

Rec. @ 5/14
Hearing by
D. Roggeveen
Quidnet/Squam Assn.

MEMORANDUM

Date: May 14, 2014
To: Nantucket Conservation Commission
From: Dirk G. Roggeveen
Re: Town of Nantucket/SBPF NOI to Validate Emergency Permit for Geotextile Seawall

As you all are aware, I represent the Quidnet Squam Association, an association of homeowners to the north and down drift of this project. The project, as proposed and as built will impact the beaches, barrier beaches, and coastal dunes to the north, properties owned by members of the Quidnet Squam Association. Additionally, the members of the Association frequent the publicly-accessible beaches within the area, including Sesachacha Pond.

The Association continues to be opposed to any armoring of the natural shoreline to the south. Even with proposed so-called mitigation, the project will have long term impacts on sediment transport to the north. To the extent the project has now been permitted temporarily, under an emergency permit, the Association is concerned that the applicants are renegeing on their representation that the project was in fact temporary, and that the impacts will not be short term but long term. Finally, to the extent that the Commission may issue a permit nevertheless, the Association offers several points that ought to be considered in any Order of Conditions issued by the Commission.

Temporary Status of the Project:

This installation was constructed pursuant to an emergency permit issued by the state, and then by the Conservation Commission. In each case, the Town of Nantucket represented that the proposal was for a temporary project. It was not for a temporary permit. All permits are temporary. The project was temporary – specifically for the time necessary to relocate Baxter Road. This was stated at numerous points in the public hearing, for example, approximately 47 minutes into the December 18, 2013 ConCom meeting, by DPW Director Kara Buzanoski, the Town's representative for this project proposal. Ms. Buzanoski stated at one point in the hearings that Town was looking for 2-3 years.

Now the Town is trying to pretend that that is not what they represented, that instead, the permit was temporary. Permits are good for three years, extendable to six. There is no provision to extend them further. Structures built pursuant to permits are typically permanent. Once they are in, a Certificate of Compliance may be issued, with provisions for ongoing maintenance if necessary. That is not what the Town represented to this Commission or to the Community when it proposed a temporary project to hold the bank until the road could be relocated.

State and local law requires that a Notice of Intent be filed to regularize the permitting of the emergency project and to allow the Commission to condition what has been constructed. In the absence of an emergency provision (which addresses public health and safety), any notice of intent would have to meet all applicable performance standards.

Sconset Beach, Sankaty Bluff, and Performance Standards:

Armoring of a Coastal Bank is regulated by 310 CMR 10.30 at the state level, and by the Nantucket Wetland regulations, section 2.05, at the local level.

Much has been discussed about 310 CMR.10.30, but it is worth noting that section (3) does not allow for the protection of roads and infrastructure. It allows for protection of pre-1978 buildings. That's it. While the geotube may be necessary temporarily to protect a road and infrastructure serving dwellings atop Sankaty Bluff as a temporary public health and safety matter, there is no provision to protect them in any other capacity. While the Town proposed filing under a limited project status for maintenance of roadways, DEP said no to that back in December.

The local regulations also allow for coastal engineering structures on coastal banks to protect pre-1978 buildings. But the regulations use the term "structure" and also permit armoring to protect "public infrastructure." Both of these exceed the authority of the Commission, because they weaken the protection of the state act which only protects buildings. The idea that Nantucket can also protect swimming pools, tennis courts, parking lots, etc., all found within its definition of "structure," waters down the state's interest in protecting coastal banks except to protect the buildings that pre-existed the Act. The same goes for public infrastructure. And the regulations for Coastal Beaches under the local bylaw, into which this structure has been built, does not purport to protect "public infrastructure" at all.

Under the State Regulations, at 310 CMR 10.30(8), "Notwithstanding the provisions of 310 CMR 10.30(3) through (7), no project may be permitted which will have any adverse effect on specified habitat sites of rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.37." This Commission has received evidence about the potential impacts to down drift beaches. And it has received evidence about Piping Plover and Least Tern habitat just to the North. In order to issue a permit the Commission will need to make a finding that this project will have no adverse impact on those nesting areas.

Impacts:

The applicants have submitted no evidence of "no adverse impact" on down drift beaches. The Commission has received evidence of negative impacts. See, for example, the Jim O'Connell submission.

The evidence is clear that the bank is a sediment source to down drift beaches (O'Connell, Dr. Michael Bruno) But the applicant has failed to provide information or modeling of the sediment transport system in front of the east shore beach, despite numerous requests from the public and the Commission. The applicants have agreed that the primary impact of building a coastal engineering structure in this location will be the elimination of the bank as a sediment source to down drift beaches. (Bruno) But they have represented that it is too complicated to figure out. (Bruno)

There has been no proposal to deal with the erosion cell that will develop when a storm washes away the sand from in front of the geotextile sea wall. (O'Connell) The applicant proposes to address down drift damage by applying sand at the project site. Without any information on sediment transport along that area of coast, there is no evidence that placing sand at the project site will address the erosion at adjacent beaches. In fact, the Commission has heard nothing about whether sand erosion and sand deposition are similar events, but just in reverse, or whether other dynamics take place. The Commission did hear that erosion during a storm suspends eroding sand in the water column and thereby dampens the wave energy of the storm, during the storm. A denuded geotextile sea wall will provide no such dampening influence and thus we can predict that the storm impacts will be greater than would otherwise occur in a natural state.

Commissioner Andrew Bennett asked Dr. Bruno if there was a better place to put the sand. Dr. Bruno stated that we don't know what nature does with the sand, "let nature move it." But nature is not supplying it. The dynamic is entirely man made. There is no support that a manmade system will function like nature. In fact the applicants are betting on the fact that it won't (otherwise why build a seawall).

So, absent an ability to make an honest finding of no adverse impacts to down drift beaches, the Commission can only permit this structure with the use of a waiver from the local regs, and by keeping it within the temporary framework allowed by the emergency to provide time to relocate Baxter Road.

Findings:

The Commission will need to make a number of findings to allow this project to stay in place. We suggest the following be included.

- The Commission finds that this project, as proposed and permitted, will have negative impact on down drift beaches. The Commission has not received a proposal for a sustainable plan to mitigate the negative impacts of the geotextile seawall.
- The Commission finds that this project was submitted and represented as a temporary structure while the road was being relocated.
- The Commission finds that it does not meet state performance standards, which do not permit the coastal engineering structures except to protect pre-1978 buildings (not infrastructure).
- The Commission finds that it does not meet local bylaw.
- The Commission finds that the provision of sand mitigation will ameliorate, but not eliminate the negative impacts caused by removing the natural bank as a sediment source. Commission will allow this temporary harm to the natural system for the short period necessary and as requested by the Town to relocate Baxter Road.

Waivers:

This project requires waivers from the local regulations because it will stop the bank sediment from supplying down drift beaches. One might suppose that the Commission would grant a waiver somehow tied to the mitigation protocols. But no such waiver has been requested.

It can be permitted only as an emergency, temporary project to protect public health and safety while the road is being relocate.

Precedent:

The applicants have tried to argue that there is no such thing as precedent and that each application has to stand on its own. While true to some extent, the Commission would be arbitrary and capricious to allow one project and deny another similarly situated project.

But there is another type of precedent. Procedural precedent. It also is arbitrary and capricious to require one applicant to follow the procedural regulations but not to require the same of another applicant. And it looks particularly bad when the applicant receiving the favorable treatment is the Town. There are several irregularities that the Commission might want to consider.

- The non specific waiver request: “any other waiver the Commission deems appropriate.”
- Coastal engineering structures so far removed from the bank as to be outside the Commission’s jurisdiction. What is the standard? 50 feet (the no-build limit)? 100 feet (the jurisdictional limit)? 150 feet, 200 feet?
- Applicants represent that there is an imminent threat. How does one define imminent, if that is the standard?

Maintenance:

One funny final point. The applicant has submitted, at page 6 of it’s July 2, 2013 Notice of Intent, which was included in the record of this project by D.Anne Atherton, the following: “Replacement of the geotube would be expected to be required on a frequent basis (one or more times annually).” The Commission has received no protocols for how such replacement will be performed.