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May 27, 2014

Conservation Commission
Town of Chilmark
401 Middle Road
P.O. Box 119
Chilmark, MA 02535

**Re: Construction of Coastal Engineering Structures
at premises at Map 32, Lot 68.1**

Dear Members of the Commission:

This is in response to Chuck Hodgkinson's e-mail request of May 22 for my advice concerning whether the referenced project qualifies for the exception to the prohibition, contained in both DEP's and your own wetlands regulations, on new coastal engineering structures, both of which apply to buildings constructed prior to August 10, 1978. My opinion is that the project does not qualify for either exception.

I understand the facts to be as follows. The property consists of a residence of approximately 3,165 square feet of living space located in the Stonewall Beach area. It is near a receding coastal bank. A building permit was taken out for the house in 1999, but the house does not appear to have been completed until sometime around 2006.

A house existed on the property before the current one. Although I saw nothing in the materials furnished me fixing the date of its construction, it is shown as existing on a 1979 subdivision plan, as well as on 1969 and 1971 aerial photographs I reviewed on line. I will assume for the purposes of this opinion that that house existed on August 10, 1978.

Although apparently the previous owner characterized the work as an addition, it appears pretty clear that the house was totally demolished in 1999, and the new house was constructed on the same site several years later. The owner secured an order of conditions authorizing

demolition of the former structure and re-grading the site in 1999. Among the special conditions imposed by the order was the following:

14. Although this area has a receding shoreline, 310 CMR 10.30(3) of the Wetlands Regulations promulgated under Massachusetts General Laws Chapter 131, Section 40, and Section 2.05(4) of the Chilmark Conservation Commission Rules & Regulations, promulgated under the Chilmark Wetlands Protection Bylaws, requires that no coastal engineering structure, such as a bulkhead, revetment, or seawall shall be permitted on a bank, or on an eroding bank, at any time in the future to protect the project allowed by this Order of Conditions.

Mr. Hodgkinson has forwarded me a site plan dated January 24, 2003, which shows that, when the house was reconstructed, the footprint was moved to the south and west, although a portion of the new structure over-lapped the old house site. The plan shows that the new structure is outside of the 100 foot buffer zone from an inland wetland to the northwest and the coastal bank to the south. I understand that no notice of intent was filed for actual construction of the residence, presumably because it was outside both buffer zones. The relocated structure is nevertheless approximately forty feet close to the coastal bank than the demolished structure.

The relevant language governing the issue in the Wetlands Act Regulations and the Chilmark Wetlands Protection Bylaws is very similar. 310 CMR 10.30(3) specifies:

(3) No new bulkhead, revetment, seawall, groin or other coastal engineering structure shall be permitted on such a coastal bank except that such a coastal engineering structure shall be permitted when required to prevent storm damage to buildings constructed prior to the effective date of 310 CMR 10.21 through 10.37 or constructed pursuant to a Notice of Intent filed prior to the effective date of 310 CMR 10.21 through 10.37 (August 10, 1978), including reconstructions of such buildings subsequent to the effective date of 310 CMR 10.21 through 10.37, provided that the following requirements are met:

- (a) a coastal engineering structure or a modification thereto shall be designed and constructed so as to minimize, using best available measures, adverse effects on adjacent or nearby coastal beaches due to changes in wave action, and
- (b) the applicant demonstrates that no method of protecting the building other than the proposed coastal engineering structure is feasible.
- (c) protective planting designed to reduce erosion may be permitted.

Section 2.05(4) of the Commission's Regulations promulgated under the local bylaws provides:

(A) No new bulkhead, revetment, seawall, groin, vertical walls or other coastal engineering structure shall be permitted on such a coastal bank except that such a coastal engineering structure may be permitted when required to prevent storm

damage to buildings constructed prior to August 10, 1978 or constructed pursuant to a Notice of Intent filed prior to August 10, 1978, including reconstructions of such buildings subsequent to August 10, 1978, using the best available measures acceptable to the State DEP, Coastal Zone Management and/or the Army Corps of Engineers, provided that the following requirements are met:

- (i) a coastal engineered structure or a modification thereto shall be designed and constructed so as to minimize adverse effects on adjacent or nearby coastal beaches due to changes in wave action, using best available measures, as per the guidelines of the Shore Protection Manual or other guidelines, and
- (ii) the applicant demonstrates that no alternative method of protecting the building other than the proposed coastal engineering structure is feasible, including moving the structure.
- (iii) protective planting designed to reduce erosion may be required.

I believe the residence does not qualify for the “reconstruction” exception under either regulation for two reasons. First, special condition 14 in the Commission’s 1999 Order of Conditions is pretty clear on the point, stating that no coastal engineering structures shall be permitted “in the future to protect the project allowed by this Order of Conditions.” Although the “project” authorized by the order of conditions did not, strictly speaking, include the new residential structure, the work was preparatory for the new residence and appeared to include a new septic system for the proposed new residence. The condition would be meaningless unless it applied to the residence that was contemplated by the site preparation authorized by the order.


It is possible that the applicant could argue that the condition was inapplicable because both Chilmark’s and DEP’s regulations specify that that condition be imposed only for “new buildings within 100 feet of the coastal bank,” and, according to the site plans, the residence ultimately constructed was more than 100 feet away. However, special condition 14 did not itself contain that limitation, and, having failed to appeal the decision, and having recorded the Order of Conditions, the applicant is bound by its terms regardless of whether the performance standards of the regulations strictly required it.

Second, independent of special condition 14, I do not believe that the new dwelling qualifies as “reconstruction” of the pre-1978 dwelling. The 2006 project substantially extended the footprint of the dwelling toward the coastal bank. I interpret “reconstruction” to be limited to a project either entirely within the footprint of the original structure or one in which any extension of the footprint is in a direction away from the coastal bank. Although there is no published guidance on this issue, I spoke with Christine Odiaga of DEP’s Southeast Regional Wetlands section, and she confirms that, on appeal, DEP would treat the 2006 project as new construction, because it extended the structure seaward of the original footprint.

There is a small outbuilding on the property very close to the bank that has also been there since 1978. It does not appear from the notice of intent that the applicant claims that erosion control is necessary to protect this structure. Given its modest size and value, I do not believe it qualifies for the exception to the prohibition on coastal engineering structures because it could easily and economically be either moved or reconstructed at a safer location, at far less expense than the construction of a revetment that might protect it, and therefore does not meet the requirement of section 2.05(A)(ii) of the Commission's regulations.

Please feel free to call or e-mail me if you have any questions about this opinion.

Very truly yours,

A handwritten signature in black ink, appearing to read "Dml PB", written over the printed name.

DANIEL C. PERRY

DCP/tmf