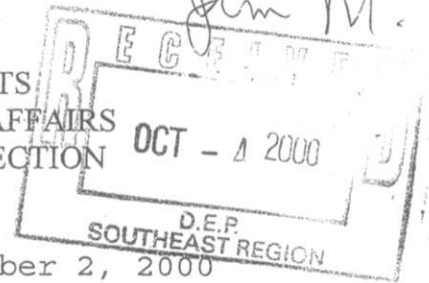


COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS  
DEPARTMENT OF ENVIRONMENTAL PROTECTION



October 2, 2000

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In the Matter of

GRANGER FROST, ERIC FROST and  
GEORGE FROST

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Docket No. 97-091  
File No. 48-996  
Nantucket

NOTICE OF TRANSMISSION OF PROPOSED FINAL DECISION

PLEASE TAKE NOTICE that on June 14, 1999, I transmitted the enclosed proposed Final Decision in this appeal to the Commissioner via the General Counsel. At that time the General Counsel was designated by the Commissioner for receiving proposed final decisions issued by the Department's Administrative Law Judges and for transmitting same to the Commissioner following review for her final decision.

The enclosed proposed Decision is signed solely by me. Per standard practice, the last page of the proposed Decision includes a signature line for adoption by the Commissioner at her discretion. The proposed Decision is not signed by the Commissioner, however. The proposed Decision is therefore not a final decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to the Superior Court pursuant to M.G.L. c. 30A.

Mark L. Silverstein  
Administrative Law Judge

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COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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In the Matter of

GRANGER FROST, ERIC FROST and  
GEORGE FROST

---

Docket No. 97-091  
File No. 48-996  
Nantucket

FINAL DECISION

*WETLANDS - PERMIT - coastal dunes, 310 CMR 10.28 - definition, 310 CMR 10.28(2) - additional requirement that coastal dune border on ocean or on another area subject to regulation under M.G.L. c. 131, §40 that borders the ocean, 310 CMR 10.02(1)(a) - nonjurisdictional dune - dune separated from ocean by two other coastal wetland resource areas.*

*WETLANDS - PERMIT - areas subject to regulation under M.G.L. c. 131, §40, 310 CMR 10.02(1)(a) - "any dune...bordering on the ocean."*

*WETLANDS - PERMIT - definitions, 310 CMR 10.04 - "bordering."*

*SUMMARY DECISION, 310 CMR 1.01(11)(f) (1995 rev.) - regulatory jurisdiction - wetlands permit appeal - coastal dune - nonjurisdictional dune - dune separated from ocean by two other coastal wetland resource areas.*

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Appeal by petitioners-applicants Granger Frost, Eric Frost and George Frost from so much of a wetlands superseding order of conditions issued to them by the Department on June 23, 1997 as denied their proposed construction of a dwelling, associated subsurface sewage disposal system and driveway at 133 Eel Point Road in Nantucket based upon the Department's determination that these structures would be built on a coastal dune or within the dune's buffer zone.

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On motions by all parties for summary decision on the issue, area in question determined not to be a coastal dune subject to protection under M.G.L. c. 131, §40 (based upon its separation from the ocean by two other coastal wetland resource areas), portion of superseding order denying proposed construction vacated for lack of regulatory jurisdiction, and redacted final order of conditions allowing remainder of proposed project (elevated walkway from dwelling to coastal bank and seasonal aluminum stairway from top of coastal bank to coastal beach) issued.

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Natalie S. Monroe, Esq. and Edward Woll, Jr., Esq. (Sullivan & Worcester, LLP), Boston, for petitioners-applicants Granger Frost, Eric Frost and George Frost.

Carol R. Wasserman, Esq., Boston, for the Department.

Peter R. Fenn, Esq. (Fenn & Heussler), Jamaica Plain, for intervenors Judith Weinstein and Joel D. Weinstein and for participant The Nantucket Land Council, Inc.

Daniel R. Deutsch, Esq. (Deutsch, Williams, Brooks, DeRensis, Holland & Drachman, P.C.), Boston, for the Nantucket Conservation Commission.

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MARK L. SILVERSTEIN, Administrative Law Judge.

### Introduction

The parties present this issue: is an area that is geomorphologically a dune also a "coastal dune," within which work is subject to regulation under the Wetlands Protection Act, M.G.L. c. 131, §40, if it does not border on the ocean or on another wetlands resource area that borders on the ocean, and is instead separated from the ocean by two other coastal wetland resource areas? I conclude that it is not; the Wetlands Protection Regulations specify, without ambiguity, that a dune must either border the ocean or border another wetland resource area that borders the ocean in order for it to be an area subject to protection under M.G.L. c. 131, §40. Since the dune in question here is separated from the ocean by two wetland resource areas--a coastal beach and a coastal bank--I

conclude that work proposed within the dune's footprint is not subject to regulation under M.G.L. c. 131, §40. I redact the wetlands permit, accordingly, so that it regulates only work proposed on the coastal bank and the coastal beach.

### Background

a.

Petitioners Granger Frost, Eric Frost and George Frost own property at 133 Eel Point Road in Nantucket. This property is bounded by the road on its south side and by Nantucket Sound on the north. Proceeding landward on the property from the Sound, one crosses Dionis Beach, a coastal beach, then a coastal bank that rises 16-20 feet above the beach, and then, approximately 300 feet southward, a parabolic-shaped ridge of sand--the dune at issue here.<sup>1</sup> The Frosts assert without contradiction that the FEMA floodplain elevation for this area (which FEMA has mapped as a non-velocity "A" zone) is at el. 8,<sup>2</sup> half way up the coastal bank or less, and that the dune is above, and

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<sup>1/</sup> As is often the case when the classification of a landform is disputed, the parties have used descriptive language as a tool of persuasion. The petitioners deny that the landform in question is a dune for purposes of coastal geology or wetlands regulation; consistent with that position, they refer to the landform in question here as a sand ridge or a ridge of sand, and have meticulously avoided the word "dune" when referring to it--a strategy of linguistic omission. The Department and the intervenors have employed, in contrast, a strategy of linguistic blending or commission, using the word "dune" to refer to both the landform in question here and a "coastal dune" defined by the Wetlands Protection Regulations and within which work is subject to regulation under M.G.L. c. 131, §40.

It is not necessary to determine whether the landform in question is a geomorphological dune. The only material issue is whether the landform in question qualifies as a jurisdictional dune under the statute given its separation from the ocean by two other jurisdictional wetlands. For purposes of this decision, then, the material semantic distinction is between dunes generally and those that are classified for regulatory purposes as "coastal dunes." The usage of "dune" and "coastal dune" here reflects that material distinction.

<sup>2/</sup> See plan entitled "Coastal Bank cross sections" dated April 4, 1996, accompanying the notice of intent for the Frosts' proposed project.

therefore outside of, the 100-year floodplain and the boundary of land subject to coastal storm flowage.<sup>3</sup>

The Frosts propose to construct a dwelling and an associated subsurface sewage disposal system approximately 200 feet to the south (landward) of the top of the coastal bank, an elevated walkway from the house to the coastal bank, and a seasonal aluminum stairway from the top of the coastal bank to the landward edge of the coastal beach that would be removed at the end of the summer. They filed a notice of intent for this work with the Nantucket Conservation Commission on April 8, 1996. In its August 2, 1996 order of conditions the Conservation Commission found that the Frost property contained a "dune ridge" that was located east and south of the proposed dwelling and that was a "coastal dune" under both the Wetlands Protection Act and Regulations and the Nantucket Wetlands Bylaw. The Commission denied the proposed dwelling, consequently, and required that the Frosts submit, for its approval, plans for a boardwalk crossing over the dune.

Asserting that no coastal dune was present on their property, the Frosts requested that the Department issue a superseding order of conditions allowing their proposed work.<sup>4</sup> The Department disagreed. It determined, in its June 23, 1997 superseding order of conditions, that the dune in question was a "continuous windblown ridge of sand which borders on a Coastal Beach and which overlies glacial sediments," and that the dune "exists at varying distances from the top of the Coastal Bank on this site and takes on a parabolic form." The Department also determined that the dune met the definition of a coastal dune set forth at 310 CMR 10.28(3) and was significant to flood control,

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<sup>3/</sup> Affidavit of Lester B. Smith, sworn-to December 19, 1997, at 2, 4.

<sup>4/</sup> The Frosts also appealed the local wetlands bylaw denial to the Superior Court. As I note below, the Superior Court appeal was stayed until this proceeding was resolved.

storm damage prevention and the protection of wildlife habitat. It denied the proposed driveway, which in the Department's view would cross over a section of the coastal dune, and the proposed dwelling and subsurface sewage disposal system, which "would fall within the buffer zone to this Coastal Dune."<sup>5</sup>

b.

This appeal followed. Two abutting owners--Joel Weinstein and Judith Weinstein--were granted leave to intervene, pursuant to 310 CMR 1.01(7)(d), and the Nantucket Land Council, Inc. was allowed to participate, pursuant to 310 CMR 1.01(7)(e). This appeal was stayed on November 19, 1997 in view of the pending wetlands bylaw denial appeal in the Superior Court and because the parties were attempting mediation.

On September 21, 1998 the Superior Court stayed the wetlands bylaw denial appeal until this proceeding was resolved, in view of "the identicalness of coastal dune regulations and in the interest of judicial economy." On November 20, 1998 Administrative Law Judge Francis X. Nee granted the Frosts' motion to lift the stay granted previously here and then held a second prehearing conference at which the parties agreed to file motions for summary decision on the following issue: "[i]s the ridge of sand (the geomorphic feature at issue) located on the property a coastal dune as defined at 310 CMR 10.28(2) and, thus, subject to regulation under the Wetlands Protection Act and Regulations?"<sup>6</sup> The Department and the intervenors moved for a summary decision determining this

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<sup>5</sup>/ The Department approved only an elevated walkway over the dune and the removable stairway on the coastal bank.

<sup>6</sup>/ The January 19, 1999 prehearing conference report states that if the sand ridge were determined to be a coastal dune, a further prehearing conference would be held to schedule a hearing on whether the project could be built to meet the relevant performance standards prescribed by the Wetlands Protection

issue in the affirmative. The Frosts moved for a summary decision that the dune is not an area subject to protection under M.G.L. c. 131, §40 and is thus not a coastal bank. The motions were argued before me on April 27, 1999.

### Discussion

1.

The parties agree that the dune was formed as a result of windblown sand deposits.<sup>7</sup> It is not genuinely disputed that the dune meets the definitional criteria for a coastal dune recited at 310 CMR 10.28(2) since it is "a natural ridge of sediment landward of a coastal beach deposited by wind action..." What is disputed is whether the dune is "bordering on the ocean," as 310 CMR 10.02(10)a) requires in order for the dune to be an area subject to protection under M.G.L. c. 131, §40. The focus of this dispute is the meaning of "bordering." Its resolution requires that I construe the regulatory definition of "bordering" recited at 310 CMR 10.04 and determine whether the dune in question fits within the four corners of the definition.

The Wetlands Protection Regulations define the areas subject to regulation under M.G.L. c. 131, §40 to include "any dune...bordering on the ocean..." 310 CMR 10.02(1)(a). According to the regulations, "[b]ordering means touching," and an area listed in 310 CMR 10.02(1)(a) "is bordering on a water body...if some portion of the area is touching the water body or if some portion of the area

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Regulations.

<sup>7</sup>/ See Affidavit of James Mahala sworn-to March 16, 1999 at 2, para. 5; Affidavit of Lester B. Smith sworn-to December 19, 1997, at 5.

is touching another area listed in 310 CMR 10.02(1)(a) some portion of which is in turn touching the water body." 310 CMR 10.04 [definition of "bordering"].

2.

If the dune in question were immediately landward of the coastal beach it would be, without question, an area subject to regulation under M.G.L. c. 131, §40.<sup>8</sup> In that case at least some portion of the dune would be touching another jurisdictional area (coastal beach) that in turn touched the ocean. The superseding order appears to suggest that the Department so found, as it describes the dune as a "continuous windblown ridge of sand which borders on a Coastal Beach and which overlies glacial sediments." There is, however, no factual support for this conclusion in any of the affidavits filed by the parties in support of their respective summary decision motions.

The Department's environmental analyst and coastal geologist does not state that the dune borders on a coastal beach. He describes the dune as having been "formed through aeolian (wind) transport of beach sediments ramping up the face of the coastal bank and being deposited over the property, resulting in the formation of a parabolic dune perpendicular to the wind, whose central zone migrates in the wind's direction--in this case, toward the southeast (away from the ocean and toward Eel Road) but whose arms are fixed by vegetation."<sup>9</sup> He states, however, that the dune "exists as a contiguous landform from the top of the coastal bank landward to a point approximately

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<sup>8</sup>/ The area in question would also be subject to regulation under M.G.L. c. 131, §40 if it bordered on land subject to coastal storm flowage--in other words, if the landward boundary of land subject to coastal storm flowage was not approximately half-way up the coastal bank and extended, instead, over the top of the bank and to the dune's edge.

<sup>9</sup>/ Affidavit of James Mahala, sworn-to March 16, 1999, at 3, para. 8.



300 feet landward of the top of the coastal bank,"<sup>10</sup> rather than from the coastal beach to a point landward of the coastal bank. He states as well that "the Coastal Dune borders on a coastal bank, which in turn borders on a coastal beach, which borders on the ocean," and concludes therefore that "the ridge of sand on the property is a Coastal Dune as defined at 310 CMR 10.28(2)." The conclusion is clearly a legal one--that a dune can be a coastal dune even if it is separated from the ocean by two other types of coastal wetland resource areas.

The intervenors' coastal geologist states, similarly, that "a distinct ridge of windblown sand arcs across the property taking on a parabolic form" that "extends from the coastal bank along Nantucket Sound in a southerly direction and makes a turn toward the west, in the vicinity of the proposed dwelling."<sup>11</sup> He also states that "[t]he Coastal Dune on the property exists as a contiguous landform from the top of the coastal bank landward to a point approximately 300 feet landward of the top of the coastal bank."<sup>12</sup> "Therefore," he concludes, "the Coastal Dune borders on a coastal bank, which in turn borders on a coastal beach, which borders on the ocean."<sup>13</sup> He agrees with the Department's witness, then, that the dune extends landward from the top of the coastal bank rather than from the coastal beach landward, and that, as a matter of regulatory construction, a dune can be a coastal dune even if it is separated from the ocean by two other types of coastal wetland resource areas.

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<sup>10</sup>/ Id., at 4, para. 10 (emphasis added).

<sup>11</sup>/ Affidavit of Stanley M. Humphries, sworn-to March 19, 1999, at 3, para. 13.

<sup>12</sup>/ Id., at para. 15 (emphasis added).

<sup>13</sup>/ Id.

The Frosts' coastal geologist describes the dune similarly as a "landward ridge of sand, which is located approximately 300 feet landward of the top of the coastal bank..."<sup>14</sup>

I find, thus, no genuine dispute as to whether the dune in fact borders on a coastal beach. The parties' respective witnesses, including the Department's, all describe the dune as extending landward from the top of the coastal bank rather than landward from the coastal beach. In addition, the conclusion of the intervenors' and the Department's witnesses that the dune is a coastal dune is based on a legal, rather than a factual, conclusion, which is that a dune separated from the ocean by two different coastal wetland resource areas can still be classified as a coastal dune under the Wetlands Protection Regulations.

3.

I cannot reconcile that legal conclusion with the plain language of the Regulations.

The Regulations are quite unambiguous about what it takes for a dune to border on the ocean and qualify as an area subject to protection under M.G.L. c. 131, §40. Per the definition of "bordering" provided at 310 CMR 10.04, the dune must be either "touching" the ocean or "touching another area listed in 310 CMR 10.02(1)(a) some portion of which is in turn touching" the ocean. Without question "another area" means one of the areas listed at 310 CMR 10.02(1)(a) and not "one or more" of them, since the usual and ordinary meaning of "another" (a word that the Regulations do not define) is "one more" or "an additional one." The American Heritage Dictionary, 2nd College

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<sup>14</sup>/ Affidavit of Lester B. Smith, Jr., sworn-to December 19, 1997, at 5, para. 3 (emphasis added). Smith also opines that in view of its geomorphology and its location well outside the flood plain, the dune "provides no net contribution of sediment to coastal beaches" and "plays no role in coastal processes," id., and that in view of its distance from the coastal bank face and its elevation approximately 16 feet above the 100-year flood level, the dune "does not confine the 100-year flood level and is not a vertical buffer to storm waters," id., at 4, para. 2.a.

Ed. (Houghton Mifflin Co., New York, 1991). See, as to according undefined words in regulations their usual and ordinary language, Matter of Quarry Hills Associates, Inc., Docket Nos. 97-110, 970-128, Final Decision at 13, 5 DEPR 33, 36 (March 11, 1998), citing Warcewicz v. Department of Environmental Protection, 410 Mass. 548, 574 N.E.2d 364, 365-66 (1991).

Only one of the areas listed in 310 CMR 10.02(1)(a) can separate the dune from the ocean, therefore. The dune in question is, however, separated from the ocean by two such areas--a beach bordering on the ocean (a coastal beach) and a bank bordering on the ocean (a coastal bank). For that reason the dune is not an area subject to protection under M.G.L. c. 131, §40, even though it meets the definitional criteria for a coastal dune recited at 310 CMR 10.28(2).

#### Disposition

I conclude that the dune on the Frosts' property is not a coastal dune. The Frosts' motion for summary decision on this issue in their favor is, thus, granted, and the motions of the Department and the intervenors for summary decision of this issue in their favor are denied.

The superseding order allowed the proposed elevated walkway over the dune and the removable stairway on the coastal bank (both subject to conditions). That portion of the superseding order stands. As I have concluded that the dune is not a coastal dune, however, there is no longer any jurisdictional basis, under M.G.L. c. 131, §40, for denying the proposed roadway, dwelling and subsurface sewage disposal system based upon their location in a coastal dune and its buffer zone or their failure to meet performance standards for work in a coastal dune. That denial is excised, therefore, from the final order of conditions issued with this decision, which regulates only the

project components that will be built on the coastal bank and coastal beach (the removable stairway and the elevated walkway).

Notice of Reconsideration and Appeal Rights

The parties to this proceeding are hereby notified of their right to file a Motion for Reconsideration of this Decision, pursuant to 310 CMR 1.01(14)(d) (1995 rev.). The motion must be filed with the Administrative Law Judge, and served on all parties, within seven business days of the postmark date of this Decision.

The parties to this proceeding are hereby notified further that any party may appeal this Decision to the Superior Court pursuant to the Massachusetts Administrative Procedure Act, M.G.L. c. 30A, §14(1). The complaint must be filed in the Court within thirty days of receipt of this Decision.

A handwritten signature in dark ink, appearing to read 'Mark L. Silverstein', is written over a horizontal line.

Mark L. Silverstein  
Administrative Law Judge

I adopt this Decision as my Final Decision.

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Lauren A. Liss  
Commissioner

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