

HEARING OFFICER'S REPORT

TO: The Honorable Shawn M. Garvin
Cabinet Secretary, Department of Natural Resources and Environmental Control

FROM: Theresa L. Smith (Formally Newman)
Regulatory Specialist, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: Subaqueous Lands Lease Application of James and Meredith Bruner

DATE: October 15, 2024

I. BACKGROUND AND PROCEDURAL HISTORY:

A virtual public hearing was held on Thursday, November 5, 2020, at 6:00 p.m. via the State of Delaware Cisco WebEx Meeting Platform by the Department of Natural Resources and Environmental Control (“DNREC,” “Department”) to receive comment on the application submitted by James and Meredith Bruner (“Applicant”) for a Subaqueous Lands Lease. In accordance with 7 DE Admin. Code 7504 - *Regulations Governing the Use of Subaqueous Lands of the Regulations* (“Regulation”) the applicant is proposing to construct and utilize a residential pier, dock, and boatlift in the Little Assawoman Bay at 1306 N. Schulz Road, Fenwick Island, Sussex County, DE (“Application”).

On March 20, 2020, the Department’s Division of Water, Wetlands and Waterways Section (“WWS”) received the initial application submitted by the Applicant to construct an L-shaped convenience structure to gain access for mooring a boat and recreational activities in Little Assawoman Bay. The proposed project includes a 4-foot-wide by-28-foot-long pier extended seaward from the property line, a 6-foot-wide by-35-foot-long dock positioned west of

the pier, and an 11-foot-wide by-11-foot-long boatlift with four (4) associated pilings structured toward mean high water. The total encroachment of the proposed structure is 45 feet channelward from the mean high-water line. The Applicant's waterfront property line extends 141.63 feet and is at the tip of a peninsula, with the project planned to the north. An adjacent property lies to the right of the project, featuring a structure on the east side of the peninsula. There is no property directly to the left of the Applicant, but behind their property is another adjacent lot with a structure located to the west side of the peninsula.

Subsequent to the desktop review of the Application, the Department published the proposed project in the *Delaware State Newspaper* and *The News Journal* for a 20-day public notice period, from April 29, 2020, through May 19, 2020. To that, the Department received comments that were opposed to the proposed docking facility, perceiving it as excessively large and the size potentially obstructing navigation of the water by the public.

As a part of the Application review process the Department conducted an onsite review. On May 27, 2020, the Department met with the contractor/consultant of the proposed project, the Town of Fenwick Island Officials, and the Council Members to discuss the Department's regulatory authority, the configurations of the proposed structure, and to propose feasible alternatives including a reconfiguration.

The Department then conducted another onsite visit by boat on June 1 and June 3, 2020, to collect data for accurately mapping channel markers, measuring setbacks, and assessing the minimization of the proposed structure's encroachment into the channel. Using survey-grade

GPS equipment, they marked channel markers, and measured water depths at mean low water (“MLW”). Based on these findings, DNREC found that adequate water depths could be realized with minimizing the size of the proposed structure while still being able to reach 18 inches at MLW for safely mooring a boat.

The Department recommended a reconfiguration of the project by reducing the extent of the pier starting at the retaining wall and up to the toe of the riprap, which is approximately 13 feet however only 10-11 feet of the pier are channelward of the MHW and within the Department’s jurisdiction. This minimization of the pier would align with the channelward distance as other adjacent neighbor’s bulkheads. In addition to the minimization of the pier, the Department also recommended a realignment of the structure to reduce encroachment into the navigation channel by 20 feet, which will minimize potential impacts.

The Department received a revised Application on June 9, 2020. The Applicant revised the initial application by reducing the length of the pier by 18 feet, increasing the dock length by 10 feet to accommodate the vessel length, and increasing the width and length of the boat lift by 1 foot on each side, with adding an elevator lift. More specifically, the revised Application proposes to construct and utilize a 4-foot-wide by 13-foot-long pier (of which only a 4x10 foot long section of the pier will be channel ward of the MHW line), a 6-foot-wide by 45-foot-long dock west of the pier, and two boatlifts. One boatlift will have four (4) associated pilings and the other will have two (2) associated pilings, abutting the dock parallel to the property line. The overall encroachment of the revised proposed structure decreased from 45 feet to 28 feet

channelward of MHW. It should be noted that where the proposed pier meets land, it is located 10 feet from the adjacent property line to the east, in accordance with the Regulations.

Although the Applicant reduced the channelward encroachment in response to the comments received and at the recommendation of the Department, the overall square footage increased from the proposed extension of the dock. The Department placed the revised Application on public notice in the Delaware State News and The News Journal for a 20-day period from June 24, 2020, to July 14, 2020. To that, the Department received ten (10) comments in opposition of the revised Application, and a public hearing was requested. The Department then was issued a public notice of the hearing in the Delaware State News and The News Journal from September 30, 2020, to October 20, 2020.

On November 5, 2020, the virtual public hearing was held by the Department. There were members of the public in attendance at the virtual hearing, along with the Applicant, a representative of the Applicant and WWS staff. The record remained open through November 20, 2020, and comment was received from the public. Subsequent to the record closing, this Hearing Officer requested a Technical Response Memorandum (“TRM”) from the expert staff of WWS that will be discussed in further detail below. Proper notice of the hearing was provided as required by law.

II. SUMMARY OF THE PUBLIC HEARING RECORD:

The public hearing record (“Record”) consists of the following documents: (1) a verbatim transcript; (2) nine documents introduced by responsible Department staff at the public hearing held on November 5, 2020 and marked by this Hearing Officer accordingly as "Department Exhibits 1-9"; (3) three documents introduced by Edward Launay with Environmental Resource Inc, a consultant of Applicant and marked by this Hearing Officer accordingly as "Applicant Exhibits 1-3"; and (4) the TRM that includes a draft Subaqueous Lands Lease, from Matt Jones, Program Manager II, Division of Water. The Department's person primarily responsible for reviewing this Subaqueous Lands Lease Application, Mr. Jones, developed the Record with the relevant documents in the Department's files.

Following opening remarks, Mr. Jones provided a presentation on behalf of the Department (and the introduction of the Department's exhibits to be entered into the Record). Mr. Bruner then proceeded to offer a brief background and description of the proposed project, that then led to the presentation of the Applicant’s consultant, Mr. Launay. Mr. Launay offered a background of his experience provided an overview of the project and entered into the record three documents to support the details of the presentation and Application. Following the presentations, there were 6 verbal comments received at the time of the hearing.

Thereafter the public hearing, the Department received 5 written comments, with objection to the revised Application. The objectors expressed concern over what was perceived as an excessively large docking facility, concerns that the docking facility would hinder

navigation, structure orientation, create unsafe conditions for motorized and non-motorized water dependent activities, and maintenance of unmarked navigation channels. The comments also expressed concern for land reclamation activities and loss of habitat for sea and bay life. Many of the commenters suggested the structure be placed to the west of the property, rather than the north.

The Record closed with regard to public comment 15 days following the public hearing, on November 20, 2020.

Subsequent to the close of the Record as noted above, this Hearing Officer requested a Technical Response Memorandum (“TRM”) from the WWS technical experts in the Department’s Division of Water to: (1) address the concerns associated with this pending Application, as set forth in the public comment received by the Department; (2) provide a formal regulatory review of the Applicant’s proposed project; and (3) offer the Division of Water’s conclusions and recommendations with regard the pending Application for the benefit of the Record generated in this matter.

The Department’s TRM and the draft Subaqueous Lands Lease, dated August 30, 2024, was received by this Hearing Officer on September 4, 2024, and is attached hereto as Appendix “A” and Appendix “B,” respectively. The TRM acknowledges all comments received, addressing the public concerns of the proposed revised Application and provides a thorough and balanced response to the same, accurately reflecting the Record generated in this matter. Rather than attempting to relay each of the public comments received in this matter, this Order will

highlight the Department's responses to the same, as provided for in full within the Report's Appendices, as referenced above.

The Department conducted a review of the Application, as it pertains to the comments received and the requirements of the *Subaqueous Lands Act* (7 Del. C., Chapter 72) and the *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504) adopted in accordance with the statute.

In accordance with the Regulations, the Department determined that the Applicant's waterfront property line extends 141.63 feet, to which the Applicant has the right to wharf and access to water from any point of their riparian property boundary. The Department conducted onsite evaluations, and the recommendations made by the Department were implemented by the Applicant through a revised Application. The revised structure does not exceed 250 linear feet in length and is within 20% of the width of the body of water.

In addition, the Applicant has minimized the scope of the structure within subaqueous lands. The Department determined that the overall channelward encroachment was reduced from 45 feet to 28 feet, therefore it reduces the impacts on navigational concerns made by the public. Moreover, given the space that is available to navigate the waters, it is the responsibility of the operator to abide by the Regulations thus, to operate at safe speeds. According to DE Boating Laws wakes should not be made within 100 feet of a structure.

The site of the proposed project has also been evaluated with the consideration of proximity of existing adjacent structures. Neighboring parcels exist 100 feet southwest of the proposed docking facility and 174 feet east of the proposed docking facility. The Department determined that the navigation issues directly adjacent to the proposed structure should be minimal since the closest docking facility is over 100 feet away. In addition, a bathymetric survey done by Plitko, LLC indicated water depths at the proposed location of the docking facility ranged from approximately -2.0 to -5.0 feet. The deepest water exists channelward of the proposed docking facility, with depths decreasing to -3.0 feet on the opposite shoreline.

In addition, to address the concerns of the proposed revised structure further limiting the accessible water depths of the channel, the Department confirmed that that this area was recently approved under # SP-253/23 to be dredged to a depth of -4.0 MLW. Therefore, the project will not adversely impact boat navigation or the existing navigable channel.

The Department concluded that the Applicant has exhibited minimization of the initially proposed project by bringing the structure in landward to reach adequate water depths at MLW (18 inches), thus reducing channelward encroachment and reducing the risk for navigational concerns. The Department determined that the revised proposed structure complies with regulations regarding the total width is less than 20% of the waterbody (measured from the Mean Low Water Line to the Mean Low Water line on the opposite bank), the distance from state navigational channels is over 10 feet, and ensures adequate water depths (18 inches at MLW). The proposed structure's length would obtain adequate water depth at mean low water, for the draft of the proposed vessel to be berthed, avoiding the need for dredging. Moreover, the

proposed structure does not impact aquatic vegetation or wetlands. It should be noted that even though the navigation channel is marked, it is not state maintained but consideration to navigation was taken into account after receiving public comments.

I find that the Division of Water's TRM offers a detailed regulatory review of all aspects of the Applicant's proposed revised Application, identifies all the concerns raised by the public and responds to them in a balanced manner, with accurately reflecting the information contained in the Record. Thus, the aforementioned TRM is attached hereto as Appendix "A" and expressly incorporated herein as such.

III. RECOMMENDED FINDINGS AND CONCLUSIONS:

The Applicant has applied for a Subaqueous Lands Lease application, seeking approval to construct and proposes to construct and utilize a 4-foot-wide by 13-foot-long pier (of which only a 4x10 foot long section of the pier will be channel ward of the mean high water line), a 6-foot-wide by 45-foot-long dock west of the pier, and two boatlifts, one with four (4) associated pilings and the other with two (2) associated pilings abutting the dock in the Little Assawoman Bay at 1306 N. Schulz Road, Fenwick Island, Sussex County, DE.

In reviewing the applicable statutes and regulations, as well as weighing public benefits of this project against potential detriments, the Department's experts in the WWS have concluded that the aforementioned project complies with all applicable state laws and regulations. Should this Application be approved, the WWS Subaqueous Lands Lease that

would be issued by the Department would be reflective of the revised Application submitted and would include all necessary requirements intended to protect public health and the environment. I find and conclude that the Applicant has adequately demonstrated its compliance with all requirements of the statutes and regulations, as noted herein, and that the record supports approval of the Application submitted by James and Meredith Bruner.

In conclusion, I recommend that the Subaqueous Lands Lease necessary for the proposed project as set forth in the revised Application submitted by James and Meredith Bruner consistent with the Record developed in this matter, be issued by the Department in the customary form, and with appropriate conditions.

Further, I recommend the Secretary adopt the following findings and conclusions:


1. The Department has jurisdiction under 7 *Del.C.* §§6003, 6004, 6006(4) and all other relevant statutory authority, to make a final determination of the Application after holding a public hearing, considering the public comments, and reviewing all information contained in the Record generated in this matter;
2. The Department provided proper public notice of the Application submitted by James and Meredith Bruner and of the public hearing held on November 5, 2020, and held said hearing to consider all public comment that may be offered on the Application, in a manner required by the law and regulations;
3. The Department has carefully considered the factors required to be weighed in issuing the lease required by this Application, and finds that the Record supports approval of

the Application, and the issuance of the Subaqueous Lands Lease associated with the same;

4. The Department shall issue the Subaqueous Lands Lease to the Applicant, James and Meredith Bruner, to construct and utilize a 4-foot-wide by 13-foot-long pier (of which only a 4x10 foot long section of the pier will be channel ward of the mean high water line), a 6-foot-wide by 45-foot-long dock west of the pier, and two (2) boatlifts, one with four (4) associated pilings and the other with two (2) associated pilings abutting the dock in the Little Assawoman Bay at 1306 N. Schulz Road, Fenwick Island, Sussex County, DE, consistent with the Record developed in this matter.

Furthermore, said lease shall include all conditions set forth in the Department's draft lease, to ensure that Delaware's environment and public health will be protected from harm;

5. The Department has an adequate Record for its decision, and no further public hearing is appropriate or necessary; and
6. The Department shall serve and publish its Order on its internet site and shall provide legal notice of the Order in the same manner that the Department provided legal notice of the Application.



Theresa L. Smith
Theresa L. Smith
Public Hearing Officer

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Attachments/Appendices:

Appendix A: Technical Response Memorandum (08/30/2024)

Appendix B: Draft Permit and Attachments