



**TOWN OF KILL DEVIL HILLS**  
*Land Where Flight Began*

MEMORANDUM

December 10, 2018

TO: Mayor and Board of Commissioners  
FROM: Casey C. Varnell, Town Attorney  
REF: Town Attorney's Agenda

**1. Request for removal of property from Municipal Service District (Attached TA-1)**

At the October 8, 2018 meeting of the Board of Commissioners, Randy Appleton, owner of 2024 North Virginia Dare Trail submitted a written request to have his property removed from the beach nourishment Municipal Service District. The Town Attorney was asked to research this matter and to report to the Board. The report is attached and the Town Attorney will be available to address this matter at the December 10<sup>th</sup> meeting. Mr. Appleton is aware this item is included on this meeting's agenda.

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December 4, 2018

**OPINION OF COUNSEL**

TO: Deborah Diaz, Town Manager for  
Kill Devil Hills, North Carolina

FROM: Casey C. Varnell, Town Attorney for  
Kill Devil Hills, North Carolina

**RE: REQUEST FOR REMOVAL OF PROPERTY FROM MSD/2024 N. VA. DARE  
TRAIL, KILL DEVIL HILLS, NC**

Mrs. Diaz:

I have been requested to provide a legal opinion and response regarding Mr. Appleton's attached request that his property located at 2024 N. Va. Dare Trail, Kill Devil Hills, North Carolina (hereinafter "Property") be removed from the Kill Devil Hills Municipal Service District (hereinafter "MSD") that was duly formed by the Town for the purpose of beach erosion control and flood and hurricane protective works.

From a procedural standpoint, this request is governed by N.C.G.S. 160A-538.1 which is entitled Reduction of Service Districts. Under this statute, any decision made on this request will have to be by way of public hearing in which the Kill Devil Hills Board of Commissioners holds vote on whether the subject parcel should be removed from the MSD. The notice of the hearing shall state the date, hour and place of the hearing, and its subject, and shall be published at least once not less than one week before the date of the hearing. In the event a majority of the Board affirmatively votes to remove the subject parcel from the MSD, the proposed ordinance shall not be finally adopted until it has been passed at two meetings of the Board by majority vote of the voting members present, and no service district shall be reduced except by ordinance. Any such ordinance shall take effect at the end of the fiscal year following passage of the ordinance by the Board.

**ATTACHMENT TA-1**

Regarding legal formality of the subject request, the standard in which the Board must use in making a decision on this request is as follows: "Is the subject parcel in need of the services, facilities, or functions of the district, specifically being beach erosion control and flood and hurricane protection works, to a demonstrably greater extent than the remainder of the Town?". The applicant has asked the Board to consider several items in support of his request. The main assertion of the applicant is that beginning in 1999 and prior to the creation of the MSD, the owners of the Clay Don properties, which include the applicant's Property, performed independent erosion control measure(s) which acted to create a large, vegetated dune on the oceanfront portion of the applicant's Property that extended several hundred yards eastward from its toe. The applicant further states that because of the existence of the aforesaid stable and extended dune line, the subject parcel was and is not in need of the functions of the MSD to a demonstrably greater extent than the remainder of the Town. The applicant provided various pictures, past and present, in an effort to illustrate the foregoing.

In performing my assessment of this request, I found it vital to speak with the engineering firm that was hired to design and oversee the subject beach nourishment project, as the process of beach nourishment is one based in science, to include selection of the project's boundaries. I was interested in why and how the applicant's Property was suggested by the engineering firm for inclusion in the adopted MSD. I am copying the engineer's response directly below:

"The determination of project extent is described in detail in the *Town of Kill Devil Hills Erosion and Shoreline Management Design Report* dated July 2015. Specifically, section 15 discusses the Platform Design, and Section 17.1 summarizes the rationale for project extent as follows:

The storm damage risk assessment suggested that impacts to structures could occur between 189+87 and 299+92, supporting a full design cross-section through this area. (A taper at the north end is not required because the project continues into Kitty Hawk.) Model results for profiles 304+82, 309+71, and 314+88 were inconclusive. Ultimately results were interpreted to align with more conclusive model results exhibited along profiles 299+92 and 320+05. The shoreline retreat rate between 294+96 and 314+88 (from 1996 to July 2012) exceeds 5 feet/year, which is the highest retreat rate along the shoreline evaluated. Given the high retreat rates and inconclusiveness of the model results along that section of shoreline, it is recommended that a complete design section extend from 189+97 to 314+88. The shoreline between 314+88 and 324+97 also exhibited high shoreline retreat rates. It is recommended that fill also be placed within this area. It is appropriate to construct the fill taper through this area given that the net longshore transport is to the south. The subject property (applicant's property) is located between Stations 245+00 and 250+00."

The Town is familiar with the above language, given this report was made part of the materials that the Board assessed when making the decision to include the applicant's Property within the adopted MSD. Based on the response of the engineer, it seems clear that all customary techniques and standards were applied by the engineering firm in

performing their due diligence, with the resulting storm damage risk assessment being vital to the Board's evaluation and adoption of the district boundaries. In fact, any and all advice of the engineering firm, who was the professional entity engaged to direct the Town on matters such as this, was paramount in making any and all determinations as to the designation of the MSD.

In that the independent erosion control measures pronounced by the applicant were performed prior to the engineering study, the engineer's report would indicate that the applicant's property was/is in need of beach nourishment to a demonstrably greater extent than the remainder of the Town regardless of any independent measures taken. Given this, along with the fact that the applicant's Property actually received mechanically-moved sand in the performance of the nourishment project, I would opine that the Town has adequate foundation for its decision to include the applicant's Property within the adopted MSD and that the Town is not legally obligated to grant the applicant's request for removal.

Please let me know if you have any questions regarding this opinion.

Sincerely,



Casey C. Varnell  
Town Attorney

cc: Debora P. Diaz, Town Manager