

BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE

IN THE MATTER OF)
)
WILLOW CREEK) Appeal No. 93-11
)
HOMEOWNERS' ASSOCIATION)

FINAL ORDER

This decision follows the August 24, 1993 hearing on an appeal from Secretary's Order No. 93-0094 and Subaqueous Lands Permit No. SP-0512/93 ("Permit"). The Board members present were Thomas J. Kealy, Chairman, Clifton H. Hubbard, Jr., Ray K. Woodward and Richard C. Sames. Steven C. Blackmore, Deputy Attorney General, represented the Board. The Permit authorized Robert Larson ("Permittee") to install a boat ramp and two courtesy piers in an area of Sussex County near Lewes along the Old Mill Creek called the Great Marsh. The Permittee has leased his lands to the Great Marsh Sportsmans Club (the "Club") which will be using the ramp and piers. The Permittee was represented by Robert V. Witsil, Jr., Esquire. The Secretary of the Department of Natural Resources and Environmental Control ("DNREC") was represented by David L. Ormond, Deputy Attorney General. Scott Peterson, President of Willow Creek Homeowners Association, represented himself and the Association.

The Board will remand this appeal to DNREC with instructions.

SUMMARY OF THE EVIDENCE

Mr. Peterson objected to the size of the permitted boat ramp

and courtesy piers.¹ Mr. Peterson does not object to a continuation of the Club's present use, which primarily involves boats being pulled in and out of the Great Marsh for duck hunting purposes. The Great Marsh is an undeveloped wetlands area in Sussex County. Mr. Peterson does object to the size of the proposed ramp and piers which would provide access to bigger boats than the boats presently owned by the Club, which do not exceed 16 feet in length. The proposed piers would allow docking of larger boats. Mr. Peterson is concerned that Permittee's land will be subdivided or otherwise developed, and the ramp and Great Marsh will be over-utilized.

The parties presented their case through witnesses, photographic evidence and diagrams of the area at issue. The Club presently consists of eight members who own four boats. It leases approximately 132 acres and it has the option to buy this parcel. The Permittee is the present owner of the parcel. He originally sought a 16 foot wide boat ramp but DNREC only authorized a 10 foot wide boat ramp in the Permit. The boat ramp will extend to the low water mark. Clam shell fill will be added since the area at issue is extremely muddy. (See photo exhibits). Mr. Peterson presented his testimony and the testimony of Joel

¹Initially, Mr. Peterson asked for a continuance so that he would have more time to prepare for the hearing. The Board denied his request. Mr. Peterson and the other parties had sufficient time to prepare for the hearing having been notified of the date of the hearing by letter dated July 12, 1993. While counsel for the Board held the pre-hearing conference closer to the hearing than usual, on August 11, 1993, this schedule was due to the desire to meet at the parties' convenience and the failure of Mr. Peterson to include a telephone number where the Board could easily contact him.

LoBiando, the developer who developed Willow Creek. The Board will not be sympathetic to a developer who wants to eliminate other developments, but Mr. LoBiando correctly stated that the construction of the docks/piers may encourage other land owners to request docks/piers and encourage boating and activities potentially harmful to the Great Marsh.

FINDINGS OF FACT

1. The Great Marsh is an undeveloped area in which environmental harm and development should be limited. Preservation and conservation in the Great Marsh should be encouraged.
2. The granting of ramp and dock permits may encourage other applications and corresponding development and use.
3. The Permitted boat piers may be used for mooring and docking of boats by Club members and may attract other users.
4. The Club presently uses the same boat launch area, but it has to launch its boats by wading through the mud and water. While the courtesy piers/docks will make boat launching much easier, and keep the boaters dry, two courtesy piers/docks are not a necessity since the Club has been successfully launching boats without them to date.

CONCLUSIONS OF LAW

DNREC contended that it evaluated the environmental impact of the application and issued a permit in compliance with applicable statutes and the subaqueous land regulations. DNREC reduced the requested width of the ramp to 10' to reduce the environmental impact of boats and to respond to appellant's

concerns. DNREC applies a less restrictive standard to applications for permits on private subaqueous lands. DNREC seeks to issue a permit containing reasonable restrictions when private lands are involved. DNREC and the Permittee cited the environmental benefit of the ramp, such as reduced turbidity, erosion and ruts in the muddy bottom. A boat ramp is a better alternative from an environmental perspective than the present system of dragging boats through the mud to and in the Great Marsh. In short, DNREC conducts a balancing test when it reviews a subaqueous land permit application.

The Board is conscious of DNREC's desire to avoid harming private property interests. Regardless, the Board believes that more scrutiny is necessary here since the Great Marsh is an environmentally sensitive wetlands area which has not been commercially developed. The Board would like to see more restrictions to prevent potential future expansion into this pristine area. While present members of the Club testified sincerely to their desire to continue the existing uses, and not to expand and harm the Great Marsh, the Board notes that future expansion in the size and number of boats and users has not been positively restricted. More importantly, the Board is concerned about the message this Permit sends, since it authorizes the courtesy piers. The boat ramp is environmentally beneficial but the two 16 foot long piers/docks are not. These piers make it easier to place larger boats in and out of the water and they may be used as docks. The evidence did not reveal whether DNREC considered placing a restriction in the Permit prohibiting the

Club from using any boats larger than their existing boats, or limiting the number of boats which may use the ramp and piers or deleting or altering the piers/docks. These docks may act as attractive nuisances and encourage boaters to use them since there are not many boat ramps or docks nearby. The Board is also concerned that the Permit would encourage other private landowners to request ramps and docks and increase boating or potentially harmful environmental activity in the Great Marsh.

DNREC indicated that it had the right to impose greater restrictions on this Permit in the future if problems develop, after a hearing. However, the Board would like to see these issues addressed in the initial Permit rather than at a later date. Perhaps the parties can reach an agreement on remand by amending the Permit to limit the size or number of boats or limit future expansion or use.² Under 7 Del. C. §6001 the land, water and air resources of the State are to be protected and managed to provide the maximum contribution to the interests of the people of Delaware. One of DNREC's responsibilities is to direct "the protection and conservation of the land, water, underwater and air resources of the State, for public recreational purposes, and for the conservation of wildlife and aquatic life." 7 Del. C. §6001(c)(3). "This chapter...shall be liberally construed in order to preserve the land, air and water resources of the State." 7 Del. C. §6020. The Board recognizes that DNREC must

²The parties are presently litigating the right of access to this parcel in Chancery Court. This issue is not before the Board and the Board defers to local municipalities on land use and planning issues.

weigh competing interests in permit decisions. The Board has no objection to a ramp which would reduce turbidity and harmful environmental aspects while continuing the present recreational use. However, the Board does not believe that the installation of two courtesy piers, each 6' wide and 16' long, for private use, survives this balancing test.

CONCLUSION

By unanimous decision, the Board remands this proceeding to the Secretary for a reconsideration of the two courtesy piers in light of the reasoning behind this opinion.

Thomas J. Kealy

Ray K. Woodward 10/24/93
Ray K. Woodward

Clifton H. Hubbard Jr. 10/24/93
Clifton H. Hubbard, Jr.

Richard C. Sames

DATE: October _____, 1993

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FINAL ORDER

A hearing on this appeal was held on August 24, 1993 by a Panel of four Board members. After this hearing, but before a decision had been drafted, approved and released, new members were added to the Board and old members replaced. The new members were confirmed by the Senate on September 21, 1993. Therefore, since the Board panel which heard this appeal no longer constitutes a quorum of the Board, the present Board reviewed and considered at its October 26, 1993 meeting the Final Order prepared by the prior Panel.

Upon review of the Panel's Final Order and any other items from the record deemed necessary, the Board adopts the attached Final Order and incorporates it by reference herein. The following Board members concur in this decision.

Clifton H. Hubbard, Jr. 10/29/93
Clifton H. Hubbard, Jr.,
Chairman

Ray K. Woodward 10/26/93
Ray K. Woodward

Joan Donoho
Joan Donoho

Charles E. Morris 10/26/93
Charles Morris

Diana Jones
Diana Jones

Robert S. Ehrlich 10/26/93
Robert S. Ehrlich

Robert I. Samuel
Robert I. Samuel

DATED: October 26, 1993

