

Judge upholds SBPF geotube removal order



Superior Court Judge Mark Gildea and legal representatives from the SBPF and ConCom during a site visit of the Sconset Bluff this summer.

PHOTO BY DEAN GEDDES

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By Dean Geddes

(Sept. 8, 2022) The Conservation Commission’s order to remove the Sconset Beach Preservation Fund’s erosion-control project from the base of the Sconset Bluff is valid, a Superior Court judge ruled in a 16-page decision handed down Friday.

The SBPF now has 60 days to remove the geotextile tubes from below Baxter Road, barring an appeal. The ConCom also has the right to extend that deadline by written request from the SBPF.

SBPF president Josh Posner said this week the organization has not yet decided if it will appeal the decision.

“We will discuss this with our partners in the town and Select Board regarding next steps,” he said.

Judge Mark Gildea agreed that the SBPF was in violation of its permit for failing to dump enough sacrificial sand on the project, and did not have a plan in place to replace the sand by June 30, 2021, the deadline set by the Conservation Commission.

“The administrative record demonstrates that the commission requested the submission of such plan, and that no specific plan had been submitted to the commission in writing or orally presented at a

meeting on or before that date,” Gildea wrote.

“We are disappointed by both the court’s decision and the consistent, misguided efforts by some to dismantle the geotubes,” Posner said in a statement released after the decision.

“Since 2013, this privately-funded project has successfully protected town infrastructure, historic homes and access to Sankaty Light, with no downside impact to neighboring beaches.”

Posner said he was hopeful the current Conservation Commission will work with the SBPF and allow the project to be brought into compliance.

Select Board member Matt Fee said there are still a lot of “big picture” questions that need to be answered about the future of erosion on the Sconset bluff and beyond.

The town’s coastal-resilience consultant Arcadis recommended in a report released last September that the geotubes remain in place until the town has a shovel- ready plan to relocate Baxter Road.

The Select Board and SBPF announced plans last year to submit a joint application to the ConCom for a phased expansion of the erosion- control project.

“As a community we still have to figure out what the right thing to do is,” Fee said. “The Arcadis report is saying we can have some major issues if we take it out right away. There are things that we have to figure out first.”

Coastal erosion is an issue the town will be dealing with for decades to come, not just in Sconset but all around the island, Fee said.

“We’re going to have to find ways to protect, or potentially retreat, and not charge the taxpayers for all of it. And so far, the taxpayers haven’t paid for any (of the SBPF) project,” he said.

But Emily Molden, executive director of the Nantucket Land Council, said that even though the geotubes are slowing erosion in the area they are installed, the lack of nourishing sand has caused damage to the adjacent and downdrift shorelines.

“I hope that after this ruling, the town will move with more urgency on the plans to move Baxter Road,” she said.

While proponents of the project seem to be interested in going back to the bargaining table with the town and ConCom, Molden said she was perplexed as to why they weren’t more proactive about bringing the project into compliance before the ConCom issued a removal order that was upheld by the court.

In his decision, Gildea pointed out that the compliance plans the SBPF had originally submitted were contingent on the Conservation Commission approving an expansion of the project.

“The plaintiffs did not intend to comply with any plan to rectify the deficit without a quid pro quo from the commission,” he wrote.

In ruling on the SBPF’s claim that irreparable damage would occur if the erosion- control project was removed, Gildea said it was outside the scope of the legal issues before the court to determine whether the risks were supported by substantial evidence and then weigh those risks “against other strategies which could hypothetically be undertaken.”

“This court’s review is limited to a much narrower question: whether there was a rational basis for the exercise of discretion to pursue enforcement,” he wrote.

In his ruling, Gildea said he was applying the “arbitrary and capricious standard of review,” meaning that he would give wide deference to the Conservation Commission, and only nullify its decision if the record showed it acted in an arbitrary and capricious manner.

In summary, he concluded, “the plaintiff fails to meet its burden to demonstrate that the enforcement order is arbitrary and capricious on this basis.”

The Conservation Commission voted 5-1 in June 2021 to issue an enforcement order to the SBPF, requiring it to remove the erosion-control project from the base of Sconset Bluff, following a finding that the project had been in violation of its permit for several years for a lack of sacrificial sand it was required to dump on the project.

In September 2021, the SBPF filed suit appealing the enforcement order, claiming the ConCom erred in its decision, failing to take into account the SBPF’s ability to get the project back into compliance and that it ignored the environmental risks of removal.
