

NEXSEN|PRUET

MEMORANDUM

TO: Peter Kristian, General Manager **CLIENT-MATTER NO.:** 049139-00001
Hilton Head Plantation POA
Tom Davis, Esq., Senator,
District 46

FROM: Mary D. Shahid *MDS*

DATE: June 27, 2016

RE: Pine Island Revetment and Request for Final Review Conference

Background

Pine Island is a residential community that is part of Hilton Head Plantation ("the Plantation") and abuts the Port Royal Sound. The shoreline along Pine Island is an important community amenity for Hilton Head Island residents who enjoy walking from Dolphin Point and the Dolphin Head Recreation Area along the Port Royal Sound. The physical connection between Pine Island and Hilton Head Island is described as the Pine Island spit. The spit is the only barrier between the marsh and the development on Pine Island and the Port Royal Sound. The spit protects the adjacent upland development and protects important stormwater infrastructure that serves approximately one-third of the development on Hilton Head. Unfortunately, the spit has eroded significantly over the past year as a consequence of the King tides. The loss of the Pine Island spit exposes tidal marsh and approximately one thousand homes to the unrestrained forces of the tides and the Port Royal Sound.

The shoreline along other sections of the Port Royal Sound is protected by a rock revetment, approximately one mile in length, installed several decades ago. The existing rock revetment was lengthened approximately five years ago to include part of the Pine Island spit. The Plantation POA's maintenance team, including Steve DeSimone, had conducted repair and maintenance on the revetment for years. As part of that repair and maintenance effort, in 2011, the POA installed additional rock along the spit to protect the access to Pine Island. The section of the revetment that was installed along the spit was approximately 100 linear feet in length.

Upon discovering the installation the S. C. Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management ("OCRM") initiated an enforcement action requiring removal of the rocks placed to protect the spit, considering the installation an unauthorized alteration of critical area. The enforcement action was concluded with the issuance of a consent order, Consent Order 11C-004Z. In accordance with the Consent Order the maintenance crew removed the rocks and met with OCRM personnel to determine the location of the critical line. OCRM personnel identified the location of the critical line and the area where additional rock could be added to protect the spit landward of the critical line. Mr. DeSimone installed the additional rock which had been removed from the critical area in

accordance with the Consent Order in the location determined by OCRM personnel to be outside of OCRM's permitting jurisdiction and on upland.

Approximately five years later, by letter dated April 15, 2016, OCRM advised Peter Kristian, General Manager of Hilton Head Island Plantation POA, that the spit included "unauthorized rock" that was the subject of the earlier Consent Order. OCRM requested removal of all alleged unauthorized rock. Although the rock had been placed in reliance on OCRM personnel's determination of a location landward of the critical line, Mr. Kristian felt compelled to comply with the directive in the April 15, 2016 letter. Mr. Kristian was advised by OCRM enforcement staff that any pending enforcement would result in delay in issuance of authorizations to renourish the beach along Pine Island and Dolphin Point. The POA is in possession of a still valid renourishment permit identified as P/N 2004-13583-11W. The POA was seeking authorization to renourish the area adjacent to Pine Island and Dolphin Point in accordance with this renourishment permit, but a permit modification was necessary to allow for work on the beach during turtle nesting season. OCRM enforcement staff indicated that the necessary permit modification would not be forthcoming unless the POA capitulated and removed the rocks a second time even though the placement of the rocks had been verified by OCRM staff.

Removal of the rocks has resulted in significant damage to the spit. The access to Pine Island is eroding into the marsh. The spit has been breached by the King tides. Adjacent properties and infrastructure are vulnerable.

POA's Position

The POA complied with OCRM, removing the rocks a second time, and sought a permit amendment to replace the rocks and to renourish the spit during turtle nesting season. On June 10, 2016, the POA received notification from OCRM that renourishment of the Pine Island spit could occur during turtle nesting season, but the rocks that had been placed in 2011 and then removed could not be installed again along the spit. Other conditions were included in OCRM's permit modification issued June 10, 2016, including that the existing rock revetment could not be covered with sand during the renourishment effort, which includes remnant rocks located along the spit, and that a sand fence that had been in place since 1999 had to be removed. These conditions are unacceptable to the POA. The POA's coastal engineer has advised that renourishment of the spit will necessitate burial of remnant rocks located on the spit and it is not feasible to avoid these areas during renourishment. And, the sand fence in place since 1999 was recently inspected by the Department's staff – Jeramie Stanley – and repaired. Mr. Kristian emailed Mr. Stanley on May 11, 2016 confirming the repairs and received no information contradicting Mr. Kristian's authorization to maintain the sand fence which is critically important to the renourishment project and to stabilizing the shoreline. The POA is filing a Request for Final Review Conference, a copy of which is attached to this Memo as Exhibit 1, of the Department's letter of June 10, 2016, challenging the conditional permit amendment.

The POA acted in good faith in agreeing to remove the rocks a second time and requesting authorization for the rocks along the spit as part of the permit modification request. The POA removed the rocks to cooperate with OCRM and to obtain, as quickly as possible,

authorization to renourish Pine Island. However, the POA did not realize that its good faith efforts in cooperating would result in a determination that the rocks couldn't be replaced, once removed.

Had the POA not removed the rocks in the spirit of cooperation with OCRM, the agency would not have been able to compel removal. S. C. Ann. Sec. 48-39-170(C) provides for a three year statute of limitations applicable to minor development activities. Minor development activities include "construction, maintenance, repair or alteration of any private pier or erosion control structure" provided the construction or installation does not result in dredging. There are exceptions to the statute of limitations where there are "knowing or intentional attempts to withhold or conceal" information. Here, the POA's maintenance team met with OCRM personnel in 2011 to determine the location of the critical line for the exclusive purpose of placing the revetment outside of the agency's permitting jurisdiction. There was no effort on the part of the POA or its contractors to conceal their actions and, in fact, every effort was made to insure that the rocks, when installed, were placed in upland where a permit was not required. OCRM's insistence in 2016 on removal of the rocks added in 2011 is inconsistent with the protections afforded by S. C. Code Ann. Sec. 48-39-170(C).

Similarly OCRM is unjustified in requiring removal of a sand fence, particularly in light of the POA's coordination with staff. And, it isn't feasible to renourish the spit and avoid the remnant rocks or the rock revetment if the revetment were to be installed again.

Conclusion

While the POA appreciates OCRM's efforts to timely respond to a permit amendment request to allow renourishment activity to occur during turtle nesting season, the conditions imposed by the permit amendment render the project potentially infeasible and unsuccessful. OCRM required removal of the 100 linear feet of revetment along the spit a condition of the agency's consideration of the permit modification when, in accordance with S. C. Code Ann 48-39-170, the POA had no legal obligation to remove the section of the revetment along the spit. Pursuant to the attached Request for Final Review Conference Requestor seeks authorization to replace the rocks along the spit as part of the renourishment project and authorization to cover these rocks with renourished sand. Requestor also seeks to retain the sand fence that was initially placed in 1999. These components of the project – rebuilding the 100' linear extension of the revetment, covering it, and retaining the sand fence – are necessary in order to preserve the spit and protect the adjacent upland and infrastructure.

EXHIBIT

1

RECEIVED

JUN 27 2016

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Clerk, Board of Health
and Environmental Control

Mary D. Shahid
Member
Admitted in SC

June 27, 2016

Lisa Lucas Longshore, Clerk
Board of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201

Re: Request for Final Review Conference
P/N# 2004-13583-11W (permit amendment request)

Dear Madam Clerk:

This office represents the Hilton Head Plantation POA ("Requestor") for purposes of this Request for Final Review Conference ("Request") submitted in accordance with S. C. Code Ann. Sec. 44-1-60. This Request is related to a letter sent on June 10, 2016 by the Office of Ocean and Coastal Management of the South Carolina Department of Health and Environmental Control ("the Department") which amended the above-referenced renourishment permit. A copy of this letter is attached as Exhibit A to this Request. The letter sets out several conditions applicable to the authorized renourishment, including a requirement that the renourishment sand must not cover an existing rock revetment adjacent to Port Royal Sound, including remnant rocks located in the area described as Pine Island spit. Requestor seeks review of the conditions that prohibit 1) the burial of the remnant rock located on the Pine Island spit with renourishment sand; 2) the replacement of the rock revetment along Pine Island spit; and 3) the removal of sand fencing that has protected the spit since installation in 1999.

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

I am attaching my law firm's check in the amount of \$100.00 representing the filing fee for this Request.

The Department's action of June 10, 2016, constitutes a decision subject to review in accordance with S.C. Code Ann. § 44-1-60. This Request is submitted pursuant to the Department's procedures. Since the 15th day from the date of the Department's action was Saturday, June 25, this request for Final Review Conference is timely.

205 King Street
Suite 400 (29401)
PO Box 486
Charleston, SC 29402
www.nexsenpruet.com

T 843.720.1788
F 843.414.8242

E MShahid@nexsenpruet.com
Nexsen Pruet, LLC

Attorneys and Counselors at Law

NPCHAR1:1749404.1

GROUNDS FOR REVIEW

Hilton Head Plantation is a residential community on Hilton Head Island bounded in part by the Intracoastal Waterway and Port Royal Sound. As shown on the attached map and detail (Exhibit B), Pine Island is on the northern tip of Hilton Head Plantation and is attached to the area on Hilton Head known as Dolphin Point by a small spit (land is illustrated in green on the map). This spit provides access to Pine Island and is the sole barrier protecting the multiple residences adjacent to the marsh as well as storm water infrastructure that drains a third of Hilton Head Plantation.

The spit has been protected by sand fencing that was placed pursuant to a permit for beach renourishment issued by OCRM in 1999. The spit was further protected by the extension of an existing rock revetment that extends for approximately one mile along Dolphin Point. The revetment extension consisted of approximately 100 linear feet of rocks installed in 2011. Upon its initial installation the Department required the Requestor to remove the rocks along the spit. Following removal of the rock revetment along the spit, the Requestor met with the Department's staff who indicated an area along the spit that was outside of the critical area for placement of the revetment. The rock revetment was installed again where indicated by the Department staff.¹

Requestor justifiably relied upon the advice and instruction given by OCRM's representative, Ms. Lamaker, in 2011 and should not have been ordered to remove any part of the revetment under OCRM's current belief that it is an "unauthorized structure." Because the location of the revetment was specifically authorized by OCRM's representative as previously explained, OCRM is estopped from ordering its removal. South Carolina case law has established that estoppel is applicable against a governmental agency if a relying party can prove:

- (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question,
- (2) justifiable reliance upon the government's conduct, and
- (3) a prejudicial change in position.

¹ Requestor arranged for its engineer, Steve DeSimone, to meet on-site with OCRM staff Kathleen Lamaker, to obtain specific instruction as to location of the revetment in relation to the critical line. After identifying the critical line, Ms. Lamaker placed a pole in the ground confirming where rock could be placed. Requestor then undertook placement of the rocks in reliance on this specific instruction.

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Quail Hill, LLC v. County of Richland, 387 S.C. 223, 237, 692 S.E.2d 499, 506 (2010), citing *Grant v. City of Folly Beach*, 346 S.C. 74, 80, 551 S.E.2d 229, 232 (2001).

The relying party in this instance, Requestor, can prove these three elements of estoppel. Requestor asked for specific guidance from the Department as to the location of the critical line. Requestor's engineer was on-site with Ms. Lamaker and personally observed identification of the line as well as Ms. Lamaker's placement of the reference pole. The revetment was installed at the location of the pole and in specific compliance with Ms. Lamaker's instructions.

Requestor only removed the revetment along the spit because the Department, five years after the revetment was installed, erroneously concluded that the revetment is illegal. Moreover the Department threatened to hold-up this permit modification, which allows Requestor to renourish the spit during sea turtle nesting season, unless Requestor removed the revetment. Finally the Department threatened to assess penalties of \$1,000.00 per day. Requestor removed the revetment under duress and its removal has caused significant damage to the spit, threatening the storm water infrastructure and adjacent marsh and causing a potential loss of pedestrian access to Pine Island. Importantly, the Department disregarded the protection of S. C. Code Ann. 48-39-170 which imposes a three year statute of limitations on enforcement actions of this nature.

Additionally the Department's letter of June 10, 2016, includes a condition requiring removal of a sand fence that has been in place since 1999. The June 10, 2016 authorization also includes a condition that no sand be placed in the area of the revetment where remnant rock is still located. Requestor challenges these conditions. The sand fence was duly authorized and performs a significant function in conjunction with periodic renourishment of this area. And, it is infeasible to renourish this area without placing sand over the remnant rock in the vicinity of the revetment.

Requestor respectfully seeks review by the Board of OCRM's conclusion that the rock revetment protecting the small strip of land between Dolphin Point and Pine Island is an unauthorized structure, and the condition following that conclusion included in the June 10, 2016 letter from OCRM prohibiting burial of the revetment with renourished sand. Additionally Requestor seeks review by the Board of the condition of authorization requiring removal of the sand fence that has been in place since 1999.

I look forward to notification of the Board's action to this request.

Lisa Lucas Longshore, Clerk
June 27, 2016
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Very truly yours,



Mary D. Shahid

MDS/amc

cc: Hilton Head Plantation POA



Catherine E. Heigel, Director

Promoting and protecting the health of the public and the environment



June 10, 2016

Hilton Head Plantation
Attn: Mr. Peter Kristian, POA Manager
7 Surrey Lane
PO Box 21940
Hilton Head Island, SC 29925

Dear Mr. Kristian,

The South Carolina Department of Health and Environmental Control's Office of Ocean and Coastal Resource Management (SCDHEC OCRM or Department) is providing this letter in response to your request to immediately address the erosion at the access point to Pine Island from Dolphin Point. Specifically, you have requested to install rip rap and utilize upland beach compatible sand to renourish the access point and berm area extending out to Pine Island. The purpose of your request is to preserve access to Pine Island, including emergency access, protect the existing stormwater plan for a major portion of the community and protect residential properties interior to the berm and estuarine system from damage by tidal surges. With the exception of the rip rap, this work to utilize upland beach compatible sand for renourishment is authorized under permit # 2004-13583, however is limited by special condition number 2 which prohibits work during turtle nesting season.

The Department has coordinated with the United States Fish and Wildlife Service and the South Carolina Department of Natural Resources. Based on your request, the renourishment of the access point and berm area is authorized to be conducted during turtle nesting season provided the following conditions are met:

- 1) The sand fencing in areas where renourishment will take place must be removed and shall not be buried or reinstalled in the current configuration with current materials. The Department will consider a request to reinstall sand fencing in accordance with the requirements of R.30-13(L)(1)(a)-(h) (i.e. biodegradable material, "V" shaped installation, 5ft breaks in fencing, above highest up rush of waves).
- 2) Renourishment must only be conducted during daylight hours.
- 3) The local contractor shall be in direct contact with the DNR Marine Turtle Conservation Program (MTCP) and Coastal Discovery Museum (CDM). CDM must conduct daily, morning surveys of the beach to document turtle nesting activity and shall be consulted each morning prior to any work being performed on the beach. In the event a nest is disturbed during construction and/or sea turtle is encountered, all work should cease and the DNR MTCP should be contacted immediately. The MTCP contact is Michelle Pate who can be reached at 843-953-9052 (office). The CDM contact for this area is Amber Kuehn, HHI Sea Turtle Protection Project Manager, who can be reached at 843.338.2716.
- 4) Renourishment must not exceed the remaining 8,000 cubic yards available under permit #2004-13583. The quantity of renourishment sand must be documented and submitted to

Mr. Peter Kristian
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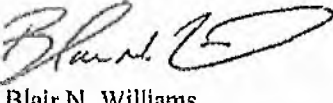
the Department in the form of number of truck loads of sand, volume of sand, and purchase ticket receipts.

- 5) Renourishment sand must not cover the existing rock revetment in place.
- 6) Renourishment must not exceed the original permitted footprint.

As it relates to the rip rap revetment, the Department is evaluating the previously approved critical area line (upland boundary at access point), researching past authorizations and evaluating different options available to Hilton Head Plantation to address the erosion. The Department will work to expedite our research and provide options to Hilton Head Plantation as soon as possible once that research is complete.

This amendment is made a part of your permit and is subject to the full terms of the permit as issued and previously amended on October 3, 2011. A formal amendment letter to permit #2004-13583-11W allowing renourishment to be conducted during turtle nesting season, with conditions, will be mailed to you via U.S. mail. Please confirm receipt of this authorization and your acceptance of the same with a quick reply in the affirmative. This email does not relieve you of the responsibility of acquiring any other applicable federal or local permits that may be required. As indicated in the email provided on Friday, June 10, 2016, you must request an amendment to the existing federal permit issued by the US Army Corps of Engineers to utilize upland beach compatible sand within turtle nesting season.

Respectfully,



Blair N. Williams
Manager, Critical Area Permitting
SCDHEC-OCRM

cc:

Honorable Senator Tom Davis, S.C. General Assembly
Honorable Bill Harkins, Mayor Pro Temp, Town of Hilton Head
Steve DeSimone, DeSimone Construction
Elizabeth B. von Kolnitz, Chief, SCDHEC-OCRM
David Wilson, Legislative Liaison, SCDHEC
Sean Briggs, Manager of Compliance and Enforcement, SCDHEC-OCRM

EXHIBIT

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