

ADMINISTRATIVE APPEAL DECISION

TOWN OF MANTEO

FILE NO. 199911345

WILMINGTON DISTRICT

DATE: May 22, 2001

Review Officer: Arthur L. Middleton, U.S. Army Corps of Engineers (USACE), South Atlantic Division, Atlanta, Georgia.

Appellant Representative: Mr. Kermit Skinner, Town Manager, Town of Manteo, North Carolina.

Receipt of Request For Appeal (RFA): March 6, 2001.

Appeal Conference Date: April 18, 2001.

Site Visit Date: April 18, 2001.

Background Information: The Town of Manteo, by application received on August 5, 1999, requested a permit to construct a replica of the Roanoke Marshes Lighthouse on the waterward end of an existing public pier and platform, located at 102 Queen Elizabeth Avenue, adjacent to Shallowbag Bay, in Manteo, Dare County, North Carolina. The project site consists of an approximate 45,303 square foot parcel of land owned by the Town of Manteo within its business district. There is a existing 245-foot long by 10-foot wide public pier on this property with an existing 70-foot long by 70-foot wide platform located on the waterward end of the pier. The existing pier and platform were authorized by State and Federal permits and was constructed over an existing concrete platform that formerly supported a wastewater holding tank on a pre-existing 90-foot long by 90-foot wide platform. The replica of the lighthouse would consist of a 26-foot long by 26-foot wide enclosed structure with a 4-foot long by 4-foot wide elevated deck and light cupola centered over the top of the enclosed structure. The structure would be located in the center of the existing platform, leaving approximately 20 feet of decking around each side of the structure for pedestrian access. The replica would be built from original plans and drawings obtained from the North Carolina Department of Archives and History. The replica would be open to the public and provide insight into the area's unique history and cultural heritage through lectures, displays and public heritage demonstrations. The light would be equipped with a fresnel lens and is proposed to serve as a navigational aid and to be included in the inventory of U.S. Coast Guard recognized navigational structures.

The project was determined to be inconsistent with the North Carolina Coastal Management Program and was subsequently denied by the Division of Coastal Management on October 15, 1999. In their denial letter, the Division of Coastal Management stated "while the structure would serve as an aid to navigation, the structure would also serve as a base for numerous non-water dependent activities." They further stated, "As a result of these findings, the replica

lighthouse must be considered a non-water dependent structure.” They continued, “the proposed project has been determined to be inconsistent with NCAC T15A:07H.0208(a)(1), which states that uses which are not water dependent shall not be permitted in coastal wetlands, estuarine waters, and public trust areas.” The Wilmington District (District) denied the Department of the Army Permit, without prejudice, on October 28, 1999, and the file was retired.

The Town of Manteo appealed the denial of the State permit and after additional review, the State issued a permit to the Town of Manteo on January 21, 2000. The non-water dependent components of the project were authorized under legislation passed by the North Carolina General Assembly (House Bill 1059). The Town of Manteo resubmitted their application on August 16, 2000, requesting that the Corps of Engineers reopen the file and consider Federal authorization for the project. On December 1, 2000, the Wilmington District Engineer denied the request for authorization. He stated, (Environmental Assessment, Finding of No Significant Impact and Statement of Findings (SOF), pages 8-9) “Although there are no State or Federal agency objections to the proposed work, the project, as proposed remains inconsistent with Wilmington District’s position regarding the construction of enclosed structures over navigable waters...I have reviewed and evaluated, ever considering the overall public interest, the impacts of this application, as well as the stated views of non-Federal agencies and the concerned public. Pursuant to Wilmington District policy described above, I have determined that the work cannot be permitted. My decision to deny this permit was based on my evaluation of the probable impacts, including cumulative impacts, and anticipated effects on the public interest. Evaluation of the probable impacts which the proposal could have on the public interest included a careful weighing of all relevant factors. The benefits, which reasonably could be expected to accrue from the proposal, were balanced against reasonably foreseeable detriments. My decision to not authorize the proposal was determined by the outcome of this general balancing process. My decision reflects the national concern for both protection and utilization of important resources. Denial of this application for a DA permit is based on a thorough analysis and evaluation of the various factors enumerated above. There are reasonable alternatives available to the applicant that would achieve the purposes for which the work would be conducted. Denial of this application is consonant with national policy, statutes and administrative directives designed to protect the navigable capacity of the nation’s waters. On balance, the total public interest would best be served by the denial of this Department of the Army permit.” The denial is being appealed.

Summary of Decision: I find the appeal has merit as follows: I find that (a) the District inappropriately applied a policy that is not a USACE policy; (b) the District was inconsistent in its comparison of the potential impacts to navigation of an enclosed structure verses a similar structure that is open or partially enclosed; (c) the District did not discuss, in the decision document, the role other statutes (North Carolina, local, etc.) would play in preventing the proliferation of certain structures in navigable waters; (d) the District did not demonstrate how concerns about navigation are overriding in importance in light of the State of North Carolina position regarding the proposal. This matter is remanded to the District Engineer for reconsideration of the permit decision consistent with the instructions in this administrative appeal decision.

Appeal Evaluation, Findings and Instructions to the Wilmington District Engineer (DE):

Reasons for the appeal as presented by the appellant:

Reason 1: “The Wilmington District contends that the project as proposed is inconsistent with its policy prohibiting the construction of any enclosed structures over navigable water. It is the Town of Manteo’s position that no such policy exists.”

FINDING: Reason 1 for the appeal has merit.

ACTION: The decision is remanded to the DE to reevaluate the request without applying a “practice” or “policy” that prohibits the construction of enclosed structures over navigable waters.

DISCUSSION: As noted above, the DE in summarizing his reason for the denial stated, “Although there are no State or Federal agency objections to the proposed work, the project, as proposed remains inconsistent with Wilmington District’s position regarding the construction of enclosed structures over navigable waters.” In the SOF (page 3) he stated, “ It has been the informal policy of the Wilmington District for many years...not to permit enclosed structures over navigable waters unless they are required to be over water to fulfill their basic function.”

The Administrative Record contains several references to this informal policy regarding the construction of enclosed structures over navigable waters. In the October 28, 1999, letter denying the Department of the Army authorization, without prejudice, the District stated, “the Wilmington District continues to have concerns over this proposal for a non-water dependent, enclosed structure over navigable waters...you should be aware that this issue must be resolved prior to issuance of a Department of the Army permit. We strongly recommend that if you wish to pursue this matter, you give serious consideration to revising your plans for this structure.” Emphasis added.

In a conversation record dated October 18, 1999, Ms. Shannon Twiddy, Town of Manteo was advised, “Strongly rec[ommend] that [the] application be modified to include structure w[ith] non-inhabitable features, i.e. ½ sides, or only two walls as opposed to four, and/or pile-supported roof w[ith] canopy, etc.”

By letter dated June 16, 2000, the District informed Dr. Walter L. Bloom, M.D., “We certainly have no objections to the reconstruction of the Light at an appropriate location on the edge of the high ground along the waterfront rather than on the old pier or alternatively, with appropriate modifications, on the pier structure as originally proposed. The nature of the modifications would have to be such that the structure is not an enclosed structure...Our objection is to the enclosed structure over the water area.” Emphasis added.

By letter to the Wilmington District, dated March 10, 2000, the Town Manager, Town of Manteo stated, “it is my understanding that it is the policy of the District Office that no structure that has the potential for human occupation is considered a permissible use. I also understand that it is the Corps position that their authority to regulate a reuse project of this nature is enumerated in the

Harbor and Navigation [Rivers and Harbors] Act of 1899.” He requested “a copy of the written policy of the Wilmington District Office that precludes the reuse of an existing structure of this type.”

By letter dated August 17, 2000, Lee Tugwell, Mayor, Town of Manteo informed Walter B. Jones, United States Representative, “The Wilmington District...has asserted that it is policy of their district that no such structure can be constructed over navigable waters...On March 10 [2000] the Town formally requested that the Wilmington District supply the Town with documentation that would support their position...we have yet to receive this information.”

The District did provide a copy of an excerpt of the regulations 33 CFR 325.3 and 327 regarding Public Notices and Public Hearings. The District did not provide “a copy of the written policy.”

In a letter to the Town Manager, Town of Manteo, dated August 24, 2000, the District stated, “the Wilmington District does not generally permit enclosed structures to be erected over navigable waters, unless they are required to be located over waters to fulfill their basic function. Structures over waters are vulnerable to the elements, and, if not maintained, create unreasonable and unnecessary obstructions and possibly hazards to navigation...and create short and long term problems for navigation. This is especially true if there is a proliferation of such structures over the navigable waters within the State of North Carolina.”

Although the DE does have a responsibility to protect navigable waters (see the discussion in Reason 3 below), there is no USACE policy that precludes the construction of enclosed structures over navigable waters.

Reason 2: “The Town further contends that any attempt to represent “position” or “practice” as a formal policy of a federal agency would result in an arbitrary and capricious enforcement action by the agency.”

FINDING: Reason 2 for the appeal has merit.

ACTION: The decision is remanded to the DE to reevaluate the request without applying a “practice” or “policy” that prohibits the construction of enclosed structures over navigable waters.

DISCUSSION: This Reason for Appeal is closely tied to Reason 1. The Administrative Record is very clear that a modified structure, one that is not enclosed, would have been authorized. See the discussion for Reason 3 below.

Reason 3: “The Wilmington District contends that the project is contrary to the public interest. The Town of Manteo contends that this allegation is without merit. Anecdotally speaking it is inconceivable how the conversion of a wastewater treatment plant into a public access historical and educational site could be determined to be “contrary to the public interest”. The Town contends that the position of the Wilmington District is inconsistent with every other federal, state and local permitting and regulatory agency.”

FINDING: Reason 3 for the appeal has merit.

ACTION: The decision is remanded to the DE to reevaluate the request with regard to the public interest factors. There must be a reasonable and accurate comparison of the potential impact to navigation of structure that is enclosed verses a similar structure that is open or partially enclosed. In light of the specific circumstances associated with this proposal (The State of North Carolina issued a permit, including coastal zone consistency, for the proposal and the non-water dependent components of the project were authorized under legislation passed by the North Carolina General Assembly (House Bill 1059 – to allow certain types of redevelopment within historically urban waterfronts that historically have a pattern of urban-level development)) the DE is to reconsider the perceived cumulative impacts to navigation and the potential for proliferation. In addition, the DE must clearly explain, within the decision document, how concerns regarding navigation are overriding in importance if issuing a decision contrary to state and local decisions.

DISCUSSION: The regulations at 33 CFR 320.4 state, “The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. Evaluation of the probable impacts which the proposal may have on the public interest requires a careful weighing of all those relevant factors which become relevant in each particular case...All factors which may be relevant to the proposal must be considered including the cumulative impacts thereof: among those are...navigation...” As noted above, the DE stated, “My decision to deny this permit was based on my evaluation of the probable impacts, including cumulative impacts, and anticipated effects on the public interest...Denial of this application is consonant with national policy, statutes and administrative directives designed to protect the navigable capacity of the nation’s waters.” Emphasis added.

The regulations at 33 CFR 320.4(o)(3), state, “Protection of navigation in all navigable waters of the United States continues to be a primary concern of the federal government.” In this instance, the primary Federal agency with this responsibility is the USACE, Wilmington District. The SOF (page 3) states with regard to navigation, “The District’s position reflects a concern that structures over the water are vulnerable to the elements, such as wind, rain, and currents, especially in storm conditions.” Emphasis added.

In a conversation record dated October 18, 1999, Ms Shannon Twiddy, Town of Manteo, when considering to resubmit their application, was advised, “Strongly rec[ommend] that application be modified to include structure w[ith] non-inhabitable features, i.e. ½ sides, or only two walls as opposed to four, and/or pile-supported roof w[ith] canopy, etc.”

By letter dated 31 May 2000, the District informed the Town Manager, Town of Manteo, “we would not object to the construction of an open-sided structure similar in design to your proposed project provided it in constructed within the footprint of the existing pier and platform... We continue to believe that it is possible to reach an agreement on a structure, which will serve your basic purpose and need and also satisfy our position.”

By letter dated June 16, 2000, the District informed Dr. Walter L. Bloom, M.D., “We certainly have no objections to the reconstruction of the Light... with appropriate modifications, on the pier structure as originally proposed.”

The SOF (pages 6-7) states with regard to alternative structures, “There are modifications available to the project which would make it consistent with Wilmington District policy, including, but not limited to, similar designs with open sides, screens instead of walls, open-ended interpretive display cases enclosed in plexiglass, and/or the construction of a light cupola over the top of a pile supported roof on the existing platform.” Emphasis added. The SOF implies that enclosed structures pose a more serious threat to navigation than a structure with two sides, or a “cupola over the top of a pile supported roof on the existing platform” when exposed to the elements or storm conditions. The argument that an enclosed structure built over the water is more susceptible to the elements and storms than structures with three sides, two sides or no sides, is unfounded.

In the instant case, in order for the proposed structure to become an impediment to navigation it would have to deteriorate and collapse into the water or be driven there by the force of wind or water. Otherwise, the sheer mass of the existing pier and platform buffer it from interfering with navigation. The SOF (page 6) states, “The applicant states...because they are a local government supported by local and State funding sources...they do not agree that there is any likelihood that the project would be abandoned and/or collapse into the waters of Shallowbag Bay. I concur that this project, owned by a local government, is more likely to be properly maintained than a privately owned project might be.” It continued, “No amount of proper maintenance, however, can completely protect such structures from the elements to which they have been intentionally exposed, including storms and long term erosive forces. Structures that should not be placed within navigable waters should not be.” During the site visit on April 18, 2001, the Appeal Review officer observed a large, pile supported, gazebo, located at the end of a pier extending into Shallowbag bay, adjacent to the site of the proposed structure. The open sided gazebo is obviously exposed to the elements, including storms and long-term erosive forces. While gazebos can be constructed on uplands to fulfill their purpose, the District authorized this one over navigable waters.

By letter dated November 27, 2000, the DE informed the Town of Manteo that he denied their request for Department of the Army Authorization. He stated, “ I have determined that the structure, as proposed, will likely result in an unreasonable and unnecessary obstruction to navigation. The cumulative impact of...structures and the potential failure of the structures at some time in the future will likely result in...obstructions and hazards to navigation. I have found that there are other alternatives available to you [,] which would serve the basic purpose and need for the structure and at the same time considerably reduce the possibility of such present and future obstructions and hazards. These...include such alternatives as structural changes which would convert the structure to a more acceptable structure...”

In the August 24, 2000, letter noted in Reason 1, the District expressed a concern about the “proliferation of such structures over the navigable waters within the State of North Carolina.” The SOF (page 3) states, “There is a great deal of pressure all along the coast of North Carolina to place such structures over the water for a myriad of reasons. This District has requests to

place homes, restaurants, visitor booths, offices, apartments and condominiums, museums and hotels over pilings over the navigable waters within our jurisdiction.” The District did not elaborate, in the decision document, about the specific circumstances associated with this proposed activity (The State of North Carolina issued a permit, including coastal zone consistency, for the proposal and the non-water dependent components of the project were authorized under legislation passed by the North Carolina General Assembly (House Bill 1059 – to allow certain types of redevelopment within historically urban waterfronts that historically have a pattern of urban-level development)) and how, outside these unusual circumstances, there are other statutory mechanisms in place to squelch the proliferation of structures in navigable waters of North Carolina.

Because of its application of what could be characterized as an arbitrary policy, it appears the District found it necessary to develop an argument that the enclosed structure would pose a threat to navigation and therefore, its authorization would be contrary to the public interest. The District did not build a strong case to support its conclusion that the proposed project would, on its own or cumulatively, represent a negative impact to navigation.

The regulations at 33 CFR 320.4(j)(2)(4) state, “The primary responsibility for determining zoning and land use matters rests with state, local, and tribal governments. The district engineer will normally accept decisions by such governments on those matters unless there are significant issues of overriding national importance. Such issues would include...navigation... Whether a factor has overriding importance will depend on the degree of impact in an individual case... In the absence of overriding national factors of the public interest that may be revealed during the evaluation of the permit application, a permit will generally be issued following receipt of a favorable state determination provided the concerns, policies, goals, and requirements as expressed in 33 CFR Parts 320-324, and applicable statutes have been followed...” Emphasis added.

Regulations at 33 CFR 325.2(a)(6) state “If a district engineer makes a decision which is contrary to state or local decisions, the district engineer will include in the decision document the significant national issues and explain how they are overriding in importance.”

Regulations at 33 CFR 320.4(j)(3) state, “Where a state has not designated a single responsible coordinating agency, district engineers will ask the Governor to express his views or to designate one state agency to represent the official state position in the particular case.”

The District has failed to demonstrate how the concerns regarding navigation are overriding (of the state and local decision) in importance. The District must clearly explain, within the decision document, how they are overriding in importance when issuing a decision contrary to state and local decisions.

Information Received and its Disposition During the Appeal Review:

1. At the site visit on April 18, 2001, digital photographs were taken of the existing pier and platform and adjacent areas and structures. These were used to clarify the record and for briefing purposes.

2. At the appeal conference on April 18, 2001, Mr. Kermit Skinner, Town Manager, Town of Manteo, provided a color facsimile of a photograph of the sewage treatment tank that once stood on the existing pier/platform structure. This was used to clarify the record and for briefing purposes.

3. At the request of the Review officer, the Wilmington District submitted a copy of the application for a structure at Morehead City, North Carolina, mentioned in the Administrative Record. Included with the application was a copy of a site map that included proposed work as well as a drawing showing what was actually permitted. The material was reviewed but not considered in this evaluation.



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