

Defining a Dune: A Case Study in Current Coastal Permitting Battles

By Agnes Antonian
and
Christina Sartorio Ku,
Connell Foley

Watching helplessly as all of your neighbors expand their homes while locked in a six-year struggle to obtain routine permits for a small expansion project – this is the reality for two homeowners in the Borough of Beach Haven, New Jersey. Michael and Maria O’Hara originally applied for a Coastal General Permit 5 in February of 2017, seeking approval for the reconstruction and expansion of their oceanfront, single-family home. The application sought to allow expansion in line with other neighboring properties, which had all previously received permit approvals in the past few years to expand their homes and decks towards the water. Given that their application request was similar, the O’Haras believed that they would be able to begin construction soon.

However, without providing any supporting documentation or explanation, the state Department of Environmental Protection (DEP) notified the O’Hara’s engineer in a March 2017 email that the dune was located further west (inland) than had been found for all of their neighbors. The DEP issued a permit, which did not allow any expansion of the house from its current footprint, and set the home back as compared to the adjacent properties.

The O’Haras, who were not aware of these changes, were surprised and extremely disappointed when they first learned about this significant change, months after the Coastal Area Facility Review Act (CAFRA) permit had been approved. Since the appeal window had lapsed, the O’Haras had to file a second permit application on May 15, 2020, for the same proposed footprint. The DEP again denied this application on August 12, 2020. The O’Haras were forced to appeal and are currently in litigation.

The DEP’s denial of the 2020 permit application was based on the determination that, again, the dune extends further west than the adjacent properties. However, this determination appears inconsistent with the NJDEP’s dune regulations. Specifically, N.J.A.C.



Maria and Michael O’Hara’s house in Beach Haven is the third from the left.

7:7-6.5(d)1ii notes that a primary frontal dune means a “continuous or nearly continuous mound or ridge of sand with relatively steep waterward and landward slopes immediately landward of and adjacent to the beach.” The Appellate Division of the New Jersey Superior Court has interpreted “relatively steep” to mean that the “waterward and landward slopes... must abruptly incline and decline respectively compared with the rest of the subject property or with the other properties in the area immediately adjacent to the subject property. *Siegel v. NJDEP*, 395 N.J. Super. 604, 619-20 (App. Div. 2007).

Here, consultants and engineers for the O’Hara project have confirmed that the landward slope of the primary oceanfront dune, characterized by the requisite “relatively steep slope,” is east of the dwelling, and does not include the area beneath the deck which is flat. Thus, judicial precedent and DEP’s regulations confirm that the subject dune ends waterward of the proposed development.

The DEP’s denial also appears to be contrary and inconsistent with its prior findings relating to another property to the south, where the NJDEP issued a jurisdictional determination allowing construction in the same area the O’Haras seek to renovate their house. Other dwellings in the area are all similarly built to, or even beyond, the same building line to which the O’Haras seek to expand. Thus, DEP’s ruling in this matter appears inconsistent with prior permit approvals at properties near the O’Haras and the current regulations and judicial precedent.

This case shows that the process to obtain land use permits, including Coastal Zone Development Permits such as that sought by the O’Haras, has been increasingly unpredictable and difficult to navigate over the past decade, especially in light of the state’s changing policies and regulations to address emerging issues such as climate change. The complex and unique nature of DEP’s permitting process only highlights the importance of retaining experienced environmental consultants and attorneys as early in the process as possible to help minimize the risk of potential hurdles and significant, years-long delays. ❧