

BEFORE THE ENVIRONMENTAL APPEALS BOARD

FOR THE STATE OF DELAWARE

THE GLADE L.L.C.,

Appellant,

v

**SECRETARY OF DEPARTMENT OF
NATURAL RESOURCES & ENVIRONMENTAL
CONTROL, STATE OF DELAWARE,**

**Agency-below,
Appellee.**

Appeal No. 97-07

FINAL ORDER AND DECISION

John A. Sergovic, Jr., Esq., of Sergovic, Ellis & Shirey, P.A. 9 North Front Street,
P.O. Box 566 Georgetown, Delaware 19947-0566 Attorney for Appellant The Glade L.L.C.

Kevin P. Maloney, DAG, Department of Justice, State of Delaware, 820 N. French
St., 6th Flr., Wilmington, Delaware 19801 Attorney for the Secretary.

Before Chairman Clifton H. Hubbard, Jr., Diana Jones, Robert S. Ehrlich, and Charles
Morris, comprising a quorum of the Environmental Appeals Board. Joelle P. Hitch, Deputy
Attorney General for the Environmental Appeals Board.

The Environmental Appeals Board (hereinafter the "Board") scheduled a hearing on the above captioned appeal for May 25, 1999. The Appellee, Department of Natural Resources and Environmental Control, (hereinafter "DNREC") filed a Motion to Dismiss the appeal which the Glade L.L. C. (hereinafter "the Glade") opposed. The Appellee also filed a Motion in Limine to exclude certain evidence from the hearing, which the Glade also opposed. Both parties were given the opportunity to brief both the Motion to Dismiss and the Motion in Limine for the Board. The Board met on May 25, 1999, to consider the motions and responses and to hear oral argument from both parties through counsel. The following is the Order of the Environmental Appeals Board.

STATEMENT OF THE CASE

On or about May 20, 1996, the Glade entered into a contract with Mark L. and JoAnne G. Woodruff (hereinafter the "Woodruffs") for the sale of Lot 68 at the Holland-Glade Subdivision. (See Appellant Motion Exhibit "A") The contract was contingent upon the securing of a permit by the Glade for a dock and pier for Lot 68. The Woodruff/Glade application for a Subaqueous Lands permit (SP-1709/96) and Wetlands permit (WE-1809/96) was subsequently filed with DNREC on or about August 14, 1996. (See Chronology Exhibit 7)

By letters and memoranda to the Woodruffs and the Glade dated July 3, 1997, the Department denied the application citing the results of the cumulative impact analysis and the cumulative impact matrix scores for all of the Glade applicants. (See Chronology Exhibits 5 and 6) On or about July 29, 1997, the denial of the application for the Subaqueous Lands Permit and Wetlands Permit was appealed to this Board by letter from Mr. Sergovic dated July 25, 1997. (See Chronology Exhibit 4)

A hearing was scheduled on January 27, 1998, to hear the appeal of the permit denial in

addition to several other applications which were likewise denied. The hearing was continued until an indefinite date at the request of the parties due to a proposed settlement. On October 29, 1998, the settlement negotiations fell through due to DNREC's position that the inclusion of Mr. Sypek, owner of Lot 69 and not an original applicant or appellant, was impermissible. By letter dated February 23, 1999, to the former Deputy Attorney General for the Board, the Glade requested a hearing be scheduled before the Board to resolve this appeal. The matter was thereafter scheduled for this hearing on May 25, 1999, at which time DNREC's Motions to Dismiss and in Limine were heard through briefing and oral argument by the parties.

The Motion to Dismiss filed by DNREC asserts the Glade is a land speculator and cannot proceed with this appeal without the "contract purchaser" of the property, the Woodruffs. DNREC asserts that Regulation § 1.06 of the Regulations Governing the Use of Subaqueous Lands ("Subaqueous Regs") has been interpreted by the Department to require an individual or family resident on an application for a structure. DNREC argues that since the Woodruffs have withdrawn from the contract with the Glade for Lot 68, the Glade essentially has no right to appeal as it could not have filed the application initially without the Woodruffs and the Woodruffs are therefore an indispensable party to this appeal.

The Motion in Limine filed by DNREC asserts that the Board should not hear evidence regarding the content of settlement negotiations between the Department, the Glade, and Mr. Sypek. DNREC asserts Mr. Sypek was never an applicant and his involvement is irrelevant to the application by the Woodruffs/Glade for Lot 68.

MOTION TO DISMISS

SUMMARY OF FACTS AND ARGUMENTS

Arguments were presented through the motion, the filing of briefs by each party, and the oral argument of each party before the Board. In support of the Motion to Dismiss, DNREC argues Regulation § 1.06 of the Regulations Governing the Use of Subaqueous Lands entitled Prohibition provides "certain types of projects are deemed inappropriate for consideration and shall not be considered or approved for private and public subaqueous lands under the Regulations". Specifically, DNREC cites section G. Developments which reads at section 4: "No Individual boat dock application shall be accepted prior to the legal subdivision and sale of individual lots on, or adjacent to, the proposed structure."

DNREC asserts that an individual or family resident must be a party to an application for a structure prior to consideration of the application by the Department. DNREC asserts this interpretation of the regulation provides DNREC the ability to ensure the need and desire for the proposed structure. In accordance with this rationale, the Department asserts that the Woodruffs were an indispensable party to the permit application.

The Department further argues the Woodruff/Glade application would not have been accepted without the sales contract with the Woodruffs. DNREC argues the Glade is not entitled to appeal the denial of the application without the joining of the Woodruffs to the appeal as they are an "indispensable party".

The Department argues the Board should defer to the decision of DNREC regarding the interpretation of its regulations and cites *Eastern Shore Natural Gas Co. v. Delaware Pub. Serv. Comm'n*, Del. Supr., 637 A.2d 10 (1994) in support of its argument. In *Eastern Shore*, the Court

held it would give substantial weight to the agency's interpretation of its statute, provided the agency's interpretation is not clearly erroneous. *Id.* at 15.

In response to the arguments of DNREC, the Glade asserts the denial of the application for Lot 68 was addressed solely to the Glade, L.L.C.. The letter advises the Glade of its right to appeal to this Board, and the denial does not reference the ownership status of Lot 68 as the basis for the denial. (See Chronology Exhibit 5)

The Glade further asserts that despite the original joint application between the Woodruffs and the Glade, the Glade was not precluded from submitting the application on its own behalf under Regulation § 1.06 G.4. The Glade asserts the Holland-Glade Subdivision was legally of record at the time of the application and the Glade, L.L.C. had purchased the lot from the original developer. The Glade asserts the application was submitted to the Department and already under consideration at the time the Department requested a copy of the property deed and sales contract between the Glade and the Woodruffs. The Glade argues DNREC had accepted the application from the Glade without a requirement that the Woodruffs be a party to the application.

The Glade further argues that the *Eastern Shore* case cited by DNREC is no longer applicable and cites *United Water Delaware, Inc. v. Public Service Commission*, Del. Supr., No. 176, 1998 Walsh, J. (February 11, 1999) in support of its position. In *United Water*, the Commission argued that "even if its methodology is flawed in the area of capital structure determination its decision may be up held if the result is not confiscatory". *Id.* at 5. The Court in *United Water* refused to decide the matter based on the end results being "fair" when the decision by the Commission was based on error in the methodology.

CONCLUSIONS OF LAW

The Board has heard and considered the Department's Motion to Dismiss and the response of the Appellant, the Glade, L.L.C. Pursuant to 7 *Del. C.* § 6008 (a), "Any person whose interest is substantially affected by any action of the Secretary may appeal to the Environmental Appeals Board . . ." In order to appeal to the Board the Appellant must be able to show its interest was "substantially affected". The decision in *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, Del. Supr. 636 A.2d 892 (1994) sets out the test for "substantially affected".

The Appellant must first show "an injury in fact, which is the invasion of a legally protected interest within the zone of interest sought to be protected or regulated by the statute." The invasion as defined by *Oceanport* must be "1) concrete and particularized, and b) (sic) actual or imminent, not conjectural or hypothetical". *Oceanport* at 903.

The Appellants must also show an "actual connection between the injury and the conduct complained of -- the injury has to be 'fairly . . . trace [able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Oceanport* at 903. The third part of the test requires that "it must be likely that the injury will be redressed by a favorable decision, rather than merely speculative". *Id.* at 903.

The Board has determined that the Glade was "substantially affected" by the denial of the permit. As a result of the denial, the Glade was unable to build a dock and pier at Lot 68. In addition, the contract with the Woodruffs' was contingent upon the approval of the application for the permits and as a result of its denial, the Woodruffs' voided the contract. The injury is further "concrete and particularized" and traceable to the action of DNREC in denying the permit.

DNREC argues the Woodruffs' are an "indispensable party" to this action. "All parties to

litigation who would be directly affected by a ruling on the merits of an appeal should be made parties to the review proceeding." *RE: Sussex Medical Investors, L.P. v. Delaware Health Resources Board*, 1997 WL 524065, No. 96A-10-009-RRC Del. Super., J. Cooch (April 1997) "Superior Court Civil Rule 19 (a) provides that parties needed for just adjudication shall be joined as parties . . ." *Id.* at 2. However, "as a matter of policy, appeals should, where possible and where the other side has not been prejudiced, be decided on the merits and not disposed of on technical grounds." *Id.* at 2 citing *State Personnel Comm'n v. Howard*, Del. Supr., 420 A.2d 135, 137 (1980).

Several questions remain with the Board regarding the Woodruff/Glade application and what effects a ruling by the Board in favor of the Glade may have concerning the Woodruffs. In addition, the Board has unanswered questions regarding the facts surrounding the acceptance and processing of the application and DNREC's interpretation and application of Regulation § 1.06. The Board is not convinced it must follow DNREC's interpretation of Regulation § 1.06 based on the holding in *United Water*. Despite how DNREC may have applied that regulation previously, this appears to be a new occurrence and the Board is not convinced by the evidence thus far presented that the regulation prevents the Glade from moving forward in its own right.

Although the Glade has met the "substantially affected" test, the Board is unsure based on the facts presented whether the Woodruffs are an "indispensable party" and whether the interpretation and application of Regulation § 1.06 G. 4 should preclude the Glade from proceeding on appeal without the Woodruffs.

In keeping with the policy set forth in *State Personnel Comm'n.*, the Board has decided to deny the Motion to Dismiss at this time. The Board will, however, permit DNREC to renew its Motion to Dismiss following the presentation of evidence at a full hearing.

MOTION IN LIMINE

SUMMARY OF FACTS AND ARGUMENTS

The second motion filed by DNREC was a Motion in Limine to exclude the presentation of evidence regarding settlement discussions between the Department, the Glade, L.L.C. and Mr. Sypek. DNREC asserts this evidence is both irrelevant and inadmissible pursuant to Delaware Rules of Evidence 401, 403 and 408. In support of this argument, DNREC states the only application before the Board on appeal is that of Woodruff/Glade for Lot 68. Any consideration of discussions regarding a different application involving Mr. Sypek and Lot 69 is not relevant to the denial of the Woodruff/Glade application. DNREC further argues any application by Mr. Sypek was never accepted by the Department and has not gone through the necessary administrative proceedings.

DNREC further asserts that evidence of compromise or efforts to compromise are inadmissible to prove a claim, a defense or the amount of damages. DNREC asserts public policy reasons and the Rules of Evidence in support of this argument.

The Glade argues the evidence of settlement negotiations is necessary to support their argument of equitable estoppel against the Secretary. The Glade asserts it agreed to enter discussions regarding settling the appeal as opposed to taking the matter to a hearing before the Board. The Glade argues an actual agreement was reached in December of 1997 involving revised plans to meet the 50 percent reduction in cumulative impacts and as a result of this agreement a revised application involving both the Glade at Lot 68 and the Sypek's at Lot 69 was submitted to DNREC. The Glade seeks to have the Board enforce this agreement and require DNREC to approve the joint application of Glade/Sypek. The Glade concedes that mere settlement negotiations are improper evidence to be considered before a trial court, however; asserts that a settlement agreement

was reached and evidence of that agreement is permissible evidence to be considered by the Board.

The Glade further asserts DNREC accepted this new application from the Glade and Sypeks as settlement of the Woodruff/Glade application. The Glade argues DNREC cannot claim grounds for denying the Woodruff/Glade application now based on Regulation section 1.06 G.4 since this was not a reason for the original denial.

CONCLUSIONS OF LAW

It is clear through oral arguments and briefing that the parties do not agree that a settlement agreement was reached. Although in *State, Department of Health and Social Services v. Weiss*, Del. Super., 1993 WL 19575, Barron J. (January 15, 1993), the court looked to a settlement agreement to resolve remaining issues, there was no dispute that such an agreement existed. The dispute centered around the scope of the settlement agreement.

That is not the situation in the case *sub judice*. It is clear from the briefing that the Glade has gone to considerable expense and invested a good deal of time in these negotiations. The Board, however, will not analyze the settlement negotiations between the parties, and a third party not involved in this appeal, to determine whether a settlement agreement was reached. To attempt such would lead to the Board having to further determine what the terms of such an agreement would have been. The Board's power is limited to affirming, reversing or remanding with instructions any appeal of a "case decision" of the Secretary. 7 *Del.C.* § 6008 (b). Determining whether a settlement was reached and what the terms were is beyond the definition of "case decision" found in 29 *Del.C.* § 10102(3).

In light of this determination, the Board rules that it will not accept evidence of these settlement negotiations. In addition, the settlement negotiations involve a joint application

submitted by the Glade and the Sypeks for a shared pier. Although the Board is not bound by the Federal Rules of Evidence it does have the power to exclude plainly irrelevant evidence under both the APA and Title 7. The negotiations surrounding the settlement do not concern the basis of the denial of the Woodruff/Glade application on appeal before this Board and involve a third party that may or may not have an application submitted to DNREC.

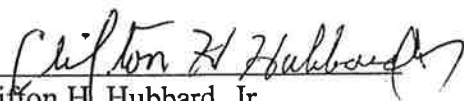
WHEREFORE, the Motion to Dismiss filed by DNREC is hereby **DENIED**, however, the Department may renew its motion at the close of the next hearing should it believe the motion is adequately supported by the record.

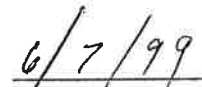
WHEREFORE, the Motion in Limine filed by DNREC to exclude evidence concerning settlement negotiations between the Department, the Glade and the Sypeks is hereby **GRANTED**.

WHEREFORE, a hearing shall be scheduled at the Board's earliest convenience to address the merits of the appeal of the denial of the application for a Subaqueous Lands permit (SP-1709/96) and Wetlands permit (WE-1809/96).

IT IS SO ORDERED.

The following Board members concur with this decision.

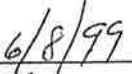

Clifton H. Hubbard, Jr.,
Chairman


Dated

Environmental Appeals Board
Appeal No. 97-07



Diana Jones
EAB Board Member



Dated

Environmental Appeals Board
Appeal No. 97-07

Robert S. Ehrlich
Robert S. Ehrlich
EAB Board Member

June 4, 1999
Dated

Environmental Appeals Board
Appeal No. 97-07

Charles E. Morris
Charles Morris
EAB Board Member

6/18/99
Dated

