COMMONWEALTH OF MASSACHUSETTS

NANTUCKET, ss. **SUPERIOR COURT**
CIVIL ACTION
NO. 2021-00030

SIASCONSET BEACH PRESERVATION FUND, INC.

vs.

CONSERVATION COMMISSION OF NANTUCKET & another [1, 2]

MEMORANDUM OF DECISION AND ORDER ON SBPF AND COMMISSION'S CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

The plaintiff Siasconset Beach Preservation Fund, Inc. ("SBPF"), as permit holder for an erosion-control array of geotextile tubes ("geotubes") placed at the base of a bluff on Nantucket, brought this action seeking certiorari review pursuant to G. L. c. 249, § 4 of the Conservation Commission of Nantucket's September 2, 2021, enforcement order requiring the removal of the geotube array in response to SBPF's failure to meet sand nourishment conditions. The plaintiff concedes this failure but moves for judgment on the pleadings on the ground that the commission's order erred in its findings regarding the absence of a sand remediation plan and inability to achieve compliance, and arbitrarily ignored the environmental risks of removal. The commission cross-moves, noting that the plaintiff expressly refused to complete mitigation unless the commission approved new permits for a large expansion of the geotube array. For the reasons set forth below, the plaintiff's motion for judgment on the pleadings is **DENIED**, the commission's cross-motion for same is **ALLOWED**, and the enforcement order is **AFFIRMED**.

[1] Town of Nantucket.

[2] Consolidated with Nantucket Civil Action 2021-00035, *Robert F. Greenhill* v. *Conservation Commission of Nantucket and Siasconset Beach Preservation Fund*.

BACKGROUND

The following facts are drawn from the administrative record and the parties' supplemental administrative records (Papers 5, 14, and 20), with certain details reserved for further discussion.

The plaintiff, SBPF, is an organization of homeowners in the Siasconset ("Sconset") area of the island of Nantucket. Many SBPF members own property on Baxter Road, which runs along the approximately seventy-foot high Sconset bluff. The Sconset bluff has been eroding for decades as a result of wave action at the "toe" of the bluff on the public beach below, imperiling the existing layout of Baxter Road (along with its municipal utilities), and several pre-1978 structures. In 2013, the commission approved the plaintiff's emergency request to install a three-tier geotube array along the toe of the bluff under 91 to 105 Baxter Road, pursuant to a license with the town to occupy the publicly owned beach. In 2015, the commission issued the SE48-2824 order of conditions ("2824 OOC") for the existing array, with the addition of a fourth tier to the 91-99 Baxter Road section and expansion of the northern and southern ends of the project.[3] A.R. 3910-3938.

The 2824 OOC contained forty special conditions, some of which required the plaintiff to provide sand mitigation (sometimes called "nourishment" or "sacrificial sand") to cover the geotube array and provide a source of littoral sand to compensate for the array's blockage of natural bluff erosion. A.R. 3926-3932. Of particular relevance to this case, Special Condition 32 set out a fixed annual quota of twenty-two cubic yards per linear foot of mitigation sand to be

[3] The geotube array was approved "as a temporary installation for a period of three years, with the option for the proponents to request an extension of the term for a maximum of three additional years in accordance with the provisions set out [in the SE48-2824 OOC]." A.R. 3926. In 2018, the 2824 OOC was extended and amended to include placement of coir fiber logs at the ends ("returns") of the geotube array, without changing the sand mitigation conditions discussed *infra*. A.R. 0862-0894. The 2824 OOC is set to expire in March 2023 (rather than in 2021), by operation of the pandemic-related permit extensions set out in Section 17 of Chapter 53 of the Acts of 2020.

delivered to the project at various points during each year.[4] A.R. 3928. Special Condition 34 specified that any failure by the plaintiff to conduct certain actions, including the on-going sand mitigation requirements, "shall constitute a project failure . . . if not performed within the stipulated timeframes or within such other reasonable periods of time as determined by the [c]omission in the event of a delay in performance outside the control of SBPF, or if there are unmitigated adverse impacts from the project." A.R. 3928-3929. Further conditions set out requirements for a hearing when failure criteria are met, and methods to be followed if project removal were ordered after such hearing.[5]

In 2018, the plaintiff filed a separate Notice of Intent ("NOI") to expand the length of the geotube array into "Phase 2," which would protect the properties of additional SBPF members.[6] S.R. 4262-4794. The commission denied approval of this NOI, and the merits of that decision are not presently before this court. S.R. 4795-4813. The record does not indicate that the plaintiff filed any further NOIs to expand the geotube array after 2018.

In 2019 and 2020, the plaintiff submitted annual reports required by the 2824 OOC containing an "annual sand delivery report" detailing how much mitigation sand was delivered to the array during set periods of time.[7] A.R. 2489, 2865. Given the existing length of the project

[4] Special Condition 33 further required that "[i]f there is not adequate space to provide the entire mitigation volume within the project area footprint, then any remaining sand shall be placed in a berm at the toe of the coastal bank and landward of [mean high water] within 300 feet of the ends of the [g]eotubes . . . equally distributed to the areas north and south of the project area. A.R. 3928.

[5] Special Condition 35 required that, "[s]hould any of the failure criteria be met, the Applicant shall schedule an appearance before the . . . [c]omission at its next available hearing," at which the commission "shall review the failure and determine how the Applicant shall act to address it." A.R. 3929. Special Condition 36 required the plaintiff to maintain an escrow fund to pay for the removal of the geotubes if ordered, and set out protocols and methods to be followed by the plaintiff in such instance, including spreading along the beach the sand previously held inside the geotubes. A.R. 3930.

[6] This 2018 NOI for the Phase 2 expansion is identified as SE48-3115 ("3115 NOI"). S.R. 4262.

[7] These periods, referred to by the plaintiff as "sand years," do not align with calendar years.

at 947 linear feet, the sand mitigation required by Special Condition 32 was 20,834 cubic yards per calendar year. A.R. 2489. The annual reports identified a cumulative backlog of 26,637 cubic yards of sand mitigation by the end of 2020, as the plaintiff subsequently conceded.[8] S.R. 5263. In each annual report, the plaintiff asserted that the sand mitigation condition should be changed to an "adaptive" measurement, requiring only the *maintenance* of a total of twenty-two cubic yards per linear foot of sand *on* the geotube array itself during any given year, rather than the fixed *delivery* of that same volume of sand each year to the site, to be placed on or *adjacent to* the array.[9] A.R. 2854-2855, 2868. However, the plaintiff never sought or received an amendment to the 2824 OOC changing the fixed annual sand mitigation quota set out in Special Condition 32 to the adaptive measure proposed in the annual reports.[10] S.R. 4887-4888.

At meetings in March and May 2021, the commission reviewed the 2019 and 2020 annual reports and requested that the plaintiff provide a sand remediation plan to make up the deficit.[11] S.R. 4886. With the addition of further uncompleted sand mitigation due by March

[8] In the May 2021 response of plaintiff's expert to the evaluation of its 2020 annual report by the commission's expert, which identified a 26,637 cubic yard deficiency as of January 15, 2021, the plaintiff's expert asserted "[t]he volumes delivered to the template are not in dispute, neither is the deficiency from the permit volume new information nor disputed." A.R. 3106.

[9] The adaptive measure urged by the plaintiff would result in a reduction of delivery of sand to the site, as compared to the fixed annual quota set out in Special Condition 32, in any year where wave action did not remove at least 20,834 cubic yards of sand from the *surface* of the geotube array during that period. See A.R. 2485 ("The proposed mitigation approach recognizes that not all of the sand *on* the template is contributed to the littoral system each year" [emphasis added]).

[10] The plaintiff did seek an adaptive sand mitigation in the 2018 "3115" NOI seeking to expand the geotube array to "Phase 2," but such NOI was denied by the commission. A.R. 2855; S.R. 4262, 4795. The 3115 application had no effect on the conditions of the existing 2824 OOC at issue in this case.

[11] The commission's review was informed by an independent expert analysis of the 2019 and 2020 annual reports, wherein the expert observed that "[t]he project site has received the required volume of sand in only one of the sand years since 2015," and noted the lack of approval for an adaptive mitigation measurement. A.R. 3087-3088; S.R. 4844, 4887. While noting that "[r]eexamining the appropriateness of the required mitigation volume [was] not part of this review," the expert stated that "the surplus [of sand] in the template combined with a deficit in nourishment volume may indicate that the template may not be providing sediment to the beach system during non-storm periods," and that "nourishment sand does not need to be placed on the template [and] could be placed at the ends of the geotube array (an area of noted erosion) or immediately seaward of the array." A.R. 3087, 3089.

30, 2021, the cumulative sand deficit grew to 47,471 cubic yards by the time of these meetings, representing more than two full years of required sand delivery.[12] During the May meeting, the plaintiff's president conceded the sand deficiency, but emphasized that the plaintiff had only agreed to the fixed annual quota of twenty-two cubic yards per linear foot with the expectation that it would be changed in the future and had always planned to stop maintaining the project if the commission did not approve an expansion of the geotube array and a decrease in sand mitigation requirements.[13] S.R. 4888. The commission thereafter voted to find that the plaintiff had not delivered the sand mitigation required by the permit, constituting a project failure criterion under Special Condition 34, and to order the plaintiff to appear at the next available hearing. S.R. 4889.

On June 30, 2021, the commission held a special meeting to address its prior finding of a permit failure criterion. The plaintiff's engineer asserted that the plaintiff was "willing to create," with the assistance of town staff, an as-yet-uncompleted four-year plan to make up the sand deficit, S.R. 5045-5046, but the plaintiff's president again stated that implementation of any such plan was contingent on the commission's future approval of an expanded geotube array. S.R. 5046. At the conclusion of the meeting, the commission voted to order removal of the

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Finally, the expert made a "key finding" that the sand mitigation deficiency present by the end of 2020 "continues a disturbing trend of increasing deficits which may lead to negative impacts, although current reporting requirements have not shown such an impact" in light of the lack of further monitoring data, such as a "sediment budget" that could separate potential negative impacts of the geotube array from "[t]he natural changes in this dynamic area." A.R. 3090, 3092.

[12] The plaintiff subsequently conceded the accuracy of the 47,471 cubic yard number. S.R. 5263.

[13] Specifically, the plaintiff's president stated: "We recognize we are short on the permit and have made it clear for a number of years; at the beginning of the process, we indicated the 22 [cubic yards] was not sustainable. We agreed with the expectation we could change it. We indicated from the beginning that we would turn the project over to the Town if we could not reach an agreement on the expansion and on a reasonable amount of sand delivery." S.R. 4888.

geotube array on the basis of its prior finding sand mitigation failure set out in Special Condition 34. S.R. 5047.

On July 7, 2021, the plaintiff submitted an engineering proposal for a sand mitigation program to make up approximately 27,000 cubic yards of sand deficiency divided over four years.[14] A.R. 3611. However, in an email accompanying the engineering proposal, the plaintiff again reiterated that its completion of the proposed mitigation plan, and future compliance with the annual sand quota set out in the permit, would *only* occur if the commission approved a future expansion of the geotube array to project more SBPF member properties. A.R. 3608-3609.

On September 2, 2021, the commission issued the previously voted enforcement order to remove the geotubes. S.R. 5053; A.R. 3978-3988. The enforcement order contained, *inter alia*, the following findings: the 2019 and 2020 annual reports demonstrated that fixed annual sand mitigation required by Special Condition 32 had not been met; the violation of Special Condition 32 constituted a failure criterion set out in Special Condition 34; the commission had requested the plaintiff to provide a sand remediation plan addressing the deficiency during its March and May, 2021 meetings; the plaintiff had not provided such sand mitigation plan by June 30, 2021 and "testimony taken during the June 30, 2021 meeting and additional communications that the applicant did not intend to make up for that shortfall" ("Finding 6"); and given the prior findings, "testimony taken and past issues of non-compliance, . . . that the structure is not being maintained in compliance, is not able to be maintained in compliance with the [2824 OOC] or brought back into compliance within a timeframe to ensure that there are no impacts to the

[14] On August 4, 2021, the plaintiff subsequently proposed minor revisions to the July 7 proposal, which do not affect this court's analysis. S.R. 5049-5050. The August 4 revisions did not retract any of the plaintiff's statements attending the July 7 proposal, detailed *infra*. The plaintiff's proposal never addressed the full sand deficit occurring to that date, approximately 47,000 cubic yards.

resource areas, their protected interests, buffer zones and updrift and downdrift areas" ("Finding 7"). A.R. 3981-3982.

The plaintiff thereafter appealed the commission's enforcement order to this court in Nantucket Civil Action No. 2021-00030 ("'30 complaint"). The case was consolidated with a separate action brought by a neighbor, Nantucket Civil Action No. 2021-00035 ("'35 complaint"), which challenges the commission's decision to order removal of the geotubes without also requiring the plaintiff to mitigate the existing sand deficit. In this memorandum of decision and order, the court addresses only the parties' cross-motions for judgment on the pleadings on the '30 complaint (Papers 12 and 17). The parties' cross-motions for judgment on the pleadings, and SBPF's motion to dismiss, the amended '35 complaint (Papers 11, 23, and 24) will be addressed by separate memorandum of decision and order.

DISCUSSION

Judicial review of a conservation commission's enforcement order is available only through an action in the nature of certiorari pursuant to G. L. c. 249, § 4. *Conservation Comm'n of Norton* v. *Pesa*, 488 Mass. 325, 330 (2021), citing *Garrity* v. *Conservation Comm'n of Hingham*, 462 Mass. 779, 791-792 (2012). "Where . . . the decision being reviewed implicates the exercise of administrative discretion, the court applies the 'arbitrary or capricious' standard, which is more deferential to the party defending the administrative action it took. This standard requires only that there be rational basis for the decision" (internal citations omitted). *Mederi, Inc*. v. *City of Salem*, 488 Mass. 60, 67 (2021). Importantly, the court may neither "displace the [commission's] choice" if the commission "has, in the discretionary exercise of its expertise, made a choice between two fairly conflicting views and its selection reflects reasonable evidence," nor "substitute [its] judgment for that of the commission" "if the question is fairly

debatable" (internal quotations and citations omitted). *Conservation Comm'n of Falmouth* v. *Pacheco*, 49 Mass. App. Ct. 737, 739 n.3 (2000), quoting *Lisbon* v. *Contributory Retirement Appeal Bd.*, 41 Mass. App. Ct. 246, 257 (1996) and *Arthur D. Little Inc.* v. *Commissioner of Health & Hosps. of Cambridge*, 395 Mass. 535, 553 (1985).

Here, this court applies the arbitrary and capricious standard of review to the plaintiff's appeal: the enforcement order was not the result of an adjudicatory proceeding and constitutes the discretionary exercise of the commission's undisputed authority to enforce the Wetlands Protection Act, G. L. c. 131, § 40, as well as the local Nantucket wetlands bylaw, within the town. See *Garrity*, 462 Mass. at 792, citing *Forsyth Sch. for Dental Hygienists* v. *Board of Registration in Dentistry*, 404 Mass. 211, 217-218 (1989) (*Forsyth*) (court's "task is not to determine whether the record contains substantial evidence to support the commission's action but, rather, to decide whether the commission exercised its discretion arbitrarily and capriciously"). As the entity challenging the order, the plaintiff has the burden to prove the commission exercised its discretion arbitrarily or capriciously by showing that there was "no ground which 'reasonable [persons] might deem proper' to support it." *T.D.J. Dev. Corp.* v. *Conservation Comm'n of N. Andover*, 36 Mass. App. Ct. 124, 128 (1994), quoting *Cotter* v. *Chelsea*, 329 Mass. 314, 318 (1952).

The plaintiff argues that this court should reverse the commission's removal order, where two findings (Finding 6 and Finding 7) within the commission's enforcement order are factually erroneous and the commission failed to properly consider the environmental harm that would occur as a result of removal. This court considers each argument in turn.

A. Finding 6

First, the plaintiff claims factual error in Finding 6's determination that the plaintiff had not "provided or presented" the requested sand mitigation plan as of June 30, 2021, and "did not intend to make up for [the sand] shortfall." A.R. 3982. The plaintiff argues that there was no requirement for a plan to be filed by that date, it was in the process of developing such plan with town staff, it repeatedly stated it intended to follow such a plan, and a firm plan was filed shortly after the commission's vote to issue the enforcement order.

As a preliminary matter, this court concludes that there is no factual error in the specific language of the Finding 6 determination that no sand mitigation plan had been "provided or presented" by June 30, 2021. 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. S.R. 4886, 5045. The plaintiff's position to the contrary finds no support in its reliance on its prior, inchoate "requests" for assistance or statements of intent to complete a plan: neither the plaintiff's May, 2021 letter to the commission "request[ing] that the [c]ommission direct [town] staff . . . to work with SBPF to develop a plan," nor its expert's statement at the June 30 meeting asserting that the plaintiff was "willing to create" a "four-year plan [for which the plaintiff] would like to work out the details with [s]taff," represent the provision or presentation of a completed mitigation plan. A.R. 3976-3977; S.R. 5046-5047. Moreover, nothing in Finding 6 states that the plaintiff was "required" to submit such plan by June 30, 2021—the Finding clearly describes the mitigation plan as a prior "request" of the commission, without any reference to a deadline. A.R. 3982. For that reason, this court cannot fairly conclude that the disputed portion of Finding 6 constituted factual error.

The plaintiff's argument fares no better when cast as a claim that Finding 6, although semantically correct, was misleading in substance where the commission knew the plaintiff planned to imminently submit such a plan and it did so in July. The challenged aspect of Finding 6 is only one part of a multi-clause sentence. The entire Finding 6 determines that the mitigation plan had not been presented by June 30 *and* "that the testimony taken during the June 30, 2021 meeting and additional communications that the applicant did not intend to make up for that shortfall on the structure . . ." A.R. 3982. The remaining portion of the sentence provides context for the determination that a mitigation plan had not been submitted by that date: the plaintiff's repeated statements of intent in May and June to submit a plan were accompanied by the simultaneous reiterations of its president that it would *not* complete the required sand mitigation unless the commission approved a future permit to expand the project to a second phase.[15] The commission was entitled to credit these statements, rather than the plaintiff's selectively quoted portions of its engineer's statements during those same meetings. As such, the record contains sufficient evidence to support the substance of Finding 6 – that a plan had not yet been submitted, and if eventually submitted, would likely be irrelevant to achieving compliance given the plaintiff's repeated insistence that its performance was contingent on future action by the commission on a separate, as-yet-unfiled permit application.

[15] During the May 2021 meeting, the SBPF president stated: "We recognize we are short on the permit and have made it clear for a number of years; at the beginning of the process, we indicated the 22 [cubic yards] was not sustainable. We agreed with the expectation we could change it. We indicated from the beginning that we would turn the project over to the Town if we could not reach an agreement on the expansion and on a reasonable amount of sand delivery." S.R. 4888. During the June 30, 2021, meeting, the SBPF president stated, in reference to the SBPF engineer's discussion of some elements of a mitigation plan, "[g]etting into compliance can only happen in the context of a full, sustainable project." S.R. 5046.

The plaintiff's reliance on its July 7 and August 4, 2021 submissions of what it characterizes as a "concrete compliance plan" does not alter this court's analysis.[16] The letter accompanying the mitigation plan set out the same contingent position on performance: that remediation of the short fall and full compliance going forward would only occur if the commission approved a future expansion of the geotube array.[17] Thus, the eventual submission of a sand mitigation plan only serves to confirm the substance of Finding 6 – that the plaintiff's did not intend to comply with any plan to rectify the deficit without a *quid pro quo* from the commission. In short, there is no merit to the plaintiff's argument that it was arbitrary or capricious for the commission to "ignore" the July plan without "explanation for why it was sufficient" – a plan is facially insufficient if it promises *non*-performance unless an unrelated administrative matter is decided favorably.

Accordingly, neither the commission's observation that the sand mitigation plan was absent on June 30, nor its conclusion that the plaintiff asserted at that time that it did not intend to comply with any such plan, was erroneous or misleading. For that reason, the plaintiff has failed to meet its burden to show that Finding 6 did not provide a rational basis for the commission's enforcement decision. See *Mederi, Inc.*, 488 Mass. at 67.

[16] The August 4 submission proposed minor revisions to the July 7 proposal, which do not affect this court's analysis. S.R. 5049-5050. The August 4 revisions did not retract any of the plaintiff's statements attending the July 7 proposal, detailed *infra* at note 17.

[17] In the letter, the plaintiff's counsel "clarif[ied] that [the plaintiff would] agree to comply with the sand mitigation requirements of the [2824] OOC" and its proposed sand mitigation program *only* if the plaintiff continued to maintain the existing geotube array, which the plaintiff reiterated was "simply not feasible . . . unless there [were] a viable path to building the full-sized project, as has always been the plan." A.R. 3608-3609. Counsel directly confirmed that if the plaintiff chose to "no longer maintain the [2824 OOC] project in the future and discontinue operations, SBPF [did] not intend to provide this additional sand mitigation" set out in the engineering proposal. A.R. 3608.

B. Finding 7

The plaintiff's second argument claims that despite its undisputed lack of compliance with sand mitigation requirements in the years approaching 2021, it was error to conclude in Finding 7 that the project was "not able to be maintained in compliance . . . or brought back into compliance within a timeframe to ensure that there are no impacts to the resource areas . . . ." A.R. 3982. The plaintiff argues that it offered to make up the sand deficit through a four-year sand mitigation plan, and that the commission lacked evidence to conclude that environmental harm would occur at any point between 2021 and 2025.

The plaintiff relies on its July 7 mitigation plan and its prior statements of intent as evidence that compliance was planned and known to the commission at the time this finding was made. For the reasons set out *supra* with respect to Finding 6, the plaintiff's repeated qualification of any future compliance as contingent on future approval of an as-yet unfiled permit application provide a reasonable basis for the commission to conclude that future compliance would not be achieved at all, i.e. "not able to be maintained in compliance with the Order of Conditions" as stated in Finding 7. This alone is sufficient to conclude that Finding 7 provided a rational basis for the enforcement decision.

Nevertheless, the plaintiff argues that the fixed sand quota set out in Special Condition 32 was substantially excessive and expert testimony during the enforcement proceedings demonstrated that there had been, and would be, no damage to the littoral system from its noncompliance. The plaintiff has forgone two opportunities for evaluation of the merits of the fixed sand quota amount and/or the "adaptive" mitigation proposal: it declined in 2015 to pursue judicial review of the conditions set out in the 2824 OOC, and it never applied to the commission for an amendment of Special Condition 32 at any point thereafter. Having failed to exhaust such

administrative remedies in a timely fashion, the plaintiff is not entitled to litigate in the merits of such condition through collateral attack at this late date.

Regardless, the court need not reach the question whether there is sufficient record evidence to demonstrate existing or future harm from the sand deficit. The 2824 OOC does not require the commission to identify evidence of environmental damage from the sand deficit before proceeding with enforcement on the basis of the specified failure criteria. To the contrary, Special Condition 34 states that sand mitigation constitutes a project failure when not performed within the specified timeframe "or within such other reasonable periods of time as determined by the [c]ommission in the event of a delay in performance *outside the control of SBPF*" (emphasis added). A.R. 3982. The record clearly demonstrates that the plaintiff's delay in performing the required annual sand mitigation was deliberate and reflected its desire to adopt a less intensive (and inferentially less costly) "adaptive" mitigation approach, despite its failure to apply for an amendment to the 2824 OOC to approve that change. As such, the delay was not "outside the control of SBPF" and could not have triggered any arguable requirement for the commission determine a "reasonable" period for performance. Nor was the commission required to make an additional finding of harm because Special Condition 34 states that the presence of "unmitigated adverse impacts from the project" constitutes a project failure. The word "or" precedes the adverse impact phrase, clearly indicating a disjunctive term – the finding of deliberate refusal to complete required annual sand mitigation was entirely sufficient, without more, to trigger the Special Condition 34 failure criterion. Accordingly, the plaintiff has failed to meet its burden to show that Finding 7 did not provide a rational basis for the commission's enforcement decision. See *Mederi, Inc.*, 488 Mass. at 67.

C. Consideration of Harm Resulting from Removal

The plaintiff's final argument is that the commission was arbitrary and capricious in its refusal to consider the swift erosion of the Sconset bluff and imminent risk to infrastructure of the adjacent Baxter Road neighborhood that will occur upon removal of the geotubes. The plaintiff asserts that the erosion risk, which originally motivated the approval of the 2824 OOC, was known to the commission, and yet during the enforcement proceedings, the commission did not request that its independent consultant to assess the impacts of removal. Moreover, the plaintiff argues, the commission rushed to issue the removal order despite the town's request that the commission wait to make its decision until receiving the report of the town's independent consultant ("Arcadis memo"). In this context, the plaintiff urges, the commission's choice to order outright removal, rather than to order SBPF to comply with the sand mitigation conditions of the 2824 OOC, was arbitrary and capricious.

Although received after the commission's enforcement decision, the October 2021 Arcadis memo provides relevant context to the broader scope of the interests affected by the commission's enforcement decision. Arcadis was retained by the town (not the commission) to perform an "alternatives analysis for technically feasible solutions to address bluff and toe erosion in the [Sconset] area."[18] S.R. 5158. In the memo, Arcadis reviewed the residential structures and town infrastructure predicted to be at risk from unchecked bluff erosion at various points between 2030 and 2100, and opined that "[i]f the geotubes are removed without any plan or protection in place, each violent storm will lead to further bluff collapse," which potentially "will leave the [t]own and the [Baxter Road] community exposed to a range of risks including

[18] The three alternatives analyzed by Arcardis included: (1) an expansion of the existing geotube array along further sections of the bluff, (2) the installation of nearshore breakwaters in addition the existing geotube array; and (3) the removal of the existing geotube array, followed by coastal retreat and relocation of Baxter Road. S.R. 5190-5200.

damage to roadways and utilities, emergency and public access limitations, and environmental impacts from damage to residential properties." S.R. 5158-5159. Arcadis noted that "[i]t is difficult to predict how the shoreline would adjust to [removal of the geotube array]," but that there was "the potential for the shoreline realignment to be rapid and dramatic, so it is important that homeowners, the [t]own, and all residents of Nantucket have a strategic plan before removal of the geotubes." S.R. 5195. Arcadis ultimately recommended that "existing toe protection [not] be removed until after new infrastructure is in place, and an orderly retreat can be implemented, as there is not anything currently permittable to provide the same level of toe protection and risk reduction to the infrastructure and homes on the bluff" as that provided by the 2824 OOC geotube array. S.R. 5206.

This court acknowledges the potential implications of the commission's choice to move immediately to a removal order, rather than explicitly ordering compliance, as a response to the ever-accumulating sand deficit and the plaintiff's repeated refusal to provide such mitigation unless an expansion of the project is approved. The implications are significant. However, it is outside the scope of the legal issues properly before the court to determine whether the risks described in the Arcadis memo are supported by substantial evidence or weigh those risks against other strategies which could hypothetically be undertaken in response to erosion. Instead, 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. See *Commonwealth* v. *Boston Edison Co.*, 444 Mass. 324, 334 (2005) ("the proper exercise of enforcement discretion . . . is not ordinarily judicially reviewable"); *DiCicco* v. *Department of Env't Prot.*, 64 Mass. App. Ct. 423, 427-428 (2005) ("judicial intrusion in agency discretion in enforcement matters is particularly inappropriate"). If some conceivable ground exists to support the commission's discretionary

choice, this court cannot substitute its own judgment, even if it were to conclude that the community may be better served by a compliance order rather than a removal order. See *Pacheco*, 49 Mass. App. Ct. at 739 n.3, quoting *Arthur D. Little Inc.*, 395 Mass. at 553.

The record before the court demonstrates such a conceivable, if not inarguable, basis here. The plaintiff's failure to comply with the 2824 OOC sand mitigation conditions has extended over a period of years, the 2824 OOC was never amended to change these conditions, the plaintiff has repeatedly asserted it will not rectify the deficit or meet the full requirement going forward unless the commission takes favorable action on an as-yet-unfiled permit application to expand the array, and no other entity, such as the town itself, has offered (or received the necessary permits) to supply the required sand mitigation. In light of such facts, this court cannot say that the commission lacks any "ground which 'reasonable [persons] might deem proper' to support" the decision to order the removal of the geotube array which is not being maintained in compliance with the unchallenged conditions set out to protect surrounding areas from the effects of the project's obstruction of natural erosion. See *T.D.J. Dev. Corp.*, 36 Mass. App. Ct. at 128, quoting *Cotter*, 329 Mass. at 318. Accordingly, the plaintiff fails to meet its burden to demonstrate that the enforcement order is arbitrary and capricious on this basis.

ORDER

For the foregoing reasons, the plaintiff's motion for judgment on the pleadings (Paper 12) must be **DENIED** and the commission's cross-motion for same (Paper 17) must be **ALLOWED**. The commission's September 2, 2021, enforcement order is **AFFIRMED**.

Mark C. Gildea

September 2, 2022

Mark C. Gildea
Justice of the Superior Court