

BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE

IN THE MATTER OF:)

MR. & MRS. STEVEN J. COLLAZUOL)

) Appeal No. 93-15
)
)
)

FINAL ORDER

The Environmental Appeals Board ("Board") held a hearing on this appeal on December 14, 1993. The Board members present were Clifton H. Hubbard, Jr., Chairman, Joan Donoho, Charles Morris, Robert I. Samuel and Ray K. Woodward. Steven C. Blackmore, Deputy Attorney General, advised the Board. Mr. and Mrs. Steven J. Collazuol were represented by John A. Sergovic, Jr., Esquire. Robert S. Kuehl, Deputy Attorney General, represented the Department of Natural Resources and Environmental Control ("DNREC"). For the reasons that follow, the Board affirms the decision of DNREC.

SUMMARY OF THE EVIDENCE

The Collazuols desire to moor a boat in White's Creek adjacent to their home in the development known as The Cottages at White's Creek. By letter dated May 29, 1993 (Chronology #3), Mr. Collazuol notified DNREC of their claim to an entitlement to moor their boat under §1.09 (actually 1.08) of DNREC's Regulations Governing the Use of Subaqueous Lands ("Regulations"). DNREC responded by letter dated July 9, 1993 (Chronology #2) and denied this claimed exemption by reference to §1.08A of the Regulations. DNREC refused to interpret the Regulations to authorize the mooring which the Collazuols

desired. Mr. Collazuol argued that this mooring satisfied the Regulations and it did not pose a navigational hazard.

The Collazuols and the developer of the Cottages at White's Creek ("Gulfstream") disputed whether dock availability had been promised to induce their purchase. DNREC has entered into an agreement with Gulfstream to authorize installation of a small marina which would be available to certain landowners including the Collazuols. However, the Collazuols refused to accept the conditions which Gulfstream placed on use of this marina. Thus, the Collazuols appealed to this Board to authorize the mooring exemption under §1.08A.

FINDINGS OF FACT

1. When Gulfstream, in its compromise with DNREC, agreed to provide a small community marina it reserved a slip for the Collazuols. However, the Collazuols refused to agree to terms imposed by Gulfstream (from DNREC), which included a release of their associated riparian right to install a walkway and dock. See DNREC Exhibit Nos. 1, 4. This centralized marina was intended to provide access to the water and boating for riparian landowners, while minimizing the environmental impact which separate docks and walkways would cause.

2. The Collazuols' proposed mooring would involve two anchors holding the boat in place with rope. Their boat was approximately 17 feet long and six feet wide. Each rope would not exceed 24 feet in length (Collazuol Exhibit 4). The proposed mooring would be parallel to the shore line and outside of the

navigational channel, which flows around a nearby island.

3. The width of White's Creek in the area of the Collazuols' residence is approximately 200 feet, but approximately 90 feet wide between mean low water marks. The channel is approximately 40 feet wide. Id.

4. Mr. Collazuol's proposed mooring, if securely anchored as represented outside of the channel, would not pose a hazard to navigation. Collazuol Ex. No. 4.

5. At present, the Collazuols do not have a footbridge or dock to use to reach their boat. They are litigating their right to a footbridge. To access the boat now, Mr. Collazuol has to walk through the grass, mud or water. He has placed wooden planks in the wetlands to make a walkway. DNREC Ex. No. 5.

6. The Collazuols purchased their property with the understanding that they were entitled to a dock outside of their residence. They objected to Gulfstream's marina since it was three or four houses away. Also, Mr. Collazuol questioned whether the community marina would be secured and maintained.

7. Gulfstream did not try to involve the Collazuols in the design of its marina since the Collazuols had decided to pursue their own claims and had rejected the slip which Gulfstream had originally offered. The president of Gulfstream testified that DNREC had not denied permits for individual docks in the past, but that DNREC now is less lenient. He learned of DNREC's new position when it denied a permit for a dock for Gulfstream's model home.

8. The marina dock and walkway is owned by the homeowners association. Presently, the only people who have a right to use it are the two property owners who accepted the compromise and exchanged their individual riparian rights for the right to a slip. Since the Collazuols did not accept this compromise, they do not have a right of access to the marina. However, the president of Gulfstream would grant them access if he has the authority and DNREC indicated that it would approve a permit application to provide the Collazuols with a slip at this community marina.

CONCLUSIONS OF LAW

Under Title 7, DNREC is charged with evaluating the environmental impact of subaqueous land permit applications and imposing reasonable limits to protect the public interest. 7 Del. C. §7201 *et seq.* Here, the Collazuols seek an unconditional entitlement to moor their boat under §1.08A of the Regulations. To gain access to this boat, Mr. Collazuol will continue to walk through the wetlands or on wooden planks. DNREC discourages such action; it has a visible environmental effect. DNREC Ex. No. 5.

The subaqueous lands permit requirement was not intended to alter the law governing riparian rights. 7 Del. C. §7213. Riparian rights are possessed by owners of real estate adjacent to bodies of navigable water. Title to such lands generally extends to the low water mark. However, this ownership interest is subject to the reasonable right of the public to use the water body. See Wilmington v. Parcel of Land, Del. Supr., 607 A.2d

1163, 1168 (1992). DNREC balanced private and public rights here and granted a permit to Gulfstream to construct a centralized marina for the Collazuols and others to minimize the environmental impact which multiple individual docks and moorings would cause. DNREC's compromise was not designed to eliminate all of the Collazuol's riparian rights. Rather, it was an attempt to relocate the Collazuol's dock and walkway rights to the community marina. Mr. Collazuol indicated that unless he had his own dock and walkway, he would need to use the community dock anyway to pick up passengers who did not want to walk through the mud or water. DNREC's compromise is a reasonable accommodation of the public and private interest which does not violate §7213. The State cannot directly take property by eminent domain without paying compensation. However, the State may regulate or restrict private or riparian rights to benefit the public without compensation. Id. The DNREC-Gulfstream compromise provides a reasonable framework to settle the disputes among these parties.

The testimony and correspondence showed that DNREC has historically interpreted the exemption in §1.08A of the Regulations in a narrow fashion since the result is an entitlement with no conditions. The alternative to a §1.08A exemption is a boat docking or mooring permit under §3.03(b) of the Regulations which, if granted, may include conditions applicable to the individual facts and circumstances. A permanent mooring structure may be authorized by permit. Id. In general, DNREC favors permits over exemptions since DNREC may

impose conditions in permits to address specific concerns.

Section 1.08A states:

A. Anchoring

A waterfront property owner, other than one within a development which provides a marina or anchorage for residents' use, may anchor or moor, not more than two (2) personally owned vessels in the waters adjacent to and within the perpendicular seaward extension of the property boundaries of the waterfront property, provided that the preemptive mooring area does not extend more than ten percent of the width of the waterbody at high tide, is not in a navigational channel, and does not pose a navigational hazard.

Under the clear language of this section, Gulfstream has provided a marina for the Collazuols' use. To use it, the Collazuols would have to release their right to a personal dock and walkway, but they would be entitled to the same access to White's Creek through Gulfstream's marina. Thus, since a marina is provided, the Collazuols do not satisfy the exemption in §1.08A.

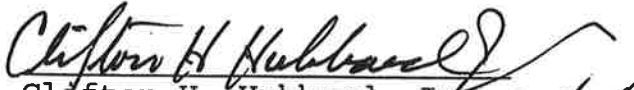
Further, DNREC has historically measured the "preemptive mooring area" from mean high water to the outer edge of the boat and mooring structure. The Board should defer to an administrative agency's reasonable construction of its regulations. See Daniel D. Rappa, Inc. v. Engelhardt, Del. Supr., 256 A.2d 744, 746 (1969). The Collazuols' interpretation of the §1.08A exemption would allow boats and structures under 10% of the width at high tide to be moored anywhere outside of a navigable channel so long as they do not pose a navigational hazard. Boats would not have to be anchored close to shore. In

contrast, §3.03B(5) of the Regulations prohibits permits for moorings which "extend channelward more than 10 percent of the width of the waterbody at that location (from mean low water)." It would not be reasonable to interpret the permit requirement to make it harder to satisfy than the §1.08A exemption.

In appeals to the Board, the appellant has the burden of proof to show that DNREC's decision was not supported by the evidence. 7 Del. C. §6008(b). The Collazuols did not satisfy that burden here.

CONCLUSION

For the foregoing reasons, the Board affirms DNREC's denial of the Collazuols' claim for a mooring exemption.


Clifton H. Hubbard, Jr.
Chairman
2/15/94

Robert I. Samuel

Charles Morris

Joan Donoho

Ray K. Woodward

DATE: February _____, 1994

CONCLUSION

For the foregoing reasons, the Board affirms DNREC's denial of the Collazuols' claim for a mooring exemption.

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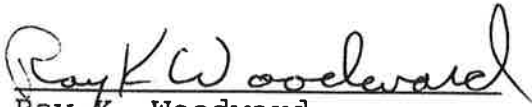
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DATE: February 5, 1994