

KEY FACTS ABOUT A CONSERVATION COMMISSION APPEAL OF THE DEP RULING

Prepared: January 11, 2015

On December 18, 2013 the Conservation Commission, at the joint request of the Town of Nantucket and SBPF, issued an Emergency Certification to allow the construction of a geotube project to protect the most endangered portions of the Sconset Bluff. On June 3, 2014, subsequent to the construction of the geotube project at SBPF's sole expense, the Conservation Commission denied SBPF's application for a non-emergency permit for the project and order that the system be removed. SBPF immediately appealed that decision to the Department of Environmental Protection. On December 19, 2014, DEP issued a Superseding Order of Conditions allowing the project to be maintained largely as anticipated in the original permit request. The Conservation Commission has now filed a request for further review at DEP. The Commission's request includes a number of inaccuracies and continues to bring up issues that have already been addressed.

The following highlights some of those areas:

1. The Conservation Commission asserts that governing section of the state wetlands regulations does not permit the use of coastal engineering structures to protect roadways.
 - *The state wetlands regulation mandates granting permits for coastal engineering structures to protect buildings constructed prior to August of 1978, and protecting the infrastructure which serves those buildings is within the scope of that mandate where it will serve to protect those buildings whether from physical damage or from becoming isolated from access or utilities.*
2. The Conservation Commission asserts that the license agreement between the Town and SBPF is expressly conditioned upon approval by the Conservation Commission.
 - *The Conservation Commission did approve the Emergency Project, just five days after the date of the license agreement. Surely it cannot mean that its later denial of the Notice of Intent on grounds that are inconsistent with the law undoes that approval.*
3. The Conservation Commission asserts that the governing regulation does not permit protecting vacant lots.
 - *The Superseding Order protects Lots 93, 97 and 99 which have pre-1978 homes on them; it also allows geotubes at Lot 91 for the express purpose of protecting the pre-1978 home on adjacent Lot 93; and it allows geotubes at Lots 87, 101 and 105 (the northern and southern extremities of the project area) to protect Baxter road and essential public utilities - which in turn protect the access to and habitability of pre 1978 homes.*
4. The Conservation Commission asserts that "the Superseding Order of Conditions is also erroneous in its failure to address the feasibility of alternatives..."
 - *The Superseding Order itself is a state form which does not set forth reasoning or analysis, and there is no requirement that the cover letter contain all of the reasoning and analysis DEP engaged in. The cover letter states that it was issued "[f]ollowing an in-depth review" and it explains that alternatives analyses were provided by SBPF pursuant to the MEPA Certificate for the project. Further, the Superseding Order adopts aspects of one of the alternatives described by SBPF in its analyses. Indeed, every single example the Conservation Commission cites as not having been "adequately analyzed" in the*

Superseding Order (which is not intended to present analysis) was identified and studied in the materials submitted to DEP, including softer alternative such as jute or coir logs/bags (including specific analysis of the use of jute logs at 79 Baxter Road which the Conservation Commission identifies as an example that should have been studied), different sizes of geotubes for parts of the project, nourishment and no-action. SBPF's analysis looked at all the issues the Conservation Commission raises and provided DEP with an ample basis to reach its conclusions. It appears somewhat ironic that the Conservation Commission should raise the "no-action" alternative after having, on more than one occasion, certified that action was required on an emergency basis.

5. The Conservation Commission asserts that "the Superseding Order of Conditions is also erroneous and inadequate in that it fails to make findings, impose conditions or discuss performance standards in any manner as to resource areas relating to the project area other than Coastal Bank..."
 - *Again, there is no provision for findings or such discussion on the official form for the Superseding Order: it merely sets forth the activities permitted and the conditions which apply to them. SBPF submitted a compliance analysis of performance standards for all relevant resource areas, and the conditions in the Superseding Order amply protect the interests those resource areas present. The Conservation Commission has not pointed to any inadequacy in that analysis.*
6. The Conservation Commission asserts that the "Superseding Order of Conditions also erroneously permits the construction and maintenance of a geotube project to protect lots on the landward side of Baxter Road on Lots 92, 96, 100, 104 and 106".
 - *There is nothing in the regulations which undercuts the mandate to grant permits for the protection of pre-1978 homes just because the homes are landward of a road – if they are in sufficient danger they are to be protected under the regulation. But in this case, DEP did not protect them on that basis at this time. Each of the lots the Conservation Commission lists is directly landward of a lot for which the Superseding Order provides protection. Surely the Conservation Commission does not mean to suggest that a seaward lot must be deprived of protection because there is a lot landward of it which (on the Conservation Commission's erroneous theory) is not entitled to protection. And the Conservation Commission has its facts wrong: what DEP actually says is "The enclosed SOC provides an opportunity for the landward pre-1978 owners (on lots 92, 96, 100, 104 and 106) to file a new Notice of Intent (NOI) to maintain the Geotubes in that stretch of the project area prior to the 6 year expiration date of the SOC. Any such future NOI must demonstrate that there are no feasible alternatives to the Geotubes such as relocation of threatened buildings, that the buildings are threatened at the time of the application and that the Geotubes or an alternative coastal structure are necessary to prevent storm damage to such pre-1978 buildings."*
7. The Conservation Commission also asserts that certain of the special conditions imposed by DEP are inadequate.
 - o *The Conservation Commission asserts that conditions 3, 5, 7, 8, 9, 10, 11, 12, 13 and 19 need to be more stringent without providing any basis for that claim or any suggestion as to how they are inadequate. The conditions were imposed by DEP on the basis of its expertise and experience, and are reflective of the years SBPF has spent before the*

Conservation Commission seeking a clear understanding of the concerns of the Commission and what conditions would be satisfactory.

- *The Conservation Commission asserts that there is no basis for conditions 18 (approving a portion of the plans included in the March 14, 2014 modification to the Notice of Intent to conform to what was already built) and 20, which calls on the Town to give DEP updates on progress toward alternative access and public utilities infrastructure for the northern end of Baxter Road. Condition 18 simply calls out a specific part of the plans that were before the Conservation Commission which deal with erosion. Condition 20 is a tool for DEP to be able to monitor the progress on issues that bear on the protection of parts of the project area.*
- *The Conservation Commission asserts that conditions 20 and 21 are arbitrary and capricious in some unidentified way “and/or” are based upon substantial but unidentified errors of law. These conditions are simply appropriate mechanisms reflecting the fact that the Conservation Commission has issued an Emergency Certification and the protective measures taken to prevent imminent harm should remain in place serving that function until some longer term solution is in place.*

The court reviewing an appeal would consider both SBPF’s original submission, as well as the DEP decision. Based on the strength of scientific data and overall protocol for erosion control, the DEP’s detailed decision and the factors outlined above, we are confident that a court would uphold the DEP decision to allow us to proceed.