

March 22, 2022

HABITAT MANAGEMENT DIVISION EVALUATION

CARL F. WESTPHAL JR. and MARY SWIFT, #22-0082. Commission review on appeal by the applicants of the City of Hampton Wetlands Board's February 22, 2022, decision to deny an after-the-fact request to retain 112 linear feet of riprap revetment and a 216.5 square foot proposed living shoreline located at 12 Curle Road situated along a cove of the Hampton River.

Narrative

On February 22, 2022, the City of Hampton Wetlands Board voted unanimously to deny a request by Carl F. Westphal and Mary Swift to retain 112 linear feet of rock riprap that was added overtop of existing concrete rubble, to remove a gravel kayak ramp, and to construct a 16-foot long stone sill. The sill would be backfilled with clean sand and planted with 216.5 square feet of tidal wetlands vegetation. This represents the Board's third denial of the applicants' after-the-fact request to retain the revetment, and follows their denials of two previous applications (VMRC #21-2108 and #21-1396) at their December 21, 2021, and August 24, 2021, monthly meetings. All three applications sought after-the-fact authorization of the constructed revetment.

The applicants and their contractor consented to and have paid the civil charges assessed by the Board at their August 24, 2021, meeting for the after-the-fact construction. The Commission upheld the Board's denial of the original application (VMRC #21-1396), on appeal by the applicants, at its September 28, 2021, monthly meeting. The original application did not include the proposed living shoreline.

During the recent hearing, the Board heard comments from the applicants' agent, Walter Priest, that a living shoreline would not be appropriate for the entire site and that it would be prohibitively expensive to the homeowners. A cost estimate, prepared by Jim Cahoon of Bay Environmental, Inc., was provided at the previous hearing which stated that a living shoreline approach at this property would cost approximately \$70,000.00.

Mr. Priest further provided information that grading back into the upland property along the entire shoreline would destabilize the adjacent property owners' existing riprap shoreline treatments. He added that an offshore sill was not an option given the insufficient load bearing capacity of the existing substrate. Mr. Priest additionally pointed out that the VIMS Center for Coastal Resources Management's Decision Tree Model recommends that an existing rubble revetment should be replaced with a properly installed stone revetment, as had been constructed by the applicant.

VIMS Office of Advisory Services' comments dated February 8, 2022, suggest that a living shoreline could achieve the project goals at the site, specifically by constructing a sill close to mean low water and transitioning it to the neighboring riprap on both adjacent properties. They further advised this would involve grading less than 35 feet into the upland yard. This report considered the site conditions of short fetch, shallow nearshore bathymetry, a large distance to upland structures, minimal boat wakes and small storm waves.

Narrative (cont'd)

A letter submitted by the Chesapeake Bay Foundation, approximately one hour prior to the start of the 3rd hearing, stated that “CBF strongly supports the staff recommendation to deny this permit” and argued that the application did not meet the criteria for granting a permit.

At the conclusion of the February 22, 2022, meeting, the Board voted again to deny the applicant’s request. Prior to her motion to deny the current application, Board member Neubert stated that *cost was not a factor* and that it *was expensive to live on the water*. The Board appeared to deny the project because they felt that the applicants’ should construct additional living shoreline over that proposed.

Issues

On February 26, 2022, VMRC staff received a letter from the applicants agent, Walter Priest, appealing the most recent denial of the application. The letter was considered timely under the provisions of Section 28.2- 1311(B) of the Code of Virginia.

In the Board’s initial review of the project (VMRC 21-1396), they debated their ability to consider cost and affordability of any project. Ultimately, at that hearing, the Board split on whether cost was a factor they could base a decision on and the original request was denied by a 4-3 vote. During that original hearing, several Board members indicated they would like to see a revised application that included a hybrid approach, or at least some elements of a living shoreline to help reduce costs from the estimate that was provided.

Although this was provided by the applicants with their 2nd and 3rd (current) applications, the Board denied both subsequent applications. It appears that their rationale for their most recent decision was based on their belief that an additional 25 linear feet of marsh sill should be in the applicant’s modified proposal.

Summary/Recommendations

Staff has carefully watched this project since its inception, originally submitted for consideration on June 28, 2021. After the initial denial, the applicant twice sought approval of a modified proposal that incorporates a living shoreline design, as recommended by the Board at their August 24, 2021 meeting. The current application provides 216.5 square feet of vegetated tidal wetlands as compensation for the net loss of 56 square feet of non-vegetated wetlands (mudflat) resulting from the after-the-fact revetment (3.9 : 1 ratio). This small amount of jurisdictional non-vegetated wetland impacts and mitigation ratio should be carefully considered by the Commission when deciding whether to modify, remand or reverse the Board’s most recent decision as charged by §28.2-1313 of the Virginia Code.

Summary/Recommendations (cont'd)

The General Assembly, with the enactment of §28.2-1301 B of the Virginia Code, charged the Commission with a requirement to “*preserve and prevent the despoliation and destruction of wetlands while accommodating necessary economic development.*” VMRC’s updated Tidal Wetlands Guidelines highlight this 1972 policy, which provides the guiding principles for the Commonwealth’s citizen-based administration of its tidal wetlands program that aims to effectively balance wetlands preservation with protection and use of private property. Section 28.2-104.1 of the Code further directs wetland boards to permit only living shorelines approaches to shoreline management unless the best available science shows that such approaches are not *suitable*.

Staff is of the opinion that the costs to construct any living shoreline are an important and necessary component of the lawful requirements to “accommodate necessary economic development” and factor into a project’s suitability. This was contemplated by the General Assembly, during its consideration of Senate Bill 776 at the House Agriculture, Chesapeake and Natural Resources Committee hearing on February 26, 2020, when cost considerations were raised by Delegates Bloxom and Ransone. This resulted in the amendment of SB 776 to replace “*feasible*” with “*suitable*,” to specifically address and allow for the consideration of a shoreline treatment’s cost.

Board Member Neubert’s statements, following her motion to deny the original application during the August 24, 2021, meeting, indicated that the Board “*is not tasked with considering cost*” and that information derived from the National Oceanic and Atmospheric Administration (NOAA) and VIMS suggest that “*living shorelines cost less.*” As provided by the applicant prior to the February 22, 2022 motion to deny the project, the cost to construct a living shoreline on the applicant’s property represents a 337.5 percent increase in costs over that of the constructed revetment (\$70,000.00 vs \$16,000.00).

In addition to their deliberation of cost, the Board, in staff’s opinion, also did not fully take into consideration the agent’s analysis of the site’s suitability of a living shoreline for the entirety of the shoreline. Arguments were provided that to achieve the proper slope for a viable living shoreline would require grading 35 feet landward into the applicants upland property and result in the destabilization of the adjacent property owner’s existing riprap revetments. Wetlands Board staff agreed that a portion of the shoreline was not suitable for a living shoreline, due to the dripline of an existing mature tree that was desired to be protected. Additionally, the agent advised that the offshore substrate sediment load bearing capacity would not support the rock sill required to establish a living shoreline. As such, it appears to staff that the Board failed to consider the project site’s suitability for a living shoreline and its economic necessity as part of the requirements of §28.2-104.1 and §28.2-1301 B of the Virginia Code.

Summary/Recommendations (cont'd)

Accordingly, after consideration of the facts and record of this case, the aforementioned legislation and VMRC's updated Tidal Wetlands Guidelines, staff recommends that the February 22, 2022, decision of the Hampton Wetlands Board be overturned. Pursuant to §28.2-1313.2e of the Code, it appears that their decision to deny the application is unsupported by evidence on the record considered as a whole. The modified proposal meets the Board's August 24, 2021 direction to provide "elements of a living shoreline" to reduce project costs. As such, staff recommends that the Board be directed to issue the permit based on the revised project drawings, dated received January 31, 2022, and a revised plan view drawing to be prepared by the agent that depicts the proposed sill in its entirety with tie-down dimensions taken from recoverable benchmarks.