



Cape Charles

Dunes and Beaches:

Wetlands and Coastal Dune Board Authority and Guidelines

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MEMORANDUM

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Subject: Cape Charles Dunes and Beaches: Wetlands and Coastal Dune Board Authority and Guidelines

Introduction

Beaches and sand dunes play an important role in helping to protect Virginia's coasts and natural resources. There are both social and ecological values to maintaining a strong shoreline, including preventing erosion caused by impending sea level rise. Further, beaches and associated dunes improve water quality and provide habitat for many different plant and animal species. While sand dunes provide benefits, they can create issues that localities are forced to address. In the Town of Cape Charles, the public beach has been the deposit site for approximately 120,000 +/- cubic yards of dredged material as part of the U.S. Army Corps of Engineers' (USACE) federal harbor dredging project. This, along with natural movement, has exacerbated an issue of increasing dune height, while also creating a surplus of sand that blocks views and creates issues on roadways.

This memo aims to provide a framework for future action in dealing with sand and dunes management by summarizing the text of state and local ordinances that govern the activities on dunes and beaches, outlining the authority of a local wetlands and dunes board, sharing examples from other localities, and discussing other state and federal programs to consider. Additionally, the memo specifically addresses whether any case law or legislation exists which would prohibit a locality from relocating sand from one area of the beach, not within a wetland, to another area of the beach for purposes of replenishment.

State Act and Local Ordinance

While a focus on maintaining Virginia's shorelines began in the first half of the 20th century, many significant issues dealing with shoreline management continued throughout the latter half of the 1970s. In 1980, the Virginia General Assembly enacted the Coastal Primary Sand Dune Protection Act, which covered nine localities.¹ This Act was originally codified in Virginia Code §§ 62.1-1321 to -1328 and later re-codified as the Coastal Primary Sand Dunes and Beaches Act (the "Dunes and Beaches Act") in §§ 28.2-1400 to -1420.² Virginia Code § 28.2-1400(B) notes that "[a]lthough . . . the terms 'coastal primary sand dune,' 'dune,' and 'beach'" each have their own definitions, ... the terms are used interchangeably within the Dunes and Beaches Act.³

Certain counties, cities, and towns may adopt a coastal primary sand dunes zoning ordinance, provided that they either have already adopted the wetlands zoning ordinance pursuant to Va. Code § 28.2-1302 or the applicable locality appoints a wetlands board.⁴ Every county, city, or town that enacts a wetlands zoning ordinance must create a wetlands board [hereinafter the "Wetlands and Coastal Dune Board"], which also handles permitting related to dunes. The Town of Cape Charles incorporated the language provided in the state code into its zoning ordinance, Appendix C in 1994.⁵ The ordinance language was amended in 1995, but no additional changes have been made since that time, even though Va. Code § 28.2-1403 has been amended multiple times since 1995. For example, the language "beach replenishment or beach nourishment, nor shall the slopes of any such mound be used to determine the landward or lateral limits of a coastal primary sand dune" was added as exclusionary language to the definition of "coastal primary sand dune" in 1998.⁶ Additionally, "[t]he construction of living shoreline projects authorized pursuant to a general permit developed under subsection B of § 28.2-104.1"⁷ was included as an authorized activity in 2014.

Before addressing the authority of the Wetlands and Coastal Dune Board, it is important to note that Virginia is a Dillon Rule state, rather than a Home Rule state. The Dillon Rule provides that localities and governing bodies "can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable."⁸ Local governments must therefore have enabling statutes authorizing their

¹ *Coastal Primary Sand Dunes and Beaches Act*, Virginia Institute of Marine Science, http://www.vims.edu/research/departments/physical/programs/ssp/beaches/dunes/coastal_primary_act/index.php (last visited Mar. 17, 2018).

² *Id.*

³ VA. CODE ANN. § 28.2-1400(B) (2008).

⁴ VA. CODE ANN. §§ 28.2-1302 & 1303 (2014).

⁵ *Compare* VA. CODE ANN. § 28.2-1403 (2014) *with* CAPE CHARLES, VA., ZONING ORDINANCE, App. C (1995), <https://capecharles.municipalcms.com/files/documents/document1468125754102413.pdf>.

⁶ VA. CODE ANN. § 28.2-1403.

⁷ *Id.*

⁸ *Jennings v. Board of Supervisors of Northumberland County*, 281 Va. 511, 516, 708 S.E.2d 841, 844 (2011) ("[A] locality's zoning powers are 'fixed by statute and are limited to those conferred expressly or by necessary implication'" (quoting *Board of Supervisors v. Horne*, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975))).

actions (which is why there is a specific code section explicitly authorizing certain localities to adopt the model ordinance set forth in Va. Code § 28.2-1403).

Authority and Role of the Wetlands and Coastal Dune Board

Virginia Code § 28.2-1408 states that “[n]o permanent alteration of or construction upon any coastal primary sand dune shall take place which would (i) impair the natural functions of the dune, (ii) physically alter the contour of the dune, or (iii) destroy vegetation growing thereon unless the wetlands board or the [Virginia Marine Resources] Commission, whichever is applicable, determines that there will be no significant adverse ecological impact, or that the granting of a permit is clearly necessary and consistent with the public interest, considering all material factors”.⁹ The Wetlands and Coastal Dune Board makes permitting decisions about certain activities on dunes and beaches. Virginia Code § 28.2-1403 provides for a government activity exemption which states that “governmental activity in coastal primary sand dunes owned or leased by the Commonwealth or a political subdivision thereof” is considered an authorized use.¹⁰ “Governmental activity” is defined as “any of the services provided by the Commonwealth or a county, city or town to its citizens for the purpose of maintaining public facilities, including but not limited to, such services as constructing, repairing, and maintaining roads; providing street lights and sewage facilities; supplying and treating water; and constructing public buildings.”¹¹ It seems that the governmental activity exception is broad, especially due to the phrase “not limited to.” Therefore, when the locality owns or leases the dunes or beaches, any government activity on the dunes or beaches would be an authorized use. In cases such as this, the Wetlands and Coastal Dune Board would play only an advisory role in relation to actions taken by a locality.¹² While it may be beneficial for a locality to create some type of sand management plan, it would be the responsibility of the locality itself, as opposed to the Wetlands and Coastal Dune Board, to create and implement such a plan. If the locality does pursue the creation of a sand management plan, there is no *per se* requirement that its Wetlands and Coastal Dune Board must be involved. However, given the nature of the Wetlands and Coastal Dune Board’s responsibilities, it may be useful to include them in the discussion and development of the plan.

Other localities have developed sand management plans through the use of an advisory committee. For example, the City of Norfolk published its Sand Management Plan (SMP) in December 2014, which was prepared by the Ocean View Sand Dune and Beach Advisory Committee, rather than by a Wetlands and Coastal Dune Board.¹³ The Committee was comprised of property owners, neighborhood representatives, City of Norfolk staff, coastal engineers, and representatives from USACE, Virginia Institute of Marine Science (VIMS), and VMRC. The plan

⁹ VA. CODE ANN. § 28.2-1408 (1992).

¹⁰ VA. CODE ANN. § 28.2-1403.

¹¹ *Id.*

¹² Telephone Interview with Tony Watkinson, Chief of Habitat Management, Virginia Marine Resources Commission (Mar. 14, 2018).

¹³ *Sand Management Plan Guidance Document*, City of Norfolk (Dec. 2014), <https://www.norfolk.gov/DocumentCenter/View/26470>.

was developed over a year and a half and was adopted by City Council in May 2016 to address “issues regarding erosion, accretion, transport, and encroachment of sand along the Ocean View Bayfront.”¹⁴ Norfolk’s SMP is being used to help deal with problems throughout the City, including in Cottage Line, an area in Norfolk that has dune height issues similar to those of Cape Charles. Cottage Line is the City’s pilot project for addressing these dune issues.¹⁵ The scope of the Cottage Line project is still in development and will take approximately one year.¹⁶

While the project in Cottage Line is still unfolding, it will be useful for Cape Charles to follow its progress, maintaining contact with the City of Norfolk to learn what is working (and what is not). It also may be useful to look more closely at Norfolk’s SMP, which has a list of objectives in order of decreasing priority. They are as follows: “(a) To maintain or improve on the ability of the primary frontal dune to protect properties from bay flooding, wave erosion, and surge overtopping; (b) To minimize inundation of areas behind the primary frontal dune crest by accumulation of wind-blown sand; (c) To maintain sand reservoirs, the stability of the shore, and the sandy upland; (d) To maintain and improve public access to the beach; and (e) To maintain or restore water views, to the extent possible, in conjunction with advancing one or more of the other priorities listed.”¹⁷ This shows that the City’s concerns are aimed more at protecting properties from flooding, with views being secondary (and only if in conjunction with addressing another listed objective).

VMRC Guidelines

During its 1980 session, the Virginia General Assembly adopted the first State-supervised program in Virginia for controlling development in coastal primary sand dunes.¹⁸ The General Assembly directed VMRC, with the assistance of VIMS, to develop and publish guidelines.¹⁹ There is language in the Coastal Primary Sand Dunes/Beaches Guidelines (the “Dunes/Beaches Guidelines”) that suggests they are not binding, stating that, “[t]hey are promulgated to supplement the policy and standards of the Coastal Primary Sand Dune Protection Act with the hope that they will assist project proponents and decision-makers alike in shaping shorefront development in a manner that protects the values of coastal primary sand dunes articulated in the Act.”²⁰

While we found no case law on the Dunes/Beaches Guidelines, the Wetland Guidelines that accompany the Virginia Tidal Wetlands Act are similar to those for the beaches and dunes

¹⁴ *Id.* at 1.

¹⁵ E-mail from Scott Smith, Coastal Resilience Manager, City of Norfolk (Feb. 7, 2018) (on file with author).

¹⁶ *Id.*

¹⁷ *Sand Management Plan Guidance Document*, *supra* note 13, at 2.

¹⁸ *Coastal Primary Sand Dunes/Beaches Guidelines: Guidelines for the Permitting of Activities Which Encroach into Coastal Primary Sand Dunes/Beaches*, Virginia Marine Resources Commission (1993), http://www.mrc.virginia.gov/regulations/dune_guidelines.pdf.

¹⁹ *Id.*

²⁰ *Id.* at 5.

so it is helpful to look at case law concerning these guidelines.²¹ Virginia courts have ruled that the Wetland Guidelines are purely advisory, and wetlands boards therefore do not need to carefully weigh the scientific data in the guidelines (even though the Wetlands Act requires that the guidelines be created and the model ordinance within the Act states that the wetlands “board shall consider . . . [t]he proposed development’s conformance with standards prescribed in & 28.2-1308 . . . and [the Wetland G]uidelines”).²² Similar language is contained within the Dunes and Beaches Act;²³ therefore, courts may find that the Dunes/Beaches Guidelines are purely advisory as well.

Beyond the Local Ordinance & VMRC Guidelines – Other Considerations for Dunes

Before taking any action that may impact the dunes, there are other factors to consider. One of these is the National Flood Insurance Program (NFIP), administered by the Federal Emergency Management Agency (FEMA), which limits what can be done to primary frontal dunes (PFDs).²⁴ The NFIP defines a PFD as “a continuous or nearly continuous mound or ridge of sand with relatively steep seaward and landward slopes immediately landward of and adjacent to the beach.”²⁵ As the first line of defense against flooding, PFDs can be identified on a Flood Insurance Rate Map (FIRM) because PFDs are usually mapped as a VE Zone.²⁶ A VE Zone is a “Coastal High Hazard Area with mandatory flood insurance requirements and enhanced development standards, including the requirement that new buildings are elevated above the BFE [base flood elevation] on piles, piers, or columns and other requirements.”²⁷

PFDs are already subject to erosion and may be susceptible to overtopping or breaching from waves and increased water levels during storms. Designation as “primary frontal dunes” ensures that dunes are not subject to manmade alterations in a way that could increase potential flooding,²⁸ because the NFIP has established special mapping, floodplain management criteria, and insurance designed to help localities protect the dunes. Based on the Town of Cape Charles’s FIRM, it seems that its dunes are classified as PFDs (showing that the Town’s beaches are in a VE

²¹ *Wetland Guidelines*, Virginia Marine Resources Commission (1993), http://mrc.virginia.gov/regulations/wetlands_guidelines.pdf.

²² *Stearns v. Va. Marine Res. Comm’n*, 57 Va. Cir. 213 (2001); Pamela Kalinowski & Yvonne Baker, *Tidal Wetlands Protection in Virginia: Time for an Update*, Virginia Coastal Policy Center, at 3 (2014), <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1012&context=vcplinic>.

²³ V.A. CODE ANN. § 28.2-1403.

²⁴ *Primary Frontal Dunes*, FEMA (Mar. 2014), https://www.fema.gov/media-library-data/1395338523968-084228a766df3f43be5b2179a8b47222/PFD+Fact+Sheet_FINAL.pdf.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

Zone).²⁹ Prior to the development of PFD regulations, there were few restrictions on construction in dune areas.³⁰ This resulted in degradation of the protective quality of the dunes and put structures at risk from flooding.

Something else to consider when taking action is the Chesapeake Bay Preservation Act (CBPA),³¹ a state law which was enacted to protect the water quality of the Chesapeake Bay and its tributaries. The CBPA, unlike the Dunes and Beaches Act, does not have a government activity exemption. The CBPA reduces disturbances and development in vulnerable shoreline areas, known as Chesapeake Bay Preservation Areas (CBPAs).³² CBPAs consist of Resource Protection Areas and Resource Management Areas.³³ An RPA is “comprised of lands adjacent to water bodies with perennial flow that have an intrinsic water quality value due to the ecological and biological processes they perform or are sensitive to impacts which may result in significant degradation to the quality of state waters.”³⁴ An RMA is “that component of the Chesapeake Bay Preservation Area that is not classified as the Resource Protection Area.”³⁵ Each Tidewater locality must establish a program that defines and protects Chesapeake Bay Preservation Areas.³⁶ Cape Charles adopted a Chesapeake Bay Preservation Ordinance, found in Article VII of its Zoning Ordinance.³⁷ Although dunes are not mentioned specifically within the definitions of an RPA or RMA, the Town should consider whether any proposed activity it may want to undertake with respect to the dunes is located within a designated RPA or RMA, and if so, the implications that designation may have on the proposed activity.

Case Law and Legislation Regarding Sand Relocation on the Beach

The Town of Cape Charles specifically requested research into any existing case law or legislation that might impact the ability of a town to relocate sand from one area of a beach, not within a wetland, to another area of a beach for purposes of beach replenishment. While case law involving beach replenishment projects does exist, these cases involve private property owners and center on issues such as eminent domain and the calculation of just compensation.³⁸ We have found no case law on the specific question posed by Cape Charles.

²⁹ *Virginia Flood Risk Information System*, Virginia Department of Conservation & Recreation, <http://cmap2.vims.edu/VaFloodRisk/vfris2.html> (last visited Apr. 9, 2018).

³⁰ *Primary Frontal Dunes*, *supra* note 24.

³¹ VA. CODE ANN. §§ 62.1-44.15:67 to – 44.15:79 (2016).

³² VA. CODE ANN. §§ 62.1-44.15:68; 9 VA. ADMIN. CODE § 25-830-40 (2015).

³³ 9 VA. ADMIN. CODE § 25-830-40.

³⁴ *Id.*; 9 VA. ADMIN. CODE § 25-830-80 (2015) (detailing additional information regarding RPAs).

³⁵ 9 VA. ADMIN. CODE § 25-830-40 & -90 (2013) (detailing additional information regarding RMAs).

³⁶ VA. CODE ANN. § 62.1-44.15:67(A)(ii).

³⁷ CAPE CHARLES, VA., ZONING ORDINANCE, art. VII (2014),

<https://capecharles.municipalcms.com/files/documents/document1468010314102413.pdf>.

³⁸ 3232 Page Avenue Condominium Unit Owners Ass’n v. City of Va. Beach, 284 Va. 639 (2012) (holding that the City could condemn property while at the same time asserting ownership of the property); Lynnhaven Dunes Condo Ass’n v. City of Va. Beach, 284 Va. 661 (2012) (holding that the Association’s loss of riparian rights was not due to the improvement of navigation and was, therefore, compensable); and Borough of Harvey Cedars v. Karan, 70 A.3d 524 (N.J. 2013) (holding that the calculation of the just compensation award related to acquisition of an easement to

The legislative analysis regarding the ability of a locality to relocate sand in this manner on a publicly owned or leased beach is similar to the analysis above regarding sand management in general. Because of the “government activity” exemption, the locality would not need to obtain a permit from its Wetlands and Coastal Dune Board. However, the locality would still want to consider any limitations under the CBPA and any potential impacts to flood zone designations under the NFIP.

Conclusion

Dunes and beaches play a critical role in reducing the risk of flooding, providing storm barriers for homes and shorelines, and creating habitats for plant and animal species. Based on the research outlined above, the Town of Cape Charles will not need a permit under the Dunes and Beaches Act from the Wetlands and Coastal Dune Board for governmental activity on its own dunes and beaches. And, if the goal is to create a plan to manage the dunes and sand placement along the beach, this would ultimately be the Town’s responsibility. While the Town does not need permission from the Wetlands and Coastal Dune Board to create and implement such a plan, it would be beneficial to consult with them due to the experience of the Wetlands and Coastal Dune Board. The Wetlands and Coastal Dune Board plays an integral role in providing permits for private citizens, and it can continue to play an advisory role for the Town in addressing this issue. VMRC guidelines will also be helpful, even though courts are likely to consider them merely advisory in nature.

Apart from the Dunes and Beaches Act and associated local ordinance, the Town may also want to consider whether the dunes or beaches are located within an RPA or RMA under the Town’s Chesapeake Bay Preservation Ordinance. Additionally, NFIP regulations dealing with PFDs may prove to be the greatest impediment. The Town should consult with scientific partners and federal authorities before taking action.

construct a dune should consider not only a potential decrease in value due to the loss of view, but also a potential increase in value due to storm protection benefits).