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August 9, 2016

Diane Ifkovic  
National Flood Insurance Program Coordinator  
Connecticut Department of Energy &  
Environmental Preservation  
79 Elm Street  
Hartford, CT 06106-5127

Dana Conover  
Public Assistance Coordinator  
Connecticut Department of Emergency  
Services & Public Protection  
25 Sigourney Street  
Hartford, CT 06106-5042

Re: *FEMA-4087-DR – Town of Fairfield – PA-ID 001-26620-00 – Project Worksheet 680 –  
Restoration of Penfield Pavilion – Potential Violation of the Minimum Requirements of  
the National Flood Insurance Program and Failure to Comply with the Terms and  
Conditions of the Public Assistance Project Award*

Dear Ms. Ifkovic and Mr. Conover:

The purpose of this letter is to respond to your letter of June 1, 2016, in which you requested technical assistance in reviewing whether the scope of work being pursued by the Town of Fairfield to restore the Penfield Pavilion complied with the minimum requirements of the National Flood Insurance Program (“NFIP”). As detailed below, there is concern that the scope of work being pursued by the Applicant does not appear to comply with the minimum requirements of the NFIP. There is also concern that the current design, for which the Applicant has already commenced construction, represents an unauthorized change in the scope of work for Project Worksheet 680 under the Public Assistance grant for major disaster FEMA-4087-DR and a violation of other material terms and conditions of the award. In light of these concerns, FEMA Region I is placing a financial hold on this project and will soon issue a request for information to support a formal determination under the Public Assistance grant and to guide any necessary enforcement and corrective actions under the NFIP. This letter does not comprise any final agency decision or determination.

## I. BACKGROUND

### A. Minimum Requirements of the National Flood Insurance Program

The National Flood Insurance Act of 1968 authorizes FEMA to offer flood insurance only in areas where an appropriate public body adopts and enforces floodplain management regulations that meet the minimum criteria established by FEMA in 44 C.F.R. pt. 60.<sup>1</sup> The definition of a “community” under the NFIP regulations at 44 C.F.R. § 59.1 is any “state or area or political subdivision thereof or any Indian tribe or authorized tribal organization, or Alaska Native Village

<sup>1</sup> National Flood Insurance Act of 1968, Pub. L. No. 90-448, § 1315 (1968) (codified as amended at 42 U.S.C. § 4022) (“National Flood Insurance Act”).

or authorized native organization, which has the authority to adopt and enforce floodplain management ordinances for the area under its jurisdiction.” A community such as the Town of Fairfield, accordingly, is the basic unit of participation in the NFIP.

FEMA identifies and publishes information on floodplain areas nationwide which have special flood hazards, establishes flood-risk zone data in such areas, and periodically updates flood hazard data in support of the NFIP.<sup>2</sup> Participating communities must base their floodplain management regulations on the data provided by FEMA, and FEMA must follow certain procedures in establishing projected flood elevations and designating areas of special flood hazard areas that participating communities must adopt.<sup>3</sup> FEMA provides this flood hazard data to a community in the form of a Flood Insurance Rate Map (“FIRM”) and Flood Insurance Study (“FIS”) report.

Protecting buildings that are constructed in special flood hazard areas (“SFHAs”) from damage caused by flooding is an important objective of the NFIP.<sup>4</sup> In support of this objective, the NFIP regulation at 44 C.F.R. § 60.3 includes minimum building design criteria that apply to new construction, repair of substantially damaged buildings, and substantial improvement of existing buildings in SFHAs. The requirements under this regulation are different depending on whether FEMA has provided base flood elevations for various types of flood zones in the community, designated the regulatory floodway on the FIRM, and identified the coastal high hazard areas on the FIRM. As it relates to the Town of Fairfield, FEMA has issued a FIRM and FIS with the data triggering the requirement for the Applicant to meet, among other things, the regulation at 44 C.F.R. § 60.3(e).

There are several requirements of 44 C.F.R. § 60.3(e) that are particularly relevant to the Applicant’s project to restore the Penfield Pavilion. First, 44 C.F.R. § 60.3(e)(4) requires that all new construction and substantial improvements in V, V1-30, and VE zones must be elevated to or above the base flood elevation (“BF E”) on pilings and columns so that the bottom of the lowest horizontal structural member of the lowest floor (excluding the pilings and columns) is elevated to or above the base flood level. Second, 44 C.F.R. § 60.3(e)(5) requires that the area beneath these elevated new or substantially improved structures remain free of any obstructions or are constructed with nonsupporting breakaway walls, open wood lattice work, or insect screening intended to collapse under wind and water loads without causing collapse, displacement, or other structural damage to the elevated portion of the building or supporting foundation system. Third, 44 C.F.R. § 60.3(e)(6) prohibits the use of fill for structural support of buildings within the V, V1-30, and VE Zones.

The Applicant is a participating community in the NFIP and has adopted floodplain management regulations that meet the minimum requirements of 44 C.F.R. pt. 60 in its Zoning Regulations.<sup>5</sup> These Zoning Regulations require that buildings and structures in flood prone areas as delineated on a FIRM “shall conform” to the standards set forth in Section 32 (entitled “Flood Protection”) and incorporate the requirements of 44 C.F.R. § 60.3(e)(4), (5), and (6) at Section 32.5.c and d.

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<sup>2</sup> *Id.* § 1360 (codified as amended at 42 U.S.C. § 4101).

<sup>3</sup> *Id.* § 1363 (codified as amended at 42 U.S.C. § 4104).

<sup>4</sup> A SFHA is the land in the floodplain within a community that is subject to a 1 percent or greater chance of flooding in any given year. 44 C.F.R. § 59.1.

<sup>5</sup> Town of Fairfield, *Zoning Regulations* (undated) (accessed at [http://www.fairfieldct.org/filestorage/10726/11028/12429/12431/Zoning\\_Regulations.pdf](http://www.fairfieldct.org/filestorage/10726/11028/12429/12431/Zoning_Regulations.pdf))

## B. Public Assistance Project for the Restoration of the Penfield Pavilion

The Penfield Pavilion, owned and operated by the Applicant, was a 16,756 square foot single story, wood/steel frame structure that consisted of an east, central, and west wings. Hurricane Sandy damaged the Penfield Pavilion from October 29 to November 9, 2012, and the Applicant applied through the Connecticut Department of Emergency Services and Public Protection ("Grantee") under the Public Assistance grant for major disaster declaration FEMA-4087-DR for financial assistance to restore this damage. Upon receiving the request, FEMA prepared Project Worksheet ("PW") 680 to set forth the disaster damage, scope of work to restore that damage, and estimated cost for that work. The scope of work for the project was the full replacement of the Penfield Pavilion, and FEMA approved PW 680 on December 17, 2015 with total estimated, eligible costs of \$4,340,054.11.<sup>6</sup>

When making the award, FEMA made clear in the text of PW 680 that the Applicant must, upon completion, return the facility to "its original design, function, and capacity within the original footprint, meeting all appropriate Codes and Standards." There are two such codes and standards currently at issue that are later discussed in this letter, although there very well may be others implicated. The first is the requirement for the Applicant to comply with Section 32 of the Fairfield Zoning Regulations, which incorporate the requirements of 44 C.F.R. § 60.3. The second is the regulation at 44 C.F.R. § 9.11(d)(6), which provides that "no action may be taken if it is inconsistent with the criteria of the National Flood Insurance Program (49 CFR part 59 *et seq.*) or any more restrictive Federal, State, or local floodplain management standards."<sup>7</sup>

FEMA also made clear in PW 680 that the "current scope of work is...replacement" and that, if the Applicant "wishes to alter the approved scope of work, [it] must formally request approval for such changes to the approved scope of work from FEMA, thru the Grantee, prior to beginning construction."<sup>8</sup> The scope of work also specifically provided that the new foundation system of the new pavilion will be raised so that the new finish floor elevation "would be 15.5 +/- minimum based on a BFE of 13...." The Applicant, in completing the project, was also required to "comply with all applicable laws and regulations...", a requirement set forth in the FEMA-State Agreement between FEMA and Connecticut that flows down to the Applicant.<sup>9</sup>

## II. DISCUSSION

You transmitted a joint letter dated June 1, 2016, to the Regional Office concerning the Public Assistance project for the Penfield Pavilion.<sup>10</sup> In the letter, you explained that the Applicant decided to repair the Penfield Pavilion instead of replacing it, commencing construction on February 29, 2016, without an official change to the original scope of work for PW 680. You also expressed concern that the revised scope of work did not comply with the minimum

<sup>6</sup> The total estimated cost to replace the facility was \$6,583,222 and, following reductions of \$2,250,000 for actual insurance proceeds and the mandatory insurance reduction under Section 406 of the Stafford Act, resulted in total estimated, eligible cost of \$4,340,054.11.

<sup>7</sup> FEMA's regulations at 44 C.F.R. pt. 9 set forth the policy, procedure and responsibilities to implement and enforce Executive Order 11988, *Floodplain Management* and Executive 11990, *Protection of Wetlands*.

<sup>8</sup> See also FEMA 322, *Public Assistance Guide*, pp. 110-111 (June 2007).

<sup>9</sup> FEMA-State Agreement, Exhibit C, Article III (executed on Oct. 31, 2012).

<sup>10</sup> Letter to Richard Nicklas, Floodplain Management and Insurance Branch Chief, FEMA Region I from Dana Conover, Public Assistance Coordinator, CTDESPP/DEMHS and Diane Ifkovic, State NFIP Coordinator, CTDEEP re: *NFIP Technical Review Request – Penfield Pavilion, 323 Fairfield Beach Road, Fairfield, Connecticut* (June 1, 2016).

requirements of the NFIP, but stated that the Applicant asserts that the building construction plans “are compliant with NFIP requirements” and that the design engineer for the project “stated that it was his professional opinion that the designs were entirely compliant with all NFIP requirements.” Because of the disagreement, you requested that FEMA review the design plans for NFIP compliance “in order that the PA SOW be re-written accurately so that there are no reimbursement issues upon project completion.” You stated that the goal of this review is “assure all parties of the compliance with the NFIP regulations and to avoid any potential eligibility and reimbursement concerns upon completion of the PA project.” Your letter included the current design plans for the Penfield Pavilion.

**A. The Design Plans May Fail to Meet the Requirements of 44 C.F.R. § 60.3**

The FIRM in effect at the time that FEMA awarded PW 680 establishes that the Penfield Pavilion is in the VE Zone.<sup>11</sup> This means that the requirements of 44 C.F.R. § 60.3 apply not only as a federal standard pursuant to 44 C.F.R. § 9.11(d)(6), but also as a local standard pursuant to the Fairfield Zoning Regulations. Upon review of the design documents that you provided, there is concern that the current design of the Penfield Pavilion may not meet the requirements of 44 C.F.R. § 60.3 as briefly summarized below.

***Fill Used for Structural Support.*** The regulation at 44 C.F.R. § 60.3(e)(6) prohibits the “use of fill for structural support of buildings within Zones...VE...on the community’s FIRM.” It is the case that, as described in Technical Bulletin 5, the placement of “minor quantities” of nonstructural fill in a VE Zone may be used for landscaping, drainage under and around buildings, and support of parking slabs, pool decks, patios, walkways, and similar site elements.<sup>12</sup> Such nonstructural fill must not prevent the free passage of floodwaters and waves beneath elevated buildings.<sup>13</sup> Technical Bulletin 5 says that it is generally the case that the addition of 1 to 2 feet of site-compatible, nonstructural fill in a V zone would not lead to adverse effects on buildings, but that amounts over 2 feet should involve the comparison of the proposed final grade to local topography. Here, the design plans show that between 4 and 5 feet of fill will be placed under and around the structure to support grade beams as part of the foundation system, and it is unclear whether such fill constitutes a prohibited use of fill for structural support. The design plans also show that other aspects of the building, such as staircases, could be also be supported by fill.

***Presence of Obstructions.*** The regulation at 44 C.F.R. § 60.3(e)(5) provides that all new and substantially improved structures within the VE Zone must have the space below the lowest floor either free of obstruction or constructed with non-supporting breakaway walls, open wood lattice-work, or insect screening intended to collapse under wind and water loads without causing collapse, displacement, or other structural damage to the elevated portion of the building or supporting foundation system. This regulation applied to the original FEMA-eligible scope of work, as it called for the Applicant to perform “new construction” of a brand-new pavilion. But the Applicant has instead elected to pursue a repair of the pavilion instead of a replacement,

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<sup>11</sup> Flood Insurance Rate Map Panel No. 09001C0438G (effective date of July 8, 2013).

<sup>12</sup> FEMA Technical Bulletin 5, *Free-of-Obstruction Requirements for Buildings Located in Coastal High Hazard Areas in Accordance with the National Flood Insurance Program*, pp. 21-22 (Aug. 2008).

<sup>13</sup> *Id.* at 11.

which raises the question of whether the scope of work comprises a “substantial improvement” so as to trigger the requirements of the regulation.

Our preliminary information indicates that the repair work comprises a substantial improvement. The regulation at 44 C.F.R. § 59.1 defines “substantial improvement” as “any reconstruction, rehabilitation, addition, or other improvement of a structure, the cost of which equals or exceeds 50 percent of the market value of the structure before the ‘start of construction’ of the improvement. ...” FEMA’s original estimate to repair the pavilion as detailed in Part A of the Cost Estimating Format was \$2,090,442.85 (which excluded costs of contingencies and other factors) and the most recent appraised value of the pavilion in 2015 was \$1,781,900.<sup>14</sup> This means that the cost to repair the pavilion appears to be well beyond 50% of the market value of the structure.

Under the assumption that this is a substantial improvement, there is concern that the Applicant is placing obstructions below the base flood elevation. The design plans show that there could be a number items below the base flood elevation that comprise obstructions, such as the fill mentioned in the previous section and concrete stairs filled with crushed stone.

***Lowest Structural Element Below the Base Flood Elevation.*** The regulation at 44 C.F.R. § 60.3(e)(4) requires that all substantial improvements in V, V1-30, and VE zones must be elevated to or above the BFE on pilings and columns so that the bottom of the lowest horizontal structural member of the lowest floor (excluding the pilings and columns) is elevated to or above the base flood level. Technical Bulletin 5 clarifies that grade beams used to tie together foundation piles or columns to provide additional lateral support are not considered obstructions is placed with their upper surfaces flush with or below the natural grade.<sup>15</sup> The design plans show that the Applicant will be using horizontal grade beams below the BFE for the repaired pavilion, and it is unclear from the available information whether these beams are flush with the natural grade (which is not prohibited) or whether they are flush with additional fill that was placed on top of the natural grade (which is prohibited).

**B. The Applicant and Grantee May Have Violated the Terms and Conditions of the Public Assistance Project Award**

The Applicant has already commenced the repair of the Penfield Pavilion instead of constructing a replacement building on the same footprint as the original building. In addition, the design plans indicate that the elevation of the lowest floor of the repaired Pavilion will only be 14.5 feet and not the 15.5 feet set forth in PW 680. These are material changes to the approved scope of work for PW 680 and for which the Applicant did not obtain prior Grantee and FEMA approval as expressly required by PW 680. There is concern, accordingly, that the Applicant and Grantee have committed a material violation of the terms and conditions of the award.

There are also other potential violations of the terms and conditions of the project award. First, as detailed above, there is concern that the Applicant has commenced construction for a building with a design that does not meet the requirements of 44 C.F.R. § 60.3, which would violate both 44 C.F.R. § 9.11(d)(6) and the Fairfield Zoning Regulations. Second, it is unclear whether the

<sup>14</sup> See Town of Fairfield, *Assessment of 323 Fairfield Beach Road* (available at <http://gis.vgsi.com/fairfieldct/Parcel.aspx?Pid=11502>) (last visited Aug. 8, 2016).

<sup>15</sup> FEMA Technical Bulletin 5, *supra* note 12, p. 13.

current design falls outside the scope of FEMA's environmental and historic preservation review for the original FEMA-approved scope of work. For example, it is unclear whether the Applicant obtained a consistency determination under the Coastal Management Act from the Connecticut DEEP pursuant to CGS 22a-100 for the current design in order for FEMA to meet the requirements of the Coastal Zone Management Act ("CZMA").<sup>16</sup> It is also unclear whether the current scope implicates additional consultation requirements under the Endangered Species Act and National Historic Preservation Act.

### III. CONCLUSION

We want to thank you for bringing this matter to our attention. In light of the concerns expressed above, FEMA will be issuing a request for information ("RFI") for this project pursuant to Public Assistance Program procedures to obtain more information before making a formal determination as to whether the current design and construction completed to date violates the requirements of 44 C.F.R. § 60.3, whether the Applicant and Grantee have violated the terms and conditions of the project, and, if so, the appropriate remedy for the noncompliance. In addition to obtaining more information to guide Public Assistance decisions, the information obtained through the RFI process will also be used for NFIP administration purposes. FEMA Region I staff may also need to perform a detailed site visit of the Penfield Pavilion to view the current construction completed to date.

This letter does not comprise a final agency decision or determination. That being said, in view of the potential for disallowance for all costs for this project, FEMA Region I is placing a financial hold on PW 680, such that the Grantee is prohibited from drawing down any funding for the project. The Grantee and Applicant should also carefully consider whether the Applicant should continue performing its construction of the pavilion, as such work could compromise future eligibility.

Sincerely,



Robert Grimley  
Disaster Recovery Manager  
FEMA Region I

RICHARD C  
NICKLAS

Richard Nicklas  
Branch Chief  
Floodplain Management and Insurance  
FEMA Region I

Digitally signed by RICHARD C NICKLAS  
DN: cn=US, o=U.S. Government, ou=Department  
of Homeland Security, ou=FEMA, ou=People,  
cn=RICHARD C NICKLAS,  
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<sup>16</sup> Section 307 of the CZMA and the implementing regulations at 15 C.F.R. pt. 930, subpart F require any applicant for federal financial assistance to obtain a determination from the designated state agency that the scope of work for which the applicant will apply the financial assistance is consistent with a state's coastal management program. This must occur *before* the federal agency may provide assistance.