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STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE

REPLY TO:
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December 4, 2024

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Certified Mail/ Return Receipt Requested and
Electronically: jleidy@hrem.com

**Re: Variance Request CRC-VR-24-12
Town of Nags Head**

Dear Mr. Leidy:

At its November 2024 meeting, the Coastal Resources Commission granted Petitioner Town of Nags Head's request for a variance. Attached is a copy of the final agency decision signed by the acting Chair of the Coastal Resources Commission. Prior to undertaking the development for which a variance was sought, Petitioner must first obtain a CAMA permit from the local permitting authority or the Division of Coastal Management.

If for some reason you do not agree to the variance as issued, Petitioner has the right to appeal the Coastal Resources Commission's decision by filing a petition for judicial review in the superior court as provided in N.C.G.S. § 150B-45 within thirty days after receiving the final agency decision. A copy of the judicial review petition must be served on the Coastal Resources Commission's agent for service of process at the following address:

William F. Lane, General Counsel
Dept. of Environmental Quality
1601 Mail Service Center
Raleigh, NC 27699-1601

If you choose to file a petition for judicial review, please sent me a copy at the email address listed in the letterhead. If you have any questions, please feel free to contact me.

Sincerely,

Mary L. Lucasse
Special Deputy Attorney General and
Counsel for the Coastal Resources Commission

John D. Leidy, Esq.

December 4, 2024

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cc: M. Renee Cahoon, Chair, electronically
Christine A. Goebel, Esq., electronically
Tancred Miller, electronically
Mike Lopazanski, electronically
Robb Mairs, electronically
Angela Willis, electronically
Ronald Renaldi, electronically
Yvonne Carver, electronically

STATE OF NORTH CAROLINA)	BEFORE THE NORTH CAROLINA
)	COASTAL RESOURCES
COUNTY OF DARE)	COMMISSION
)	CRC-VR-24-12
)	
)	
IN THE MATTER OF:)	
PETITION FOR VARIANCE)	FINAL AGENCY DECISION
BY TOWN OF NAGS HEAD)	

On October 1, 2024, Petitioner Town of Nags Head submitted a request for a variance from the North Carolina Coastal Resources Commission’s (“Commission”) rule set forth at 15A N.C. Admin. Code 07H .0304(1) to reconstruct a parking area and beach access and install a dune infiltration system located at the Juncos Street Beach Access off S. Old Oregon Inlet Road in the Town of Nags Head, North Carolina. This matter was heard pursuant to N.C. Gen. Stat. § 113A-120.1 and 15A N.C. Admin. Code 07J .0700, *et seq.*, at the regularly scheduled meeting of the Commission held on November 14, 2024 at the Ocean Isle Beach Town Hall in Ocean Isle Beach, North Carolina. Assistant General Counsel Christine A. Goebel, Esq. appeared for Respondent Department of Environmental Quality, Division of Coastal Management (“DCM”). John Liedy, Esq. appeared on behalf of Petitioner Town of Nags Head.

After receiving the variance request, the Chair recused herself to avoid any possible appearance of a conflict of interest or bias. Pursuant to the authority contained in the Commission’s Internal Operating Procedures, the Chair delegated authority to Commissioner Robert Emory to chair the Commission during consideration of the variance request and in the issuance of this final agency decision.

When reviewing a petition for a variance, the Commission acts in a quasi-judicial capacity. *Riggings Homeowners, Inc. v. Coastal Resources Com’n*, 228 N.C. App. 630, 652, 747 S.E.2d 301, 314 (2013) (Commission has “judicial authority to rule on variance requests . . .

‘reasonably necessary’ to accomplish the Commission’s statutory purpose.”); *see also Application of Rea Const. Co.*, 272 N.C. 715, 718, 158 S.E.2d 887, 890 (1968) (discussing the Board of Adjustment’s quasi-judicial role in allowing variances for permits not otherwise allowed by ordinance). In its role as judge, the Commission “balance[es] competing policy concerns under CAMA’s statutory framework.” *Riggings*, 228 N.C. App. at 649 n.6, 747 S.E.2d at 312.

Petitioner and Respondent DCM are the parties appearing before the Commission. The parties stipulated to facts and presented stipulated exhibits to the Commission for its consideration. *See*, N.C. Admin. Code 15A 07J .0702(a). If the parties had been unable to reach agreement on the facts considered necessary to address the variance request, the matter would have been forwarded to the North Carolina Office of Administrative Hearings (“OAH”) for a full evidentiary hearing to determine the relevant facts before coming to the Commission. *Id.* 07J .0702(d). As in any court, the parties before the decision-maker are responsible for developing and presenting evidence on which a decision is made. If DCM and Petitioner had entered into other stipulated facts, it is possible that the Commission would have reached a different decision. In this case, the record on which the Commission’s final agency decision was made includes the parties’ stipulations of facts, the stipulated exhibits provided to the Commission, and the arguments of the parties.

FACTS STIPULATED TO BY PETITIONER AND DCM

1. The Petitioner is the Town of Nags Head (“Town” or “Petitioner”). It is located in Dare County and has eleven miles of oceanfront coastline.

2. David Ryan, Town Engineer and licensed P.E. signed a sworn affidavit with attachments on October 30, 2024. The parties stipulated to that the affiant had prepared the

affidavit and presented it to the Commission. However, while agreeing that the affidavit includes sworn statements, DCM did not stipulate to the truth of the statements.

3. As of the 2022 Census, The Town of Nags Head is home to 3,163 year-round residents and a summer population of around 40,000.

4. The Town's amenities include 44 Public Ocean Beach Accesses (largely located at street-ends) and six Public Sound Accesses to the Roanoke Sound.

5. The Town owns the fifty-foot wide public beach access located at the intersection of Juncos Street and Old Oregon Inlet Road in Nags Head, NC (the "Site"). The Site is shown on ground and aerial photographs in a PowerPoint provided as a stipulated exhibit. The Site is shown on a 1952 plat map, a copy of which is a stipulated exhibit as is the Dare County tax listing for the Site. A title opinion about the Town's ownership of the Site from attorney Robert Hobbs, Jr. is a stipulated exhibit.

6. The Site was constructed in 1987 with funding provided by (what is now known as) the North Carolina Land and Water Conservation Fund. The dune walkover at this location was replaced in 2000 following damages sustained from Hurricane Dennis, and again in 2004 following damages sustained from Hurricane Isabel.

7. The Site offers public beach access for residents and tourists. It is one of seven of the forty-four beach accesses in Town limits accessible to wheelchairs and strollers and contains a lifeguard stand. The Site provides access for public beach driving during limited times of the year and provides emergency access, and access for maintenance and construction projects along the beach. The Site is the primary vehicle access for the southern beach area along S. Old Oregon Inlet Rd. A map from the Town's website shows driving access locations and is a stipulated exhibit.

8. Based on environmental survey data, the Site falls within flood zones AE (elevation 4), AO (elevation 2), AO (elevation 1), and VE (elevation 10). *See* Sheet C1.1 of Nags Head Dune Infiltration Permit Drawing Set 1- June 2024 which was submitted as part of the original Major Development Permit application submitted pursuant to the Coastal Areas Management Act of 1974 (“CAMA”) and Affidavit of David Ryan, paragraph 4.

9. Flooding from smaller rainfall events (as little as 2 inches) has been known to remain for significant periods of time along South Old Oregon Inlet Road, Juncos Street, and the surrounding area, impacting the Town’s primary vehicle access for the beach. Flooding also affects vehicle access to the beach and restricts use of the multi-use path, and limits vehicle movements on South Old Oregon Inlet Road (SR 1243). *See* Affidavit of David Ryan, paragraph 5.

10. Due to its elevation and location in a flood zone, as well as its importance to the Town for pedestrian and vehicular traffic, there exists a need for flood mitigation and minimization on and around South Old Oregon Inlet Road and Juncos Street. *See* Affidavit of David Ryan, paragraph 6.

11. To address flooding at and near the Site, the Town applied for a CAMA Major Permit for authorization to reconstruct a new parking area and beach access on top of and after installing a dune infiltration system located at the Site (the “Project”).

12. The Site is located in the Ocean Erodible Area (“OEA”) of Environmental Concern (“AEC”) defined at 07H.0304. At the Site, the average annual erosion rate applicable for determining setbacks is 4 feet per year, making the setback from the PPVL 120 feet landward. The setback factor, the historical shorelines, erosion transects, and the pre-project vegetation line are shown on an image from the DCM Map Viewer, provided as a stipulated

exhibit.

13. The setback requirements for Ocean erodible AECs generally state that that development must be set back a distance of 30 times the long-term annual erosion rate from the first line of stable natural vegetation or pre-project line, whichever is applicable.

14. In accordance with 15A N.C. Admin. C 07H.0305(6), which requires that a pre-project vegetation line be established prior to the initiation of a for “large-scale beach nourishment project”, a pre-project line was established in this area in 2010 prior to the Town’s initial large-scale nourishment event. This line is used as the reference point for measuring setbacks unless the vegetation line is more restrictive.

15. At this location, the waters of the Atlantic Ocean are classified as SB waters by the EMC and are closed to the harvest of shellfish.

16. Per G.S. 113A-118, any “development” within an AEC requires CAMA permit authorization.

17. The intent of the Project is to minimize flooding for small, regularly occurring storm events and quicken the floodwater recession from roads after major storms by pumping floodwaters to an underground infiltration system elevated within the existing sand dune. See Affidavit of Dave Ryan, paragraph 7.

18. This Project is part of and adjacent to a previously authorized drainage infrastructure improvement project. The goal is to supplement the existing roadside swale on the east side of South Old Oregon Inlet Road with a new drainage pipe, connected to a pump station that would convey flood waters to the dune system at the Juncos Street beach access to infiltrate through the dune and be released to the Atlantic Ocean. The part of the drainage improvement project previously authorized is located outside of the Ocean Erodible

Area of Environmental Concern. Regulatory permits were acquired, and the project advertised for bids in conjunction with a companion project. However, adequate funds were not available at that time to proceed with construction. See Affidavit of David Ryan, paragraph 8.

19. Currently the existing roadside conveyance system is mostly reliant upon evapotranspiration since the overland flow cannot reach the surface water outfalls within the South Old Oregon Inlet Road right of way. During storm events the low-lying areas intersect with the existing high groundwater table and existing soils are highly compacted due to urban development preventing any substantial infiltration. Pumping runoff into the dune will decrease the flooding time of South Old Oregon Inlet Road as well as reduce the peak floodwater elevations, which will minimize hindrances to vehicular access or pedestrian access to an important public beach access area.

20. The Project Site overlaps with an existing 20-space parking lot at the Juncos Street Public Beach Access and is located westward (landward) of existing primary dune system, which is frontal dunes at the driving access portion and have enough elevation on either side of the driving access to be primary dunes. The collection system will be located between the existing edge of the roadway and the multi-use path, entirely within the existing road right of way. The dune infiltration system is located entirely within the Juncos Street right of way. The Town of Nags Head has existing sand fencing along the seaward edge of the dune to stabilize the dune and vegetation. Rutting from vehicular traffic on the beach has occurred along the edge of sand fencing. Existing conditions depict a steeper gradient between the road and first line of stable vegetation.

21. A set of temporary piezometers were installed in 2022 to monitor the

groundwater and to gather information regarding the groundwater gradient within the project area. Survey and groundwater monitoring data indicate that the parking lot on site is lower in elevation with limited infiltration capacity due to groundwater levels just under the parking lot. See Affidavit of David Ryan, paragraph 9.

22. As detailed in the permit application, the proposed underground infiltration system will be constructed using modular buried stormwater storage units. Locating the units within the dune system will provide the minimum two-foot separation from the groundwater table and allow for greater infiltration into the groundwater. The stormwater storage units will allow for a modular installation method, will have a low profile, and possess structural capacity for handling the vehicular loading at Juncos Street.

23. The proposed dune infiltration system would start approximately ten-feet landward of the first line of vegetation and extend approximately eighty-four-feet landward. The protective polyethylene geotextile will extend an additional eighty-feet landward to accommodate the vehicular traffic. Following a storm event, it is anticipated that approximately 500 gallons of stormwater per minute will be pumped by this system. The infiltration basin will be centered at the apex of the dune.

24. The entirety of the proposed infiltration system will be constructed landward of the first line of stable, natural vegetation (as confirmed by DCM staff on May 17, 2024) as shown on site plans provided as stipulated exhibits.

25. If this variance is granted, the planned construction schedule for the Project will fall between November 16th and April 30th, avoiding potential impacts to nesting sea turtles, as well as to avoid economic impacts during tourist season. The construction laydown area will be within the existing footprint of the parking lot on Site. The overall disturbance

limit is 0.53 acres and is for the dune infiltration system only.

26. The Project will not result in additional built upon or impervious surface.

27. The Town of Nags Head is committed to maintaining its ocean beaches through a series of beach nourishment, dune planting, and sand fencing projects. The Town has implemented three large-scale beach nourishment projects since 2010. To further ensure the Town maintains healthy beaches, the Town formally adopted a Multi-Decadal Beach Nourishment Master Plan on July 3, 2024. This multi-decadal master plan identifies the Town's nourishment needs, sand resources, and funding mechanisms sufficient to provide for a beach nourishment program for the next 50 years. See David Ryan Affidavit, paragraph 10.

28. Petitioner, through its authorized agent Moffatt and Nichol, applied for a CAMA Major Permit on May 2, 2024. Additional information was submitted on June 27, 2024. The application package was accepted as complete on August 1, 2024. A copy of the permit application materials is a stipulated exhibit.

29. On August 9, 2024, DCM Field Representative Yvonne Carver completed the Field Investigation Report for the Project, a copy of which is a stipulated exhibit.

30. The Project will not require a Section 404 Permit from the U.S. Army Corps of Engineers.

31. The representative of the US Fish and Wildlife Service provided comments emailed to DCM on September 12, 2024 and September 16, 2024 including concerns about sea turtle habitat. Copies of these emails are stipulated exhibit.

32. The NC Wildlife Resources Commission's representative commented on the project on September 20, 2024 and a copy is a stipulated exhibit.

33. The Project will not require a Water Quality Certification from the N.C.

Division of Water Resources. While DWR first objected to the project, they are working with the Town to satisfy the DWR add-information request. This process may change the design from what was denied and is now the subject of this variance, as communicated in an email which is a stipulated exhibit.

34. Notice of the proposed project was posted on Site and was published on August 18, 2024 in the Coastland Times.

35. Notice of the proposed project was given to the adjacent riparian owners. The owner to north is Boat Rides 001, LLC and it received notice of the permit application on May 3, 2024. The owner to the south is Bluffs of South Nags Head and it received notice of the permit application on April 30, 2024. Copies of the notice letters and signed green cards are stipulated exhibits.

36. DCM received the following public comments:

- a. September 23, 2024 telephone conversation with Doug Davis and David Ryan, P.E. (*See* David Ryan Affidavit Paragraph 12.)
- b. October 4, 2024 email from Karen Johnson (provided as a stipulated exhibit)

37. On October 2, 2024, the Division of Coastal Management denied the Major Permit Application request because the proposed development does not meet the development setback requirements of 15A N.C. Admin. Code 07H.0306(3)(A). DCM believes that this system is a linear system that must meet the sixty-foot setback. A copy of the denial letter is a stipulated exhibit.

38. The Town stipulates that the Project is not consistent with the strict application of 15A N.C. Admon. Code 07H.0306(3)(A).

39. The Town filed this variance request on October 2, 2024, seeking relief from

strict application of the Ocean Hazard AEC erosion setback requirements set forth in 15A N.C. Admin. Code 07H.0306(3)(A) in order to develop the project as proposed in its permit application.

40. As required by 15A N.C. Admin. Code 07J.0701(c)(7) notices of the proposed variance were provided to the adjacent property owners on by certified mail-return receipt requested on October 2, 2024. Notice to Boat Rides 001, LLC was delivered on October 15, 2024 and notice to Bluffs of South Nags Head was delivered on October 18, 2024. Copies of the notice letters, certified receipts and tracking information are stipulated exhibits.

EXHIBITS PROVIDED TO THE COMMISSION BY PETITIONER AND DCM

1. David Ryan, P.E., Affidavit
2. 1952 Plat of the Site
3. Title Opinion – Town ownership of Site
4. Map of Nags Head Driving Accesses
5. DCM Map Viewer image of the Site
6. CAMA Major Permit application materials
7. August 9, 2024 DCM Field Investigation Report
8. USFWS email comments
9. NC WRC comment
10. Changes in the plan related to DWR add-info email
11. Notice documents to adjacent owners during permit review
12. Public Comments
13. October 2, 2024 DCM Denial Letter
14. Notice documents to adjacent owners about variance
15. PowerPoint Presentation with ground/aerial photos

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter.
2. All notices for the proceeding were adequate and proper.
3. As set forth in detail below, Petitioner has met the requirements in N.C. Gen. Stat. § 113A-120.1(a) and 15 N.C. Admin. Code 07J .0703(f) which must be found before a variance can be granted.

a. Strict application of the rule will cause unnecessary hardships.

The Commission affirmatively finds that strict application of the Commission's rule at 15A N.C. Admin. Code 07H .0304(1) would cause unnecessary hardships. The Commission's Ocean Hazard rules are intended to protect oceanfront dunes by keeping significant development landward of these important features, and also to minimize losses to property from storms and long-term erosion. The Town seeks a variance from these rules which require development to be landward of the sixty-foot setback as measured from the applicable pre-project vegetation line. The strict application of the applicable development standard would prevent the construction of the engineered dune infiltration system, which is being proposed to help alleviate the flooding at this location. The dune infiltration project is designed to be buried under the dunes near the location of the floodwater collection point and to filter stormwater underneath the dunes.

The Commission agrees with the parties that strict application of the Commission's setback rules and rules protecting dunes causes the Town an unnecessary hardship because the development will be placed under the dune and the dune will be reconstructed and revegetated after the underground systems are installed. For these reasons, the Commission affirmatively finds that Petitioner has met the first factor without which a variance cannot be granted.

b. The hardship results from conditions peculiar to the Site.

The Commission affirmatively finds that Petitioner has demonstrated that the hardship results from conditions peculiar to the property. Specifically, the flooding at this location is due to the elevation of the property, the proximity of the Atlantic Ocean, and the existing high groundwater table. Based on environmental survey data, the proposed project

site falls within flood zones AE (elevation 4), AO (elevation 2), AO (elevation 1), and VE (elevation 10). Due to its elevation and location in these flood zones, flooding from smaller rainfall events (up to 4 inches) has been known to remain for significant periods of time along South Old Oregon Inlet Road, Juncos Street, and the surrounding area. The flooding impacts the Town's primary vehicle access used by the Town as a main emergency access site to the beach. During storm events the low-lying areas intersect with the existing high groundwater table preventing any substantial infiltration of floodwaters.

Accordingly, the Commission affirmatively finds that Petitioner has demonstrated that this hardship results from conditions peculiar to the property and has met the second factor required for the grant of its request for a variance.

c. Petitioner has demonstrated that the hardship does not result from actions taken by Petitioner.

The Commission affirmatively holds that Petitioner has demonstrated that the hardship does not result from its actions. Specifically, the Town of Nags Head has not taken any action to cause the flooding at this location. The proximity of the adjacent ocean and beach, the resulting highwater table, and the proximity State-maintained roadway (SR 1243) are all circumstances outside of the Town's control. The Town has taken measures attempting to alleviate the flooding issues in this area, including various drainage infrastructure such as roadside swales. These efforts have largely been ineffective. There are limited location options for addressing flooding along South Old Oregon Inlet Road in this portion of Town. This project would work to reduce or eliminate flooding on SR 1243 and would have limited long-term impacts on the existing dune within the setback.

For these reasons, the Commission affirmatively finds that Petitioner has demonstrated that it has met the third factor required for a variance.

- d. Petitioner has demonstrated that the requested variance is consistent with the spirit, purpose and intent of the Commission's rules, will secure public safety and welfare, and will preserve substantial justice.**

The Petitioner has demonstrated (a) that the requested variance is consistent with the spirit, purpose and intent of the Commission's rules, (b) that it will secure public safety and welfare, and (c) that it will preserve substantial justice. The principal purpose of the Commission's rule from which a variance is sought is to protect oceanfront dune systems and to locate development more landward to reduce storm impacts. In this case, impacts to the dune system will be short-term as the existing dune will be rebuilt and revegetated after installation of the project. Also, the risk of impacts to the project will be reduced because it will be buried under the dune, despite the close ten foot distance from the vegetation line. The fact that the Town has a long-term beach plan and this area is likely to receive renourishment in the future that will also help protect the reconstructed dunes and project underneath them.

Moreover, one of the goals of the Coastal Area Management Act of 1974 is to establish policies, guidelines and standards for transportation systems, indicating that maintenance of such systems are considered critical coastal resources to be managed and protected under the Act. The implementation of the proposed project will be consistent with the intent of § 113A-102(b)(4)(d) by quickly removing excess flood water from the adjacent roadway, allowing for safe usage of this road.

For these reasons, the Commission affirmatively holds that granting a variance to vary the Commission's oceanfront erosion setback rules and allowing this project is consistent with the spirit, purpose, and intent of the Commission's rules.

The second factor that the Commission assesses is whether the variance request is

consistent with the goal of maintaining public safety. Petitioner explains that the proposed project will allow for continued and enhanced access to the dry-sand beach and waters of the Atlantic Ocean following rainfall events, including emergency vehicle access, while also keeping structures off the dry-sand beach. Public safety and welfare will be maintained and enhanced due to reduction of periods of flooding, allowing improved usage of the public transportation system in the area. Reductions in periods and durations of flooding will improve public safety of the beach-going public. Additionally, the Town's commitment to maintaining healthy beaches should ensure that the structural components of the dune infiltration system will not encroach on the dry-sand beach. The Commission agrees with the parties that the proposed project will address public safety and welfare by limiting the need to close Old Oregon Inlet Road due to stormwater flooding and improving continual access at this Site. Furthermore, locating the project within the existing dune in the setback area will cause only short-term impacts to the protective nature of the oceanfront dune.

The last factor the Commission considers is whether the variance request will preserve substantial justice. The Commission agrees that granting the Town's requested variance will preserve substantial justice in that one of the goals of CAMA is to insure the orderly and balanced use and preservation of North Carolina's coastal resources on behalf of the people of North Carolina and the nation (§ 113A-134.1.(b)(3)). Granting of the requested variance will be consistent with this goal and will preserve substantial justice by reducing flood-related impediments to the transportation system and recreational and emergency access to the ocean beach in this location in manner that represents minimal potential impact to coastal resources.

In addition, granting this variance would preserve substantial justice because because

while the CAMA makes exceptions for buried utilities, it does not make an exception for this type of project, despite the similarities in purpose.

* * * * *

For these reasons, the Commission affirmatively finds that Petitioner has met the fourth factor required by N.C.G.S. § 113A-120.1(a).

ORDER

THEREFORE, the requested variance from 15A N.C. Admin. Code 07H .0304(1) is GRANTED.

The granting of this variance does not relieve Petitioner of the responsibility for obtaining any other required permits from the proper permitting authority. This variance is based upon the Stipulated Facts set forth above. The Commission reserves the right to reconsider the granting of this variance and to take any appropriate action should it be shown that any of the above Stipulated Facts are not accurate or correct.

This the 5th day of December 2024.

/s/ Robert R. Emory
Robert R. Emory, Acting Chair
Coastal Resources Commission

CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing FINAL AGENCY DECISION upon the parties and other interested persons by the methods indicated below:

Method of Service

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This the 5th day of December, 2024.



Mary L. Lucasse
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