littoral drift goes back to the nourishment question.

Carlson – Looking at the item A, it is definitely a coastal engineering structure (CES); it is up to you to decide if it is a hard armor structure.

Erisman – She thinks there should be a minimum length and height

Bennett – Nourishment and grain size: this addresses grain size of just what's on the beach, not what's in the bank. He tends to agree with Mr. Golding it should match the bluff.

Erisman – There is the potential of fiber from the tubes entering the environment; studies are showing that.

COASTAL DUNES

Bennett – one of his concerns is the damage to the dune from end scour.

Erisman – There is a dune there and that is a major concern; if we were to go property by property, she could not approve a hard structure.

Golding – Read the function of a coastal dune; there should be no destruction of a coastal dune.

Champoux – There is language in the Performance Standards about whether or not this CES effects the ability to move landward. Asked if the CES impacts that and if it needs to be addressed.

COASTAL BANK

Carlson – You will have to determine whether or not this is a coastal bank significant to storm prevention and as a sediment source. The first performance standard is the pre-1978 requirement; it's a provision we talked about a lot regarding the gap lots. Alternatives have included discussion about moving the structures; that is germane to this. It is also necessary to determine which structures qualify for protection; you might be able to take some as groups. The local regulations include the substantially improved component; you need to state what that means.

Erisman – She doesn't see protection gap the lots as a legitimate concern.

Bennett – He could see a single gap lot but not groups.

Pucci – He looked at the gap lot issue; recommends address it in terms of performance standards under the act first then the local bylaws. The State is worded in a mandatory type of way, "you shall..." Under the State, you can't protect public infrastructure. Your regulations allow for protection of public infrastructure, which is less restrictive than the Wetlands Protection Act. The State also defines substantial improvement as an increase of greater than 20% of livable space; that is a tough provision to prove. If there is an appeal to Superior Court, DEP might defer on the State regulations. The Court's decision is going to be based upon evidence in the file; you will want to make findings lot by lot. In an appeal, owners with empty lots across Baxter Road have to prove why their structures deserve protection in place and why moving it is not a reasonable alternative. Explained the appeal process.

Steinauer – The way we traditionally look at a CES project is lot by lot; the first question is the age of the structure; if it isn't pre-1978, we tell them they need to come in with something other than a CES. This however is one big project which to him is an end run around the normal rule; the question becomes can a neighbor put in a structure to protect his neighbor's pre-1978 structure.

Pucci – If you look at it lot by lot, you have to build upon the integrity of the question. You have to find compelling evidentiary support for a continuous structure across a non-qualifying lot.

Champoux – The argument for a continuous structure is the integrity would suffer if it is not continuous.

Erisman – It was well documented from the Town that the empty lot needed protection because infrastructure was in imminent danger. This expansion has none of that; they would need to prove why protection of each gap lot is necessary to protect the pre-1978 structures.

Carlson – Read the bylaw definition of substantial improvement.

Golding – Between 119 and 85 Baxter Road there are 10 vacant lots; Lot 83 was built in 1950 but under the local bylaw was substantially improved; Lot 81 was built in 1994; and Lots 79 & 77 have lots across the street as well as having been substantially improved. The original structure was given a 6-year window; read last paragraph of FAC 2014 stating it was temporary for up to 6 years.

Pucci – The existing order talks about a 3-year term that expired in 2018 with the option to extend another three years maximum.

Bennett – Our primary concern should be to look our performance standards first; then we'll look at the gap lots. The structure needs to be built in a certain way; the State says nothing about continuous structure.

Erisman – Feels the adverse impact from a continuous structure would be compounded. A soft structure can be used to protect the non-qualifying lots. We've made other applicants with newer structures use something other than a CES.

Golding – Read the applicant’s justification for Lots 107A, 107B, 105, 101, and 99 to protect lots 97 and 93; that would set a precedent.

Topham – He’s looking at gap lots that aren’t necessary for protecting abutting qualifying structures.

Steinauer – One concern is that a non-continuous structure would have many ends subject to end scour. If we are going to protect gap lots, we need to have careful language to preclude others from asking to protect an empty lot.

Pucci – Need a rational finding to avoid being arbitrary and capricious. You do have a permitted structure in place with an order of conditions; that does have some effect on the board’s decision here.

Golding – Read the waiver section for the order of conditions on the existing structure. He feels the existing structure has not been functioning in the way that was expected and does not mimic nature. Between Lots 105 and 87, protected by the current structure, there are 3 gap lots and two pre-1978 structures. Half the lots that would be covered by the extended structure don’t qualify for protection.

Steinauer – We unanimously denied the original structure; that was appealed, and we were pressured to settle.

Carlson – There is an easement across Lot 80 that makes it unbuildable. He doesn’t have that information currently available. He will put together the history of the discussion on the meaning of substantially improved.

Erisman – We need to address end scour.

Bennett – Asked if there is significant Massachusetts Natural Heritage habitat areas.

Carlson – To the north and south but not in the project area itself. Asked which direction the commission is inclined to go so he can prepare a draft order.

Bennett – There is an existing structure, but he sees flaws in this design and has concerns about the extension north and south.

Erisman – We don’t have anything from the Town about imminent danger of infrastructure that would justify protection of gap lots. Between the gap lots and possible adverse impacts, this should be denied.

LaFleur – We haven’t seen anything positive about protecting the beach in front of the project.

Golding – He does not support protection of the gap lots and non-qualifying structures; reviewed again the lots numbers that don’t qualify for protection under the Act.

Champoux – Based upon tonight’s discussion, he has problems permitting this under the State regulations. There are environmental issues that haven’t been answered, in his mind. He’d like to see a better solution.

Steinauer – While the current project has protected the structures, he doesn’t think it has performed that well at the base. He would vote to deny.

Topham – He’s having a hard time justifying protection of the gap lots.

Carlson – We have to June 13 to issue the permit. It sounds like there is still some information commissioners want; he will get that information out. He can draft both a permissive and negative order for discussion at the next meeting.

Pucci – The applicant extended the date of the issuance until the Thursday following.

Discussion about future meeting dates: June 12 & 13.

Continued to June 12, 4:00 4 Fairgrounds Road Community Room by unanimous consent.

Motion

Vote

N/A

Adjourned at 6:23 p.m. by unanimous consent.

Submitted by:

Terry L. Norton