BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE

JOHN FLAHERTY and ROBERT MARTIN,	)	
Appellants,	)	
v.	)	Appeal No. 2012-01
THE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL OF THE STATE OF DELAWARE,	)	
Agency below-Appellee.	)	

DECISION AND FINAL ORDER

Pursuant to due and proper notice of the time and place of the hearing served on all parties in interest, and to the public, the above-stated cause of action came before the Environmental Appeals Board ("Board") on July 10, 2012, in the Auditorium of the Richardson and Robbins Building, located at 89 Kings Highway, Dover, Kent County, Delaware.

Members of the Board present and constituting a quorum were Nancy J. Shevock (Chair), Sebastian LaRocca, Michael Horsey, Gordon Wood, Dean Holden and Andrew Aerenson. No Board members disqualified themselves or were otherwise disqualified; however, Board member Harold Gray was absent and did not participate in the hearing. Deputy Attorney General Robert W. Willard represented the Board.

Appellants John Flaherty and Robert Martin (collectively the "Appellants") appeared *pro se*. Deputy Attorney General Kevin Maloney represented the Appellee Department of Natural Resources and Environmental Control ("DNREC"). Robert J.

Valihura, Esquire, represented Permittee Sea Colony Recreational Association ("Sea Colony"). [1]

STATEMENT OF THE CASE AND PROCEEDINGS

DNREC Secretary Collin P. O'Mara issued an order dated December 15, 2011 (the "Secretary's Order" or "Order") which granted Sea Colony an amended subaqueous lands lease, as well as a coastal construction permit. The amended subaqueous lands lease authorized Sea Colony to periodically replenish, over a ten year period, 2,350 linear feet of beach by hydraulically dredging approximately 150,000 cubic yards of sand from an offshore borrow site to coincide with the Federal Beach Replenishment Project along the Atlantic Coast at Sea Colony's premises at Bethany Beach, Sussex County, Delaware. The construction permit allowed Sea Colony to mechanically scrape sand from the beach to rebuild its sand dune in front of its premises.

Appellants sent an email dated January 20, 2012 to the administrative assistant of the Board stating that they wished to appeal the Order and the basis of their appeal. The email was received that same day and constituted the Appellants' statement of appeal. Both DNREC and Sea Colony filed a Motion to Dismiss the Appellants' appeal and the parties agreed, in essence, that the Board would hear those motions at that hearing.

The Appellants' responded to the Motions by forwarding a copy of a newsletter they had received which indicated that an appeal of this decision could be filed by January 21, 2012.

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[1] EAB Regulation 5.0 "Hearings Before the Board" Section 5.8 states, in part: "Following opening statements, each party shall have an opportunity to produce evidence in support of such party's position. The appellant(s) shall produce evidence first followed by [DNREC] and then followed by the Permittee if any." It follows, therefore, that Sea Colony, as Permittee, should be considered a "party" in this proceeding for purposes of presenting and arguing its motion to dismiss the Secretary's Order.

SUMMARY OF EVIDENCE AND ARGUMENTS

Prior to the hearing, the parties agreed that the Board would hear evidence and argument on the motions to dismiss. Additionally, in accordance with EAB Regulation 4.0, the Board was provided with the Chronology, consisting of the record below.

DNREC's Position

DNREC filed a Motion to Dismiss on the grounds that the Board lacks subject matter jurisdiction to hear this appeal because the appeal was not timely filed by the Appellants. In its Motion, DNREC argues that the Order was issued on December 15, 2011, and announced by public notice in the newspaper on December 21, 2011. That public notice stated that any appeal must be filed within 20 days. The Motion noted that pursuant to 7 *Del. C.* § 6008 a person whose interests are substantially affected by an order may file an appeal within 20 days of the announcement of the decision. Therefore, DNREC argues, to be timely an appeal had to be filed within 20 days of December 21, 2011. Accordingly, DNREC contends that the appeal filed on January 20, 2012 was therefore untimely and the appeal must be dismissed.

Sea Colony's Position

In its Motion to Dismiss, Sea Colony seeks dismissal on the grounds that the appeal was not filed timely, and that the Appellants' appeal is rendered moot on the grounds that the subaqueous lands lease and coastal construction permit issued pursuant to the Order was surrendered by Sea Colony subsequent to the issuance of the Order. Hence, Sea Colony argues, there is no longer a case or controversy to be addressed and decided by the Board.

Appellants' Position and Evidence

Appellant Martin testified that the Appellants received a copy of the order on December 27, 2011 from Lisa Vest, a hearing officer from an earlier public hearing on this matter. Martin also testified that he received a newsletter published by a section of DNREC which discussed the order and stated that an appeal had to be filed by January 21, 2012. He therefore argued that the appeal was timely.

DNREC argues that the law clearly requires that an appeal be filed within 20 days of the announcement of the decision. When it was not filed within that time frame, the Board lost any ability to consider the case. The newsletter's statement that the appeal could be filed up until January 21, 2012 was unfortunate, but the newsletter was wrong and it cannot change the statute's requirements. Mr. Maloney said he tried to investigate how this mistake was made, but could not discover how the newsletter came to say that an appeal could be filed up until January 21, 2012.

Sea Colony's counsel argued that the Board's powers are completely dependent upon its enabling statute, which provides that appeals must be filed within 20 days. Appellants clearly admitted learning of the order at least by December 27, 2011 and their appeal was not filed within 20 days of that date either. Sea Colony's counsel noted that Appellant Flaherty has been involved in these types of cases for many years and that the appeal which was filed carefully complies with the statute's requirements and he therefore believes that Flaherty is very familiar with the statute. Sea Colony's counsel also argued that Sea Colony has taken no action whatsoever regarding the Order; they have done nothing and have now given up all rights to do anything under the Order, and the case is therefore moot.

Regarding the issue of mootness, the Board asked Mr. Martin why the case was not moot, since Sea Colony had given up its rights under the order. Mr. Martin said that Sea Colony had wanted to be part of the federal replenishment project and the Secretary had expeditiously issued the order allowing them to do so. He said Sea Colony failed to do so and missed their chance to participate with the federal project. Therefore, Sea Colony's withdrawal of their permit request was meaningless. Sea Colony had not used the permit and therefore in effect had already withdrawn it.

The Board also asked the Appellants what they wished to gain in this appeal, since Sea Colony has given up the rights the order granted to it. Mr. Flaherty responded "I wish to gain that the public should have access to private beaches replenished with public funds. That's been going on since 1988."

Mr. Valihura then stated that he believed the real issue behind this appeal is this question of the public's right to use the beach. He said that Sea Colony now owns rather than leases this property. Its ownership carries to the low water mark based on a Superior Court decision issued in 1994. The only way that will change is through legislation or by a decision of the Delaware Supreme Court. Sea Colony is willing to let the public walk on its beach to access other beaches but is not willing to let the general public use its beach otherwise. Some people, such as these Appellants apparently, feel the public should have complete access to the beach at Sea Colony. The Secretary's Order provides that Sea Colony only owned up to the high water mark and that is why Sea Colony gave up their rights under the Order. He noted that Sea Colony will no doubt apply for a permit in the future to do work on its beach and members of the public, including the appellants, can make their arguments again then. But this particular case is moot because

Sea Colony has done nothing under the order and now can do nothing until it seeks and is granted another permit in the future.

Mr. Maloney argued that DNREC does not necessarily agree with Sea Colony's position about the public's right to access its beach, but that he agrees that there is no current case or controversy before the Board because Sea Colony gave up its rights.

Appellants continued to argue that the case is not moot and that a full hearing on the merits of their appeal should be held.

Appellants presented a witness, Steven Callanen, who argued that the Secretary's Order had not been formally withdrawn. The Order states that the property line extends only to the high water mark. Given that, the land between the low water mark and the high water mark should be open to the public.

DNREC argues that the Secretary's Order alone could not authorize Sea Colony to do anything. Rather, it is the permit issued thereafter that authorized the pumping of sand. DNREC, through one of its sections, wrote in response to Sea Colony's counsel's letter seeking to surrender all of Sea Colony's rights under the Secretary's Order that the approval to pump sand has been revoked and declared it to be null and void.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After deliberation and careful review of the parties' arguments and evidence, the Board grants DNREC's and Sea Colony's respective Motions to Dismiss. Pursuant to 7 *Del. C.* § 6008, an appeal must be filed within 20 days of the announcement of the order. The Board finds that this announcement took place on December 21, 2011 when the public notice of the order was published in the newspaper. That notice itself stated that

any appeal would have to be filed within 20 days. Since the appeal was not filed within 20 days, the Board has no jurisdiction to consider the appeal.

The Board feels compelled to note that a newsletter issued from DNREC stated that an appeal could be filed up until January 21, 2012. This was an outrageous error by DNREC and no doubt was largely responsible for the confusion in this case. However, all parties are charged with knowledge of the law, which clearly requires that the appeal be filed within 20 days. In addition, a public notice was available for the Appellants to review, which also accurately stated that an appeal must be filed within 20 days. Therefore, the Board must conclude that the appeal was not timely and must be dismissed.

Even if the Board were to conclude, and it does not, that the appeal had been timely, the Board would grant Sea Colony's Motion to Dismiss on the grounds of mootness. The Appellants argue that their appeal is about the public's right to access Sea Colony's private beach and otherwise argue that the matter is somehow not moot. But the Order from which the appeal was attempted granted Sea Colony the right to replenish its beach by dredging sand from a borrow site and to scrape sand on its beach to rebuild its sand dune. Sea Colony did none of that and in fact gave up its right to do these things in its letter to DNREC, which DNREC expressly accepted. The rights granted by the Order no longer exist. There is nothing this Board could do to grant this appeal. The public's right to use this beach is simply not an issue at this time. The same circumstances now exist as existed before this Order was entered. The Board has no power to take action on anything in existence before the Order was entered. Although the Appellants strenuously contend that their appeal is about public access to private beaches

replenished with public funds, which has existed since 1988, anything in existence before this particular Order is not before the Board at this time. It is this Order that was before the Board and every right granted by this Order has been surrendered. If and when Sea Colony seeks another permit, these Appellants and others will have to right to contest the matter and may seek to have their views adopted at that time.

The vote in favor of granting Appellees' Motion to Dismiss was 5 to 1, with Mr. Holden dissenting. Board members Shevock, Wood, Horsey, LaRocca and Aerenson concur in this decision, and Board member Dean Holden dissents.[2]

IT IS SO ORDERED, this 9th day of October, 2012.

Date: Oct 9, 2012

Nancy Shevock
Chairperson

[2] Pursuant to 7 *Del.C.* § 6008(d), "[t]he decision of the Board shall be signed by all members who were present at the hearing."

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Date: 10/10/12

Sebastian LaRocca
Board Member

Date: 10/10/12

Gordon Wood
Board Member

Environmental Appeals Board
Appeal No. 2012-01

Date: 10/11/12

Michael Horsey
Board Member

Environmental Appeals Board
Appeal No. 2012-01

Date: 10/10/12

Andrew Aerenson
Board Member

Date: 10/10/12

(dissenting)
Dean Holden
Board Member