

Public Workshops regarding proposed draft Regulations Governing Beach Protection and the Use of Beaches

Friday, May 1, 2015 – Carlisle Fire Hall, Milford, DE

Mike Powell (MP): How long of the timeframe is 3 times?

Jennifer Luoma (JL): Depends on the approval if it is construction of a house or structure. Approvals are good for 1 year to start construction, 2 years to finish. So we would add 1 year to that. If we do a scraping permit which is good for 2 years initially we would do another 2 years. So that 3 times would be at most a six year period.

We currently put in our permits for cantilever decks you cannot enclose the cantilever deck thereby increasing your footprint, your living space footprint. And then we also say you have to keep under the deck free from all obstruction. It allows the dunes to migrate underneath the cantilever deck and also prevents encroachment onto the dunes any type of enclosure..

We changed the 10 foot NGVD contour and 7 foot NGVD contour to 9 foot NAVD and 6 foot NAVD to bring it up to the currently used datum.

Question: Define “long term”? Does that mean 2 years 5, 20, 30? There needs to be some kind of flexibility.

MP: I think it is meant to mean that if a storm comes along the time that someone applies for a permit a storm has caused a change to the dune we would all agree that storms come and storms go so something as short term as a seasonal change in the beach or a storm chopping back the front half of the dune so that the 6 foot contour that used to be out here on a really fat dune in August and a hurricane comes along in September and the 6 foot contour get chopped back 30 feet through a storm induced dune erosion would be a shorter term change. We do not have a definition for long term. I think it is meant to realize that permanent makes no sense. Seasonal or storm induced changes also don't make sense to reestablish the building line. So we are somewhere between storms and seasons and permanent. If you were to make the suggestion that needs definition I would not have any augment with you.

Statement: I think it does need definition. Because the beach is dynamic it comes and goes. So if you are saying that in the opinion of the Secretary which means that that David Small has total control whether the building line moves and makes your property unbuildable.

Tony Pratt (TP): The safety net in that is that it requires a public hearing. The Secretary cannot just say the building line is changed. He can initiate the process with a public hearing. Where the input of what's long term and what's short term would be discussed. I think that's the way it would go. I think, it's right there.

Statement: If it's not defined, then people don't know. If it is defined, then we know.

TP: I think , like Mike said I have no problem.

Statement: I want to know, I'm just asking

TP: We need to address the term and define it. But I think to protect what you are ultimately after is public input in that process where there is a public hearing required to re-establish the building line. It is written in that clause so it's not as you might think that the Secretary can say okay now we're going to re-define this line. Through a public hearing process that can be done so that would be an opportunity for everyone to debate whether that's a permanent change, a long term change, or a storm related change.

MP: One of the things I worry about when defining a concept, a thing like long term change is that if we put a time frame in there it reduces the ability of the public through a hearing to have input because we've suddenly defined long term as five years or two years, there's two sides to it.

Statement: That's what I'm trying to get to, there needs to be some kind of flexibility in that so that property owners who want to sell their property or their....

TP: and I took some comfort in the fact that there's a public hearing process embedded in that. So it goes to a public forum and we all discuss whether that change has been there long enough to constitute a need to re-visit where the Building Line is established

Statement: OK

TP: A great example would be Big Stone Beach, I don't think anyone would argue that in Big Stone Beach the Building Line is almost at the edge of the water and that's a permanent change at that beach. It's a long term change. It's a good example of where that change we ought to be re-mapping that line.

Statement: Since we are talking about the public hearing issue, you're saying that's protection for property owners to have input.

Question: What is the current requirement for DNREC to notify the property owners that are affected? Does DNREC are they required to notify everyone that is affected? Or is it still the way it was back in 2006 where they had to put in one paper? What is the requirement?

Frank Piorko (FP): Having just been through the public hearing process for Aquaculture and we all know the concerns raised in that, most folks will say there's not enough public in the public notice process. Because we don't have any statutory requirement to notify all effective landowners in within "X" number of feet like there are in planning and zoning provisions. That's one of the criticisms we had with some of the folks with the Aquaculture notice even though I think we certainly went over and above what we were required to do. Some folks thought it

wasn't enough. To answer your question I don't think there is the requirement for the notification for adjacent properties in this case. We will check that with Dirk.

Question: DNREC will you go on record today saying that you will notify each individual property owner who is effective by your change in your building line in this case.

TP: No...Absolutely not...

Question: Why not?

FP: We will raise the issue because that is what a workshop is for. We will get the input from our Secretary and from our DAG (Deputy Attorney General). We don't make legal policy for the department which what you are asking would fall under that umbrella. Because as you do a process for one program or one law or regulation you do it across the board. We will raise the issue with Dirk (Durstain). We will have a dialogue about his response. It is a complicated issued. I cannot tell you "yes" or "no" that we are going to be committed to an action that is a result of this conversation.

Statement: I would like you also to talk to David Small about it. I think he would be more amenable to doing that. Having notification of the property owners...I am not saying notify everybody in Sussex County. I am talking about people that have their hard earned money invested in these properties along the beach. I am not knocking you on this but the last hearing back in 2005, 2006...if you are not in Delaware, which a lot of people don't live in Delaware and it goes in the paper 1 time and you don't know what paper it is going to be in. Then there's a lot of people that aren't notified that their property is being affected. I would be glad to talk with David Small about that. I think it's very important

Statement: Back in 2005, 2006 (Gerald Hocker) was upset because of the lack of notification. He said that he and another legislators were to introduced a bill the following Monday where every property owner along the beach and those adjacent would receive a letter. Representative Bennett told me that bill never went anywhere.

Question: When did Building Line come into effect?

JL: 1981

TP: Originally 1971 by law

Mike Costello Statement: I read with interest the additions & changes to the Act's definitions, many of which go into great detail describing criteria and giving examples. However I would like to recommend several additional definitions and clarifications.

1. Name change to Watershed Stewardship. I think it would be in the interest of anyone reading the document to have a definition of the term "Stewardship" and how it relates to DNREC. According to Webster's, "Stewardship" is the careful and responsible management of something

entrusted to one's care (stewardship of natural resources). I think the name change is appropriate since DNREC does some very good work protecting and enhancing our Great State's natural resources thus the definition should be included so people can understand the mission and responsibilities of a steward.

2. Section 3.0 Prohibited Activities, more specifically Section 3.7 "Other Prohibited Activities" add the words "...or maintained..." to the sentence "... on any State-owned or maintained beach..." For Example, prohibited activities include limiting property owners' rights by restricting pedestrian traffic, transportation and storage of boats, temporary structures, damage or removal of trees, shrubbery grass or vegetation growing on any State-owned or maintained beach seaward of the Building Line. I can understand that you want to protect the dune from pedestrian interaction and do not have a problem with that, however you are asking me to give up certain rights granted to me as the owner of private property without something in return which is contradictory to the Reasonable Person standard.

Reasonable Person: It is used to determine contractual intent, or if a breach of the standard of care has occurred, provided a duty of care can be proven. The intent of a party can be determined by examining the understanding of a reasonable person, after consideration is given to all relevant circumstances of the case including the negotiations, any practices the parties have established between themselves, usages and any subsequent conduct of the parties.

Therefore, Because the definition (of maintenance) contained in the Code refers to "structures" I suggest that a definition and examples of what "maintained" means. Webster's states:

Maintain: (1) to cause (something) to exist or continue without changing; (2) to keep (something) in good condition by making repairs, correcting problems, etc. (3) to keep in an existing state (as of repair, efficiency, or validity) to preserve from failure or decline (maintain machinery)

Maintenance: (1) the act of maintaining; (2) the state of being maintained (3) something that maintains the upkeep of property or equipment

I am not against the restrictions imposed by this section if the State meets its obligations of Stewardship and performs maintenance in a manner that satisfies the definition stated above. However what is sadly missing from these regulations and changes are words that describe what the State will do to protect property. There is not a single word obligating the State to perform maintenance or nourishment, not a single word that defines the State's role in protecting the seashore. In the past what we have seen is this is always a one-way contract where property owners' give up something in return for a "promise" from the State but the State never follows through with its promise. So I can't imagine how or why any property owner would support these regulation changes that diminish their rights as property owners without receiving something in return. I.e. assurances of maintenance.

Statement: The law states, and I'm reading 6803 title 7 chapter 68, It says the state shall prevent and repair damages from erosion on public beaches, your easement agreement waived on that, the easement agreement should have said "we shall prevent and repair damages to public beaches". That was one of my main concerns with it because it was left up to if we decide to on public beaches when property owners who gave up their rights to become public. It was left up to your discretion. The law states that you shall prevent and repair damages and I think DNREC needs to keep that in mind when there is erosion that the law states that you shall, not you may or decide when you want to.

Statement: Just to play devil's advocate, the State and DNREC doesn't have an open checkbook, you know we have a big natural catastrophe and DNREC can't be held to "you shall". The State has demonstrated they do what they can to preserve the beach but they can't guarantee. It took Broadkill 20 years to get something that wasn't even, the States not paying for it even, DNREC's not on the hook for it but they probably couldn't afford it.

Mike Costello: That begs the question, 'how can we do it?' I know that DNREC wants funding. We have the lodging tax but that's not adequate and I think you need legislative interaction in order to allocate funds. Del State, University of DE, Del Tech, those people don't have a source of funding, they submit a request to the legislature and they go down there and lobby and (inaudible), they write checks to them everyday. Why can't we do the same thing?

Statement: I think there should be a war chest so that we don't have to beg as soon as there is a catastrophe. They should have X amount of money in their checkbook that's allocated and not have to scrape at the last minute and go organize picketers in front of you know, in Dover you may have to just to get the war chest.

TP: We need to have this discussion about regulations not about funding of nourishment projects. We are here for one purpose and that's been the advertised purpose.

Boats/Sail Boats – Could not hear complete question or answer – (Question asked whether leaving a boat on the beach, not dune, would be a violation. Answer: No. It was also asked whether bringing a boat through a specified crossover would be considered a violation. Answer: No.)

Question: Other people on beach that don't follow regulations?

JL: Call us and/or DNREC Enforcement

Question: Is that the same for both public and private beaches?

TP: No, for building regulations it is. But if someone is driving on a private dune we don't have a regulation that directly addresses that.

Saturday, May 2, 2015 – Bethany Beach Town Hall, Bethany Beach, DE

Question: Is Rehoboth a natural dune or artificial dune?

Jennifer Luoma (JL): When this was written there was no dune there. And I would say that we would not consider this a natural dune because it has been constructed by our beach nourishment projects.

Question: Will the Building Line change?

JL: No change will be made.

Question: Area between high tide and low tide? Isn't that federal?

JL: That would be part of the public trust doctrine.

TP: No, Delaware is called a low water state.

Question: Do these regulations pertain to all beaches along the Delaware coast including Inland Bays?

JL: No, just from Pickering Beach, which is east of Dover, south to Fenwick Island, only along the Delaware Bay and Atlantic Ocean.

Question: Is there a separate initiative for Rehoboth Bay?

JL: I believe the wetland section may have regulations that effect the Rehoboth Bay but I don't know for sure. Contact their office.

Question: Walking across the dune.

Mike Powell (MP): If the State owns the dune or the State has an easement for that period to build dune then only pedestrian traffic should be at designated crossovers. That could be at a community crossover or individual crossover.

Question: Sussex County conflict?

MP: Not aware that our regulations are in conflict with Sussex County building code.

Comments/Questions received outside of Workshops

Statement: In 1.1 Definitions it identifies the ‘zones’ for the beach set back as follows:

Coastal Engineering Standards of Storm Protection” means level of protection for a location that consists of at least 100 feet of vegetated dune landward of the seawardmost 9-foot elevation contour above NAVD from the Delaware/Maryland line to the tip of Cape Henlopen, 100 feet landward of the seawardmost 6-foot elevation contour above NAVD from the tip of Cape Henlopen to the Rosemary Street at the southernmost limit of Prime Hook Beach, and 75 feet landward of the seawardmost 6-foot elevation contour above NAVD from Rosemary Street at the southernmost limit of Primehook Beach to the Old Marina Canal north of Pickering Beach

As I have seen in other DNREC documents, it uses Rosemary St as the southernmost end of Prime Hook Beach (PHB). Is this really meant to define the end of PHB or is it some arbitrary point to define the end of one zone and the beginning of the next. What this definition does is leave numerous PH homes south of Rosemary St and the two subdivisions including Clifton Shores which implies the way it is worded they are not part of PHB and in some other location category. If this is intentional it should state “at Rosemary St in PHB” and leave out the "southernmost limit of PHB” as this is clearly not the case. I think defining the southernmost limit of PHB as the south end of Clifton Shores Dr might be a clearer to all parties concerned for this and other regulations and documentation. This point also coincides accurately with the northern most point of Broadkill Beach so there are no gaps in definition.

Statement: In my absence from the recent meeting regarding beach protection, Mike Costello at Kitts Hummock shared with me (and other neighbors) his thoughts regarding changes that Kitts property owners might want to recommend be made. Having reviewed them, I would have to agree entirely with his assessment and would ask you to consider his remarks below to be 100% representative of my opinion, as well: (see Dr. Costello’s statement from the May 1st workshop)

Question: I would like to know if these proposed regs. impair, constrict or limit our ability to build/re-build on our property. I would like someone to clarify specifically for our lot and structure, where the "building line" is located and what is the process that I would need to follow to substantially modify or replace the current structure if we ever chose to do so.

I also want to preserve my current rights should this proposal adversely impact our ability to do something in the future so I need to understand whether I need to take some specific action or filings in the interim.

Jennifer Luoma (JL): Since the line will not be changing and the A-frame was there when it was surveyed back in 1979, you can see that the A-frame and your entire lot is completely seaward of the DNREC Building Line. Therefore, if you were to ever tear down and rebuild your house, you would be required to go through the 4-step process (proposed section 3.1.1.2). Now if you were to renovate the A-frame you would be able to make modifications within the existing footprint, unless it fell under the definition of substantial improvement:

“Substantially Improved” means any reconstruction, rehabilitation, addition or other improvement to a structure, the total cost of which equals or exceeds 50 percent of the market value of the structure before the start of construction of the improvement.

If the renovation does meet this definition, then you would be required to go through the 4-step process. It is safe to say that after going through the Permit process you would be able to build a dwelling (by our standards) or renovate the current dwelling, but what that structure will resemble will depend on what will fit your needs and what conditions exist at the time that you apply. I will be happy to go through that with you in more detail when the time comes.

Question: One quick follow-up clarification....Section 3.1.1.2.1 speaks to decks on the landward property boundary. As you know we currently have a large deck facing west (towards the refuge/sunsets) that we use daily and also provides our only access into the cottage. How would this be impacted by these regs? Can we still have a deck there (on west facing side of a new structure, as long as it stays within the landward property boundary)?

JL: Off the top of my head, I would say that if you wanted to have a cantilevered deck off the landward side of the house, it would have to extend into the setback in order for us to approve it as part of the 4-step process.

Question: If someone were to rebuild after a tear down or after a house is destroyed, what would be required in North Shores?

JL: If there is room to build landward of the DNREC Building Line, all construction would be required to be located landward of the line. If there is not enough room landward of the DNREC Building Line then, the 4-step process would be used in designing the house in order to obtain a permit.

Question: How would this affect the Villas?

JL: The Villas would probably be treated slightly differently, because, being condo units or townhouses, they don't necessarily have side yard setbacks, etc.? However, if a whole building of units was destroyed or torn down, we would probably require them to move landward, if we were able to allow them to rebuild in kind.

Question: Can you still cantilever a deck seaward of the DNREC Building Line?

JL: Yes, currently you may go as far seaward as either of the two adjacent properties. With the proposed regulations you would only be able to go the average encroachment seaward of the building line of the houses or decks within the same block.