

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE**

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| BROOKS REYNOLDS, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | EAB Appeal No. 2017-03 |
| |) | |
| DELAWARE DEPARTMENT |) | |
| OF NATURAL RESOURCES AND |) | |
| ENVIRONMENTAL CONTROL, |) | |
| |) | |
| Appellee. |) | |

DECISION AND FINAL ORDER

Pursuant to due and proper notice of time and place of 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 August 8, 2017, in the Auditorium of the Richardson & Robbins Building, located at 89 Kings Highway, Dover, Kent County, Delaware.

Members of the Board present and constituting a quorum were: Dean Holden (Chair), Michael Horsey, Robert Mulrooney, Sebastian LaRocca, Frances Riddle and Guy Marcozzi. No Board Members disqualified themselves or were otherwise disqualified. Deputy Attorney General Kevin P. Maloney represented the Board.

Brooks Reynolds (“Appellant”) represented himself appearing pro se. Deputy Attorney General Devera Scott represented Appellee Delaware Department of Natural Resources and Environmental Control (“DNREC”).

STATEMENT OF THE CASE AND PROCEEDINGS

Appellant co-owns property with Bruce C. Reynolds, who is not a party to this appeal, at 32476 River Road, Millsboro, Delaware (the “Reynolds Property”). On February 22, 2017,

DNREC published Secretary's Order No. 2017-W-0006 (the "Secretary's Order" or "Order"), which granted a subaqueous lands lease to Stephen and Johanna Owsiany (the "Owsianys") to construct a boat docking facility at their property at 32472 River Road, Millsboro, Delaware (the "Owsiany Property"), which is adjacent to the Reynolds' Property. On March 10, 2017, Appellant filed a notice with the Environmental Appeals Board ("Board"), appealing the Order. The Owsianys are not parties to this appeal.

The Owsiany Property is bordered on: (1) the west by property owned by Dale E. and Jean L. Wetzel; (2) the east by the Reynolds Property; and (3) the south by the Indian River. The Owsianys purchased the Owsiany Property in December 2013, which at that time had a bulkhead along its 50-foot waterfront boundary, but no dock. The Owsianys' neighbors on either side have docks that extend from their waterfront into the Indian River.

On June 25, 2015, the Owsianys applied to DNREC for a subaqueous lands lease to build a docking facility on the Owsiany Property. The proposed structure included: (1) a dock six feet wide and 30 feet long; (2) a pier four feet wide and 220 feet long; and (3) a boatlift twelve feet wide and twelve feet long. The Owsianys intended to berth one boat 23 feet, 8 inches in length and with an 8-foot, 4-inch beam. Before the Owsianys submitted their application to DNREC, Appellant contacted DNREC and raised objections to the Owsianys' proposed structures. Appellant contacted DNREC about the Owsiany Property before the Owsianys purchased it, and while it was for sale, to determine if a pier could be constructed on the property.

During the Owsianys' application process for the subaqueous land lease, Appellant corresponded with DNREC about the application. In an attempt to address Appellant's concerns, the Owsianys changed the dimensions of their proposed structure several times. DNREC staff attempted to facilitate a settlement of the dispute but was unsuccessful.

On July 11, 2016, at Appellant's request, DNREC convened a public hearing on the Owsianys' subaqueous lands lease application. Appellant attended with his son and both voiced objections to the Owsianys' proposed structures. The Wetzels also attended the hearing and stated that they had no objection to the Owsianys' proposed structures.

On July 13, 2016, Appellant Reynolds applied to DNREC for a subaqueous lands lease to construct a five by forty-three foot pier extension and move his boatlift. There were no objections to the Reynolds' application and DNREC granted Appellant's application. As of the date of the August 8 hearing, however, Appellant had not signed the lease.

On February 10, 2017, following the public hearing, the Secretary issued the Order, which granted the Owsianys a subaqueous lands lease pursuant to 7 Del. C. § 7205, to occupy 1,004 square feet of public subaqueous lands to install their proposed structures (pier, dock, and boatlift).

THE CHRONOLOGY

Prior to the hearing and in accordance the Board's Regulations, the Board received DNREC's Chronology, which consisted of the following:

Exhibit 1-- Email dated June 12, 2015 from Ty Reynolds to Tyler Brown, DNREC, attaching Google Earth map and plot drawing Re: Owsiany pier permie [sic];

Exhibit 2 -- Emails dated June 12, 2015 from Ty Reynolds to Tyler Brown, DNREC, attaching Google Earth map and plot drawing Re: Owsiany pier permit;

Exhibit 3 -- Application marked received June 25, 2015 for Boat Docking Facility, submitted by Stephen Owsiany;

Exhibit 4 -- Emails dated July 29, 2015 between Ty Reynolds and DNREC with Google Earth map and drawings Re: Oswiany permit;

Exhibit 5 -- Email dated August 4, 2015 from Stephen Owsiany to DNREC attaching drawing;

Exhibit 6 -- Email dated August 6, 2015 from DNREC to Stephen Owsiany attaching 1968 aerial photograph;

Exhibit 7 -- Emails dated August 10, 2015 from Stephen Owsiany to DNREC attaching drawings;

Exhibit 8 -- Emails dated between July 12 and August 20, 2015 between Ty Reynolds and DNREC Re: Owsiany pier permit;

Exhibit 9 -- Email dated August 20, 2015 from Reynolds Real Estate LLC to DNREC attaching drawing Re: River Road plat;

Exhibit 10 -- Email dated August 21, 2015 from Stephen Owsiany to DNREC attaching drawing;

Exhibit 11 -- Emails dated between August 22 and August 24, 2015 between Ty Reynolds and DNREC Re: River Road plat;

Exhibit 12 -- Emails dated August 24, 2015 from Stephen Owsiany to DNREC attaching Google Earth photograph Re: docks;

Exhibit 13 -- Email dated August 25, 2015 from Stephen Owsiany to DNREC attaching drawing Re: dock scale;

Exhibit 14 -- Emails dated between August 21 and September 28, 2015 between Ty Reynolds and DNREC with drawing Re: River Road plat;

Exhibit 15 -- Emails dated between August 20 and September 29, 2015 between Ty Reynolds and DNREC with drawings and photograph Re: River Road plat;

Exhibit 16 -- Emails dated October 20, 2015 from Stephen Owsiany to DNREC Re: 32472 River Road;

Exhibit 17 -- Email dated October 26, 2015 from Stephen Owsiany to DNREC with Google Earth photograph Re: dock;

Exhibit 18 -- Email dated October 27, 2015 from Stephen Owsiany to DNREC with drawing Re: dock;

Exhibit 19 -- Emails dated between August 20 and October 28, 2015 between Ty Reynolds and DNREC with drawings Re: River Road plat;

Exhibit 20 -- Email dated between October 28 and 29, 2015 from Stephen Owsiany to DNREC Re: dock;

Exhibit 21 -- Emails dated November 4, 2015 from Stephen Owsiany to DNREC Re: notice;

Exhibit 22 -- Email dated November 6, 2015 from Reynolds Real Estate LLC to DNREC Re: Owsiany comments;

Exhibit 23 -- Emails dated between August 20 and November 9, 2015 from Ty Brown to DNREC Re: River Road plat;

Exhibit 24 -- Email dated November 10, 2015 from DNREC to Ty Reynolds attaching Owsiany's dock permit application Re: Owsiany App.

Exhibit 25 -- Letter dated November 14, 2015 from Brook Reynolds to DNREC;

Exhibit 26 -- Email dated November 15, 2015 from Ty Reynolds to DNREC, attaching objection letter to Owsianys' dock permit application Re: Owsiany app.

Exhibit 27 -- Email dated November 17, 2015 from Stephen Owsiany to DNREC with drawings Re: Dock drawing;

Exhibit 28 -- Emails dated between November 10, 2015 and January 26, 2016 between Ty Reynolds and DNREC attaching Reynold's deed and Reynold's pier elevation Re: Owsiany app.;

Exhibit 29 -- Emails dated between January 27, 2016 and February 8, 2016 between Ty Reynolds and DNREC attaching Google Earth photograph Re: Owsiany/Reynolds;

Exhibit 30 -- Emails dated between January 27, 2016 and February 8, 2016 between Ty Reynolds and DNREC attaching Google Earth map Re: Owsiany/Reynolds;

Exhibit 31 -- Public Hearing Transcript dated July 11, 2016;

Exhibit 32 -- Technical Response Memorandum dated November 21, 2016;

Exhibit 33 -- Hearing Officer's Report dated February 3, 2017;

Exhibit 34 -- Subaqueous Lands Lease granted to Stephen and Johanna Owsiany dated February 10, 2017;

Exhibit 35 -- Secretary's Order No. 2017-W-006 dated February 10, 2017;

Exhibit 36 -- Notice of Appeal from Brooks Reynolds to the Environmental Appeals Board dated March 10, 2017;

Exhibit 37 -- Supplemental Statement of Appeal from Brooks Reynolds to the Environmental Appeals Board dated March 15, 2017;

Exhibit 38 -- Devera B. Scott, DAG Entry of Appearance on behalf of Appellee, DNREC, dated May 9, 2017;

Exhibit 39 -- Appellant Exhibits (A-F) forwarded to the Environmental Appeals Board dated June 12, 2017;

Exhibit 40 -- Legal Notice dated June 20, 2017;

Exhibit 41 -- Witness list of Appellant, dated June 26, 2017;

Exhibit 42 -- Witness list of Appellee, dated July 6, 2017;

Stipulated Board Hearing Exhibit 1 -- Enlargement of drawing for Owsiany pier application;

Stipulated Board Hearing Exhibit 2 -- Charts and Google map photos depicting low tide conditions in proximity to the proposed Owsiany pier.

SUMMARY OF APPELLANT'S POSITION

Appellant argues that the Owsiany structure will “be constructed or used in a manner which creates a safety or navigation hazard, public nuisance, or unduly restricts public use or access to public subaqueous lands” and is thus prohibited. DE Admin. Code 7504 Regulations Governing the Use of Subaqueous Lands subsection 2.6.5. Appellant contends that DNREC failed to properly consider the “degree to which the project represents an encroachment or otherwise interferes with ... surrounding private interests” and the “degree to which the proposed project fits in with the surrounding structures, facilities....” DE Admin. Code 7504 Regulations Governing the Use of Subaqueous Lands subsections 4.7.5.1 and 4.7.5.3. Appellant also contends there exists a property line boundary dispute that was not resolved by the Secretary’s Order and that the failure to resolve such property line dispute constitutes reversible error on the Secretary’s part. Lastly, Appellant contends the Secretary’s Order constitutes a regulatory taking for which just compensation must be paid.

SUMMARY OF DNREC'S POSITION

DNREC contends that it properly applied the applicable statute and regulations when it granted a subaqueous lands lease to the Owsianys to construct a boat docking facility. DNREC also reminds that on appeal to the Board, Appellant bears the burden of proving that the “Secretary’s decision is not supported by the evidence on the record before the Board.” *7 Del. C.*

§ 6008(b). DNREC further argues that the Board lacks subject matter jurisdiction to address Appellant's real property and takings claims.

SUMMARY OF THE EVIDENCE

Ty Reynolds testified that he is Appellant's son and has served as a liaison between DNREC, the Reynolds and the Owsianys. He further testified that most of the communications regarding the Owsianys' application took place between himself and Tyler Brown of DNREC.

Ty Reynolds testified that the Secretary's Order suggested that the proposed Owsiany structure will be within the allowed clearances from the adjacent properties and boat docking facilities without making reference to any specific standards contained in the regulations. He stated that it was his belief that the Secretary was simply following the recommendations of prior reports he had received.

Regarding the Hearing Officer's Report, Ty Reynolds testified that it was his and Appellant's understanding that, from the beginning, DNREC had navigational concerns with the proposal. Ty Reynolds acknowledged that there were many iterations of the proposed structure before the Owsianys settled on the structure that was put out for public notice and considered by the Secretary. He testified that various drawings depicted differences in size and that "a foot or more in this instance matters quite significantly." He testified that the biggest issue, from day one, has been the proximity from the Owsiany pier to the Reynolds stalls and lift. He testified that he found it "kind of strange" that the Hearing Officer concluded that "there was no information credible and sufficient to support a finding that the proposed boat dock would unduly interfere with navigation."

Ty Reynolds next testified about the Technical Response Document authored by Tyler Brown, Program Manager of DNREC's Wetlands and Subaqueous Lands Section. He did not

agree with Mr. Brown's conclusion that the structure as approved eliminated navigational issues. He testified that there is nothing in the regulations that enumerates requirements for proper navigation or clearances. He further testified that it is his position that structure makes "navigation impossible and very unsafe."

Upon cross examination Ty Reynolds testified that the proposed Owsiany structure obstructs the Reynolds' ability to park their boat in their lift only from the west, not the east. He testified that the river is a tidal river and can get very rough at times and that the only thing [in the Regulations] that speaks to clearances whatsoever is that structures have to be 10 feet from a navigation channel.

Ty Reynolds next testified about a number of emails contained in the chronology. He indicated that in some of the emails Tyler Brown suggests there is no set guideline or policy for setbacks from adjacent structures. He further testified that the emails demonstrated that DNREC wanted the Reynolds to change the configuration of their boat docking facility to accommodate the Owsianys.

Mr. Tyler Brown also testified. He testified that he is a Program Manager in DNREC's Wetlands and Subaqueous Lands Section. In response to questioning from Appellant, Mr. Brown acknowledged that the subaqueous lands regulations do not allow DNREC to approve structures if there is a navigational interference or a safety hazard. He next testified that there is no navigational interference or hazard created by the combination of the approved Owsiany structure and the preexisting Reynolds pier. He also testified as to how he determined the mean low waterline at the site using Stipulated Board Exhibit 2.

Mr. Brown testified that he determined that at the 250-foot mark at average low tide there is approximately 1'7" of water. He acknowledged that there were several iterations of the

Owsiany proposal and emphasized that DNREC's permitting process attempts to authorize only the minimum amount of structure needed. He testified that he has "grown up on these bays" and that he "would not have a problem getting in there [the Reynolds docking facility] with a 21-foot boat." He testified a navigation channel "essentially means a two-way street for boats" and is a marked channel by DNREC or the United States Coast Guard.

Mr. Brown testified that the Owsiany structure was justified to extend 250 feet due to very low water depth and that it fits in with structures in Oak Orchard generally. He testified that some docks in the area are as short as 40 feet and others go all the way out to 600 feet. Mr. Brown acknowledged working with both parties in an attempt to reach a compromise but denied ever telling Appellant that he must reconfigure his dock in order for Mr. Owsiany's permit to be granted. He testified that all negotiations between the parties involved took place before the Owsiany structure ultimately permitted went to public notice. He further testified that the Owsiany structure is "not even close" to being closer than 10 feet from the marked channel in the Indian River.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Prior to the August 8, 2017 hearing and in accordance with the Board's Regulations, DE Admin. Code 105 Environmental Appeals Board Regulations subsection 4.1, DNREC provided the Board the Chronology consisting of the record before the Secretary. In addition, in deciding this appeal, the Board considered the written submissions of the parties, the testimony of all witnesses and the oral argument from the parties. At the conclusion of legal argument by the parties the Board entered into executive session as permitted by 7 *Del. C.* § 6008(a) to deliberate.

After deliberation and careful review of the parties' arguments, their written submissions, and the evidence presented, the Board voted, in public session, by a vote of 6-0 to affirm the Secretary's Order. At the time the Board announced its decision it also acknowledged the difficult issues presented and the difficulty of trying to strike the appropriate balance between the interests of the State and private property owners.

As a threshold matter in any proceeding before the Board, subject matter jurisdiction must be established because absent such jurisdiction being conferred on this Board by the General Assembly, or by a Delaware court interpreting an act of the General Assembly, the Board is powerless to take action.

As to Appellant's contention that the Secretary has authority to resolve property disputes and that the Secretary's Order constitutes an unlawful taking, the Board disagrees with Appellants. Rather, the Board agrees with DNREC's position that the Board's jurisdiction is limited to actions that the Secretary takes according to the authority granted to him under the Subaqueous Lands Act ("the Act"). 7 *Del. C.* §§ 7201-7217. The Act does not vest any authority in the Secretary to transfer or determine title to real property. See Lighthouse Cove

Investors, LLC v. Environmental Appeals Board, et al. C.A. No: S12A-02-005 ESB. Rather, such authority is vested with the Court of Chancery, which in addition to its general equity powers, has exclusive jurisdiction over issues pertaining to real property. Similarly the Board's jurisdiction does not extend to constitutionally based claims of takings of property. Accordingly, the Board concludes that it does not have subject matter jurisdiction to hear Appellant's claims related to real property boundary issues or takings of property.

As to Appellants' remaining contentions, the Board finds from the evidence presented that Appellant has failed to carry his burden of demonstrating that the Secretary's decision is not supported by the evidence on the record before the Board. The Board finds that Mr. Brown is a credible witness whose testimony was supported by the totality of the evidence presented. The Board recognizes both his strength of memory and his opportunity to personally observe conditions at the site. The Board also finds that his testimony was reasonable and responsive during the hearing. The Board finds Mr. Brown's conclusions regarding navigability and navigational channels to be supported by the law and the facts presented.

The Board recognizes that Ty Reynolds may bring a bias and an interest in the outcome of the hearing because of the potential impact of the Owsiany structure on the Reynolds' preexisting structure. While recognizing this, the Board still found Ty Reynolds to be a credible witness given his demeanor on the stand while testifying and his responsiveness to the questions posed to him by counsel and Board members. The Board did not find, however, Ty Reynolds' interpretation of the "navigational channel" to be anywhere where boats can travel to be reasonable.

"The burden of proof is upon the appellant to show that the Secretary's decision is not supported by the evidence on the record before the Board." 7 *Del.C.* § 6008(b). Thus, the

Board's decision rests on Appellant's legal obligation to carry his burden of proof, as well as the amount of credible evidence supporting Appellant's claims. Based on the evidence presented, the Board is unable to determine that the Secretary's decision was not supported by the evidence on the record before the Board. Accordingly, the decision of the Secretary is hereby affirmed.

The following Board members concur in this decision.

Date:

11/3/17



Frances Riddle, Board Member

Date: 11/6/2017


Robert Mulrooney, Board Member

Date: 11/6/2017


Dean Holden, Chairperson

Date: November 6, 2017



Guy Marcozzi, Board Member

Date: 11/6/17


Michael Horsey, Board Member

Date Nov 2, 2017


Sebastian LaRocca, Board Member

