

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

COUNTY OF BRUNSWICK

SUNSET BEACH TAXPAYERS ASSOCIATION)
and NORTH CAROLINA COASTAL)
FEDERATION,)

Petitioners,)

v.)

N.C. DEPARTMENT OF ENVIRONMENTAL)
QUALITY, DIVISION OF COASTAL)
MANAGEMENT,)

Respondent.)
_____)

**PETITION FOR A
CONTESTED CASE HEARING**

I. INTRODUCTION

The Sunset Beach Taxpayers Association (“Taxpayers Association”) and the North Carolina Coastal Federation (“Coastal Federation”) (collectively, “Petitioners”) respectfully submit this Petition for a Contested Case Hearing challenging the issuance of Coastal Area Management Act (“CAMA”) Permit No. 70-16 (“Permit”) by the Division of Coastal Management (“DCM”) to Sunset Beach West, LLC (“Permittee”). The Permit authorizes development of approximately 15 acres of a 25-acre property in an area known as Mad Inlet, located between the developed portion of Sunset Beach Island and North Carolina’s Bird Island Reserve. The Permit is attached as Exhibit 1.

II. JURISDICTION AND STANDING

A. Petitioners Timely File This Petition for a Contested Case Hearing.

DCM issued the Permit on June 20, 2016. On July 7, 2016, Petitioners timely filed with the Coastal Resources Commission (“CRC” or “Commission”) a Third Party Hearing Request requesting approval to file a petition for a contested case hearing. *See* N.C. Gen. Stat. § 113A-121.1(b) (“A request for a determination of the appropriateness of a contested case hearing shall be made in writing and received by the Commission within 20 days after the disputed permit decision is made.”). Petitioners’ Third Party Hearing Request is attached as Exhibit 2.¹

¹ Exhibits to Petitioners’ Third Party Hearing Request related to the CRC’s required finding that Petitioners are directly affected or Petitioners’ claim that was denied by the Commission have been omitted. Other exhibits to the Third Party Hearing Request are attached to this Petition.

On July 22, 2016, the CRC determined that “Petitioners may file a petition for a contested case hearing” in this matter to resolve whether DCM’s issuance of the permit was “consistent with the 7H .0200 Rules- Estuarine Side;” “consistent with the 7H .0300 Rules- Oceanside;” and “consistent with the Town’s Land Use Plan.” Final Agency Decision Granting in Part and Denying in Part Petitioners’ Request for a Contested Case Hearing (“Final Agency Decision”) Exhibit 3 at 28-29. Pursuant to CAMA, “[i]f the Commission determines a contested case is appropriate, the petition for a contested case shall be filed within 20 days after the Commission makes its determination.” N.C. Gen. Stat. § 113A-121.1(b). Petitioners have timely filed this Petition for a Contested Case Hearing within the 20-day period allowed by § 113A-121.1(b).

B. Petitioners Are Substantially Prejudiced by Issuance of the Permit.

Petitioners’ rights protected by CAMA are substantially prejudiced by the issuance of the Permit. *See* N.C. Gen. Stat. § 150B-23(a). CAMA protects “the public’s opportunity to enjoy the physical, esthetic, cultural, and recreational qualities of the natural shorelines of the State.” N.C. Gen. Stat. § 113A-102(a). The statute provides for the “[p]rotection of present common-law and statutory public rights in the lands and waters of the coastal area,” *Id.* § 113A-102(b)(4), including “rights of access” and “public trust rights.” *See id.* § 113A-120(b)(5); *see also id.* § 113A-129.1 (recognizing CAMA’s intent to protect “public trust rights such as hunting, fishing, navigation, and recreation”).

The Taxpayers Association is a not-for-profit organization founded in 1984 in order to promote orderly growth within the Town of Sunset Beach that would preserve and maintain the character of the community—including both its built and natural environment.² In fulfilling that purpose, the organization has engaged in a variety of efforts over the years. Among those efforts, the Taxpayers Association was instrumental in protecting Bird Island from development and ensuring its long-term protection as part of North Carolina’s Coastal Reserve.

The Coastal Federation is a not-for-profit, membership organization devoted to protecting the coastal rivers, creeks, sounds, and beaches of North Carolina through public education, regulatory advocacy, and restoration of marshes, reefs, wetlands, and other coastal habitats. The Coastal Federation works to engage people from all walks of life who are committed to protecting the North Carolina coast for current and future generations. The organization collaborates with community groups, local governments, businesses, schools, and research institutions to find common ground and find solutions to problems facing the coast. The Coastal Federation played a central role in protecting Bird Island from development and protecting it as part of the state’s Coastal Reserve program.

Petitioners are two organizations that have worked to protect Sunset Beach for decades and are substantially prejudiced by the issuance of the Permit. They each file this petition on behalf of their members. Petitioners together represent thousands of members, many of whom live, visit, or vacation on Sunset Beach. Both organizations have members who are substantially prejudiced by the agency decision because they own property near the proposed development

² *See* SBTA Constitution and Bylaws, Art. IV (2016), *available at* <http://ninam25.wix.com/sbta#!constitution-and-bylaws/jh458>.

that is threatened by the removal of protective sand dunes authorized under the permit. Petitioners also have members who fish, boat, kayak, walk the beach, view wildlife, picnic, and bike close to the proposed development. These recreational uses of public trust waters and beach areas are substantially prejudiced by the Permit.

III. GROUNDS FOR OBJECTION

A. Factual Background

The Permit authorizes development of 21 residential lots, a private bridge extending from West Main Street, a bulkhead at the end of West Main Street, walkways, an asphalt road, and a 136-foot long pier that connects to a 64-foot long dock (“Project”). As recognized by the CRC, the majority of the site “is located within CAMA Areas of Environmental Concern.”³ Indeed, the property is in the Ocean Erodible Area, High Hazard Flood Area, Coastal Wetlands, Estuarine Shoreline, Public Trust Shoreline, Estuarine Waters, and Public Trust Area areas of environmental concern. A permit must be obtained under CAMA “before undertaking any development in any area of environmental concern.” N.C. Gen. Stat. § 113A-118(a). As designed, the project constitutes “major development.” *Id.* § 113A-118(d)(1).

As depicted in the attached site plans,⁴ the Permit authorizes construction of a bridge extending from West Main Street to the site. The Permittee has described the water body spanned by the bridge as Salt Boiler Creek, but the Coast Guard has recognized it as a tributary to Mad Inlet, which is consistent with local terminology. The proposed bridge would be 27 feet wide and approximately 620 feet long, spanning approximately 2,025 square feet of Estuarine Waters and Public Trust Areas. It would be as low as six feet from mean high water. The proposed bridge and walkways would shade approximately 15,000 square feet of coastal wetlands. On the site, the bridge would connect to an asphalt road that would follow the estuarine shoreline and add approximately 43,000 square feet of impervious surface. The Permit authorizes grading of the 15 acres of the site between the estuarine shoreline Area of Environmental Concern (AEC) boundary and the 60-foot CAMA setback line. The Project would include wooden walkways both on the estuarine shoreline and at the CAMA setback line. Finally, the Project would include a pier extending to a tributary of Mad Inlet.

The property in question was once bisected by Mad Inlet and, in recognition of its unsuitability for development, is part of the Coastal Barrier Resources System. *See* 16 U.S.C. § 3501 (recognizing natural value of components of the Coastal Barrier Resources System and threat posed by development thereof); *id.* § 3502 (describing criteria for inclusion in Coastal Barrier Resources System). As a result, no public assistance can be provided to the site through utilities, flood insurance, or disaster assistance. *See, e.g.*, 16 U.S.C. § 3504; 42 U.S.C. § 4028; 44 C.F.R. § 206.344. Because utilities cannot be extended to the proposed development, individual water wells and septic systems are proposed for each of the 21 lots.

³ Exhibit 3 at 10.

⁴ Sunset Beach West Site Plans (Exhibit 4).

During the comment period on the permit application, the North Carolina Coastal Reserve Program (“Reserve”) raised numerous concerns about the impact of the proposed development on Bird Island.⁵ Those concerns included “pollution resulting from stormwater runoff and septic system use; damage to dune structure and natural vegetation communities resulting from landcover changes associated with infrastructure and development; and disturbance to wildlife in and adjacent to the Bird Island Reserve.”⁶ The Reserve noted that the “project exceeds the research-based recommendation for impervious surface coverage . . . and has the potential to negatively impact surface or groundwater quality as a result of stormwater runoff.”⁷ The letter highlighted that “[s]eptic systems have been shown to be a major source of microbial pollution in coastal areas” and that “placement of septic systems in an area considered to be at risk for shoreline change of up to 440 feet during a storm and subject to flood water of 17-20 feet dramatically increases the risk of septic system failure, displacement or destruction during storm or flood conditions.”⁸

The Reserve also commented on the effect of the proposed development on dune integrity. It stated that the project “would require significant alteration of natural dune and vegetation communities” and noted that “the configuration of the project area and lots will place all of the residential units well oceanward and in a position of greater hazard than all of the existing structures on Sunset Beach, where extensive dune fields and vegetation offer protection to residential units.”⁹ In conclusion, the Reserve stated that “[b]ecause the dune system, vegetation communities, and wildlife that currently occur west of 40th Street have previously existed as a largely intact barrier island community, the Sunset Beach West project will have significant impacts on the Bird Island Reserve.”¹⁰

Numerous landowners, as well as both the Taxpayers Association¹¹ and the Coastal Federation¹² also submitted comments on the proposed development.

B. Objections to the Permit

1. The Permit Violates State Rules Governing Coastal Development.

Under CAMA, each Area of Environmental Concern (“AEC”) has general and specific use standards, but there is one requirement that is consistent through each AEC at issue in this matter: adverse impacts must be minimized. Unless the applicant demonstrates that it has

⁵ The North Carolina Coastal Reserve System was created “for the purpose of acquiring, improving, and maintaining undeveloped coastal land and water areas in a natural state.” N.C. Gen. Stat. § 113A-129.2. Bird Island is a component of the North Carolina Coastal Reserve. 15A N.C. Admin. Code 70 .0105(a)(9). As such, the Coastal Reserve Program of the Division of Coastal Management is responsible for “managing and protecting” Bird Island. *Id.*.0103.

⁶ Letter from H. Sutton, N.C. Coastal Reserve, to D. Huggett, DCM (Sept. 17, 2015) at 1-2 (Exhibit 5).

⁷ *Id.* at 2. The Reserve is responsible for “managing and protecting” areas like Bird Island and “providing new information on coastal processes to coastal management decisionmakers.” 15A N.C. Admin. Code 70 .0103.

⁸ *Id.* at 2-3.

⁹ *Id.* at 3.

¹⁰ *Id.* at 5.

¹¹ Letter from N. Marable, SBTA, to H. Coats, DCM (Oct. 28, 2015) (Exhibit 6).

¹² Letter from G. Gisler, SELC, to H. Coats, DCM (Oct. 7, 2015) (Exhibit 7).

minimized those impacts, DCM cannot issue a permit. The law plainly states that “[n]o permit shall be issued under Part 4 of this Article which is inconsistent with the State guidelines.”¹³ Here, the application is inconsistent with state guidelines for the Ocean Hazard AEC as well as the Estuarine and Ocean System AEC.

a. The Permit violates Ocean Hazard AEC guidelines.

The Ocean Hazard AEC provides specific protections for dune systems as the cornerstone of both protecting natural systems and preventing hazardous development. The Project violates two of the standards established to protect the dunes on the property. First, the rules specify that “[i]f a primary dune exists in the AEC on or landward of the lot on which the development is proposed, the development shall be landward of the crest of the primary dune or the ocean hazard setback, whichever is farthest from the vegetation line, static vegetation line or measurement line, whichever is applicable.”¹⁴ The property has a primary dune, yet the Permit authorizes development oceanward of its crest. Several preliminary lots are almost exclusively oceanward of its crest.¹⁵ The Permit authorizes “development,” including grading of 15 of the 25 acres on the site, the majority of which is located oceanward of the primary dune.¹⁶

In addition, the Permittee did not justify the disturbance of other dunes by showing that reducing the scale of the development in order to reduce dune impacts was impracticable. The rule states that “dunes within the ocean hazard area *shall not* be disturbed unless the development of the property is otherwise impracticable.”¹⁷ The approved grading, paving, or building would destroy 15 acres of existing dunes without any demonstration that preserving at least some of those dunes was impracticable.¹⁸ Such alteration of the critical dune system cannot be permitted unless the Applicant demonstrates that the approved disturbance is necessary to *any* development of the property,¹⁹ and that the adverse impacts of the development have been minimized.²⁰ The Permittee has not demonstrated and cannot demonstrate that the approved dune destruction is essential to any development of the property or that the adverse impacts have been minimized. The Project could be substantially reduced in size to preserve much of the dune system. Such a reduction is required under CAMA.²¹ Therefore, the Permit was issued unlawfully.

¹³ N.C. Gen. Stat. § 113A-108; 15A N.C. Admin. Code 07H.0601.

¹⁴ 15A N.C. Admin. Code 07H.0306(a)(6).

¹⁵ See Exhibit 4 (site plans); see also Preliminary Subdivision Design of Sunset Beach West (Exhibit 8) (identifying house locations in preliminary plan). The subdivision plat has not received final approval from the Town of Sunset Beach.

¹⁶ See N.C. Gen. Stat. § 113A-103(5)(a) (defining development to include “alteration or removal of sand dunes”).

¹⁷ 5A N.C. Admin. Code 07H.0306(b) (emphasis added); see *id.* 7H.0308(b)(7) (“No disturbance of a dune area shall be allowed when other techniques of construction can be utilized and alternative site locations exist to avoid unnecessary dune impacts.”).

¹⁸ H. Snider, Division of Coastal Management, Field Investigation Report at 1 (Aug. 24, 2015).

¹⁹ 15A N.C. Admin. Code 07H.0306(b).

²⁰ *Id.* 07H.0306(h) (“Development proposals *shall* incorporate measures to avoid or minimize the adverse impacts of the project.”) (emphasis added).

²¹ See N.C. Gen. Stat. § 113A-120(a)(9) (“In any case, that considering engineering requirements and all economic costs there is a practicable alternative that would accomplish the overall project purposes with less adverse impact on the public resources.”).

b. The Permit violates Public Trust Area guidelines.

Next, the Project would impair the use of public trust waters for, *inter alia*, navigation and recreation. First, the bridge would obstruct navigation of, and access to, public trust waters on the estuarine side of the development. The rules state that “[p]rojects which would directly or indirectly block or *impair existing navigation channels* . . . are considered incompatible with the management policies of public trust areas.” 15A N.C. Admin. Code 07H.0207(d) (emphasis added); *see also id.* 07H.0208(a)(2)(G) (“Development shall not jeopardize the use of the waters for navigation or for other public trust rights in public trust areas including estuarine waters”); *id.* 07H.0209(d)(5) (“Development shall not interfere with existing public rights of access to, or use of, navigable waters or public resources.”), (d)(8) (“Established common-law and statutory public rights of access to the public trust lands and waters in estuarine areas shall not be eliminated or restricted.”); N.C. Gen. Stat. § 113A-120(a)(2), (5). The Project’s bridge would extend across navigable, public trust waters in such a manner as to “interfere[] with public access to and use of the affected waters” in violation of state guidelines.

The Project also jeopardizes use of public trust waters for recreation. 15A N.C. Admin. Code 07H.0208(a)(2)(G) (“Development shall not jeopardize the use of the waters for navigation or for other public trust rights in public trust areas including estuarine waters”); *id.* 07H.0207 (establishing “recreation” as a public right in public trust areas.). Recreational use of public trust waters would be negatively impacted by degradation from storm water runoff. As noted by the CRC, “All increases in the amount of impervious surface area could seriously impact the coastal wetland.”²² Recreational use would also be negatively impacted by water quality degradation caused by the septic systems associated with the Project.

2. The Permit violates the Town of Sunset Beach Land Use Plan.

Under CAMA, DCM must deny a permit application when “the development is inconsistent with the State guidelines or local land-use plan.”²³ Here, the Project is inconsistent with Sunset Beach’s approved CAMA land-use plan (“LUP”).

The Project violates restrictions on the location of development. The LUP states that “[f]or all oceanfront residential structures, the allowable buildable area shall be measured from the property line abutting Main Street heading oceanward a maximum of 150 feet.”²⁴ Each of the proposed lots is more than 150 feet oceanward of Main Street. Moreover, because of the proposed location and nature of the development, it is not “designed and placed so as to be compatible with [Sunset Beach’s] existing coastal town and residential character.”²⁵

²² Final Agency Decision at 22. DCM failed to evaluate the impacts of stormwater runoff caused by increased impervious surfaces, and did not require the applicant to include plans for the actual lot development.

²³ N.C. Gen. Stat. § 113A-120(a)(8); 15A N.C. Admin. Code 07H.0601.

²⁴ LUP, Policy 5(C)(i), p. 120.

²⁵ LUP, Policy 14(A), p. 122.

The proposed development is also inconsistent with the LUP's sewer connection requirements. The LUP mandates that "[t]he Town shall require . . . any future developments, to connect to the Brunswick County sewer system."²⁶ The Permit authorizes septic systems,²⁷ in violation of the LUP policy to "require the elimination of septic system[s]."²⁸ It is for good reason that the Town prohibits septic systems, which inevitably pollute coastal waters. Research in North Carolina, and in Brunswick County specifically, has shown that installing septic systems on barrier islands creates potential for significant pollution.

Finally, the Project is in conflict with the LUP's public trust policies. The LUP states that "[i]n the absence of overriding public benefit, any use which significantly interferes with the public right of navigation or other public trust rights which apply in the area shall not be allowed."²⁹ As described above, the proposed bridge would not only limit access to navigable waters south of the bridge, it would eliminate public access to the creek at the end of West Main Street. Moreover, because of the encroachment into the marsh by the bridge, walkway, and dock, the Project is not consistent with Policy 31(B), which states "[p]rojects which would directly block or impair navigational channels, increase shoreline erosion, deposit spoils below mean high tide causing adverse water circulation patterns, directly cause a violation in water quality standards, or cause degradation of open shellfish waters shall not be allowed."³⁰

IV. CONCLUSION

For the foregoing reasons, DCM erred when it issued a Permit to Sunset Beach West for a development that will violate CAMA and its implementing rules. Accordingly, the Permit must be vacated and remanded.

Respectfully submitted this 11th day of August 2016.



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²⁶ LUP, Policy 51, p. 134.

²⁷ Application Form DCM MP-3, Section j.

²⁸ LUP, Policy 70, p. 141.

²⁹ Policy 31(A), p. 129.

³⁰ Policy 31(B), p. 129.

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Certificate of Service

I hereby certify that I electronically filed the foregoing Petition for A Contested Case Hearing with the Office of Administrative Hearings using the OAH e-filing system.

I further certify that I served the foregoing Petition for A Contested Case Hearing on the following in the manner indicated:

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This the 11th day of August, 2016.



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