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DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL
DIVISION OF WATER
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Technical Response Memorandum

To: Theresa Smith (formerly Newman), Hearing Officer

Through: Steven M. Smailer, Director, Division of Water

From: Matthew Jones, Section Manager, Wetlands and Waterways Section MJ

Date: August 30, 2024

Subject: James R. Bruner and Meredith K. Bruner, Subaqueous Lands Lease Application

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INTRODUCTION

On March 30, 2020, the Wetlands and Waterways Section (WWS), Division of Water, Department of Natural Resources and Environmental Control received an application from JLW Services, LLC (Jordan Winterling). submitted on behalf of James R. Bruner and Meredith K. Bruner to construct a residential docking facility in the Little Assawoman Bay located at 1306 N. Schulz Road, Fenwick Island, Sussex County, Delaware. The proposed project is subject to 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).

This Technical Response Memorandum (TRM) presents the Wetlands and Waterways Section's (WWS) findings regarding the above-referenced lease application. The TRM also addresses comments presented prior to and during the public hearing held on November 5, 2020.

The applicants, James R. Bruner and Meredith K. Bruner originally proposed to construct a 4-foot wide by 28-foot long pier, a 6-foot wide by 35-foot long dock and to install one boat lift with four (4) associated pilings channelward of the Mean High Water Line in the Little Assawoman Bay, Fenwick Island, Sussex County, Delaware.

The project was placed on 20-day public notice on April 29, 2020. During the public notice period the WWS received six letters of objection. The objectors expressed concern over what was perceived as an excessively large docking facility and concern that the docking facility would hinder navigation.

Based on feedback provided by the public and the Department after the first public notice period, the applicant chose to redesign and submitted revised plans. The applicants' reconfiguration of the structure consisted of constructing a 4-foot wide by 13-foot-long pier, a 6-foot wide by 45-foot long "L" dock and to install a boat lift with four (4) associated pilings and an elevator lift on two (2) associated pilings parallel to the shoreline. By reconfiguring the structure, the applicant reduced the pier length by 15 linear feet and added 10 additional feet to the dock to accommodate the vessel lengths and associated boat lifts.

Due to an increase in square footage but a reduction in channelward encroachment, the project was placed on another 20-day public notice on June 24, 2020. During the public notice period the WWS received ten letters of objection. The objectors expressed concern over what was perceived as an excessively large docking facility, concerns that the docking facility would hinder navigation, structure orientation and maintenance of unmarked navigation channels.

The announcement for a public hearing was placed on a 20-day public notice on September 30, 2020.

The public hearing was held on November 5, 2020. The public hearing was attended by WWS staff, the applicants, the applicants' representatives, and individuals from the public. During the Public Hearing, the Hearing Officer gave the introductory remarks on behalf of the Department. Subsequently, the project scientist gave a presentation on behalf of the Wetlands and Waterways Section providing an overview of the application as submitted for the private residential docking facility and presented the exhibits of the public records on behalf of the Department.

The applicants themselves spoke about how they did their due diligence by having a feasibility study completed, working with their home builder, marine contractor, and environmental consultant to determine if they could build a house and boat docking facility. After purchasing the property, they submitted their permit application to construct a boat docking facility. After multiple revisions and minimizations to the project throughout the permit process, they believe the structure as proposed addresses concerns and complies with all regulations and current guidelines set fourth by the Department. They closed by stating that they want to enjoy the rights to waterfront access that many of the landowners in Fenwick Island commonly enjoy.

The applicants' consultant from Environmental Resources, Inc., Edward Launay, gave a presentation, providing an overview of the application as submitted for the private residential docking facility that addressed concerns and complies with all regulations. Mr. Launay concluded his presentation and presented the exhibits of the public records on behalf of the applicants.

At that time, the Hearing Officer opened the forum for public comment. Six individuals spoke in opposition to the proposed structure. The public record was open until November 20, 2020.

Following the public hearing, prior to the record closing, the WWS received 5 letters of objections. 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.

REGULATORY REVIEW- SUBAQUEOUS LANDS

The following review evaluates the proposed project with respect to the requirements of the Subaqueous Lands Act (7 Del. C., Chapter 72 (Chapter 72) and the Regulations Governing the Use of Subaqueous Lands (7 DE Admin. Code 7504) (Regulations) adopted in accordance with the statute. The Regulations provide the criteria for evaluating projects that are proposed to be constructed in public or private subaqueous lands. The burden is on the applicant to prove to the Department that the requirements of these Regulations have been met; and if the granting of any permit, lease or approval will result in loss to the public of a substantial resource, or that the loss has been offset or mitigated. The public comments received prior to, and at the hearing, as well as the Department's regulatory evaluation and the public comments received following the hearing are addressed according to the pertinent sections of the Regulations as follows.

Section 2.0 Administrative Principles

2.6.5 Convenience Structures. No convenience structure shall be constructed or used in a manner which creates a safety or navigation hazard, public nuisance, or unduly restricts public use or access to subaqueous lands. Such structures shall be relocated or removed by the person who installed, replaced, or owns the structure.

The structure as proposed meets all regulations and guidelines set forth by the Department.

Section 4.0 Criteria of Permits, Leases and Letters of Authorization

Section 4.0 of the Regulations requires that the application be evaluated based on the consideration of specific performance specifications, standards, and other criteria, including Section 4.6 - Public Use Impacts, Section 4.7 - Environmental Considerations, Section 4.8 Requirements for all Structures and Section 4.9 – Boat Docking Facilities. It also states that an application may be denied if the activity could cause harm to the environment, either singly or in combination with other activities or existing conditions, which cannot be mitigated sufficiently.

The WWS concludes that public use impacts will be minimal since the structure will be constructed only to the minimal extent channelward to obtain adequate water depth (Figure 1). The proposed design does meet the requirements for all boat docking structures and does not exceed 250 linear feet in length.

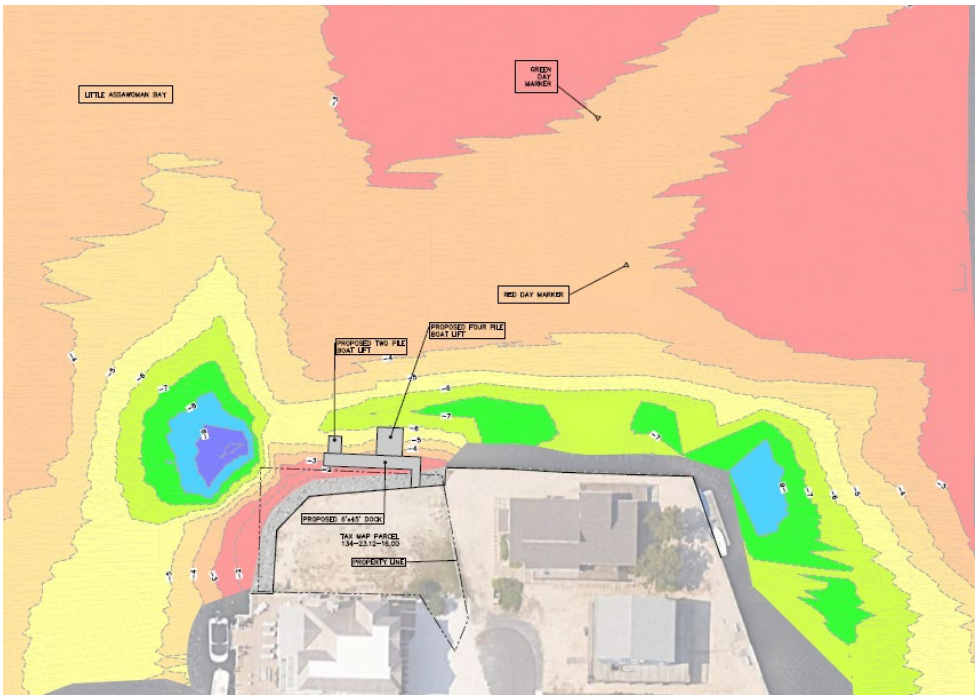

Figure 1:

<u>Section 4.6 Public Use Impacts</u>

Under this section the Department must consider, among other things, the potential effect on the public and the extent to which the public would benefit or suffer detriment from the project. Additionally, the Department must consider the degree to which the applicant's primary purpose could be realized by alternatives that would minimize or avoid impacts. The public use impacts most relevant to the proposed project are discussed in Sections 4.6.3, 4.6.5 and 4.6.6, below.

<u>4.6.3 Navigation</u> - The potential effect on the public with respect to commerce, navigation, recreation, aesthetic enjoyment, natural resources, and other uses of the subaqueous lands.

The subaqueous lands located adjacent to the subject property are open for public use. The primary users are private waterfront property owners and the general public participating in boating, watersports, fishing, and crabbing. When evaluating for navigational concerns, the WWS references Section 4.9.2.5 of the Regulations Governing the Use of Subaqueous Lands which states, in relevant part; "In no case shall a structure extend more than 20 percent of the width of the waterbody." In tidal natural features, 20 percent is measured from the mean low water mark of one side of the waterbody to the mean low water mark of the other. The proposed channelward encroachment of 28 feet channelward of the mean low water line is within 20 percent of the width of the waterbody.

<u>4.6.5 Avoidance</u> - The extent to which the applicant's primary objectives and purposes can be realized without the use of such lands (avoidance).

The applicant owns 141.63 feet of waterfront property that resides on a point of land; this is the only area where the applicant can construct a facility on their riparian property boundary. The

applicant does have the right to wharf and access the water from their riparian property boundary.

4.6.6 Minimization - The extent to which the applicant's primary purpose and objectives can be realized by alternatives, i.e. minimize the scope or extent of an activity or project and its adverse impact.

The applicant's primary objective and purpose is to have a private residential boat docking facility. The Public Trust Doctrine holds that lands under navigable waters are open to the public for commerce, navigation, fishing, and recreation. Therefore, as a waterfront property owner, the applicant has rights for a water access structure.

Several comments in opposition were concerned with the design of the docking facility which was viewed as out of characteristic for the area and excessive for a non-commercial docking facility. Through agency consultation, the applicants worked to minimize the scope of the project within public subaqueous lands. From the time of the original submittal, there were revisions which included modifying the docking facility. These modifications resulted in reducing the channelward encroachment from 45 feet to 28 feet to address impacts on navigational concerns.

The applicant has practiced avoidance as described above in Section 4.6.5 and has further proposed minimization of the channelward encroachment of the docking facility. The scope of the overall proposed design of the docking facility was minimized by realigning the structures as described above.

Section 4.7 Environmental Considerations

4.7.1.2 Any effect on shellfishing, finfishing, or other recreational activities, and existing or designed water uses.

The primary use of this waterbody is for adjacent property owners to gain access to the Little Assawoman Bay and for the general public's use. A secondary use would be crabbing and fishing. The proposed structure would allow the applicant to use the Little Assawoman Bay for these same reasons and would not impede others from gaining access to, or using, the Little Assawoman Bay (Figure 1).

4.7.1.3 - Any harm to aquatic or tidal vegetation, benthic organisms or other flora and fauna and their habitats.

The docking facility will cause some shading but should allow for the growth of aquatic vegetation and the continued use of the area by benthic organisms. The waterbody is currently used by the general public for water access along with a multitude of private docks; the addition of a residential docking facility should not have a significant adverse impact on the environment. Furthermore, the DNREC, Division of Fish and Wildlife, Species Conservation and Research Program determined that there were no records of state-rare or federally listed plants, animals or natural communities at the project site.

Section 4.7.5 Other Considerations

4.7.5.2 The degree to which the project incorporates sound engineering principles and appropriate materials of construction.

The structure is proposed to use CCA treated lumber and will be constructed to typical standards by a local marine contractor, as is common for the majority of the structures in the vicinity.

4.7.5.3 The degree to which the proposed project fits in with the surrounding structures, facilities and uses of the subaqueous lands and uplands.

There are multiple docks located in the vicinity of the project location. Structures in the area range from 25 feet long to 100 feet long. The use of the docks varies from berthing motorized vessels and launching non-motorized vessels for residential use. The existing structures within the area are of similar linear footage and obtain similar mean low water depths, or greater, than the applicant is proposing.

Section 4.8 Requirements for all Structures

4.8.4 Structures shall not interfere with navigation, public, or other rights.

The proposed structure meets the requirements stated in the regulations for proper navigation (see 4.6.3 above). The structure does not interfere with the public or other rights in regard to the use of the adjacent properties or the Little Assawoman Bay.

This structure meets the requirements stated in the regulations for proper navigation. The commentors claim that the ability to navigate effectively will be eliminated by the proposed structure which is the basis for their opposition. They also suggest there will be increased likelihood of accidents, which falls on the ability of the operator given the adequate space available and the requirements to operate at safe speeds, without a wake in proximity of fixed structures. Wakes should not be made within 100 feet of structure according to DE Boating Laws.

Section 4.9 Boat Docking Facilities

4.9.2 General Siting Considerations: Siting of boat docking facilities shall be evaluated on site-specific conditions including, but not limited to, location of navigational channel, proximity of existing structures, aquatic habitats, and width and orientation of waterbody. The following criteria will be weighed and balanced when evaluating the siting of boat docking facilities.

The applicant owns approximately 141.63 linear feet of waterfront property that is situated on a point of land. Existing docking facilities on the neighboring parcels exist 100 feet southwest of the proposed docking facility and 174 feet east of the proposed docking facility. Therefore, the siting of the docking facility structures had been designed with consideration to proximity of existing structures.

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 NAVD 88 in elevation. The deepest water exists channelward of the proposed docking facility, depths then decrease to the opposite shoreline to -3.0 feet. Additionally, there is privately marked channel which is indicated on the bathymetric survey (green day marker & red day marker) that was recently approved (SP-253/23) by the Department to be dredged to a depth of -4.0 Mean Low Water (MLW). Therefore, the project will not adversely impact boat navigation or the existing navigable channel. Considerations for siting of the boat docking facility are discussed further in Sections 4.9.2.7 and 4.9.2.10 below.

4.9.2.7 Docks and piers should extend out from the shoreline far enough so as to eliminate need for dredging and filling and provide sufficient height to allow light to penetrate to vegetation underneath and alongside.

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. As designed, the proposed structures do not impact aquatic vegetation or wetlands.

4.9.2.10 – All convenience structures should be set back a minimum of ten (10) feet from adjacent property lines.

The proposed structure adequately complies with the minimum set back of ten (10) feet from adjacent property lines.

CONCLUSION

In reviewing the applicable statues, regulations, and weighing public benefits against detriments, the WWS finds that the construction of the final proposed residential docking facility as described above for the Subaqueous Lands Lease by James R. Bruner and Meredith K. Bruner complies with the Regulations administered by the WWS.

The Public Trust Doctrine holds that lands under navigable waters are open to the public for commerce, navigation, fishing, and recreation. In addition, the applicant has riparian rights for a water access structure. Through agency consultation, the applicants have worked to minimize the scope of the docking facility within public subaqueous lands. These modifications reduced the channelward encroachment from 45 feet to 28 feet to address navigational concerns.

Therefore, the program recommends the approval of the applications for a boat docking facility.

In the event the Secretary agrees with the recommendation that this project should be approved, included are draft authorizations with appropriate conditions for consideration.

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Technical Response Memorandum

To: Theresa Smith, Hearing Officer

Through: Steven M. Smailer, Director, Division of Water

From: Matthew Jones, Section Manager, Wetlands and Waterways Section

Date: October 28, 2024

Subject: Clarification for the Record of James R. Bruner and Meredith K. Bruner, Subaqueous Lands Lease Application

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During Secretary Garvin's review of the Bruner Technical Response Memorandum, clarification was needed about the use of CCA-treated lumber. Please find the DNREC-WWS response below.

The structure is proposed to utilize CCA-treated lumber and will be built to standard specifications by a local marine contractor, consistent with the majority of nearby structures. The material will comply with the American Wood Protection Association (AWPA) standard UC5B, which corresponds to a CCA equivalent rating.

UC5B Marine use covers wood and wood-based materials that are exposed to salt and brackish water from south of Long Island, NY, to the southern border of Georgia on the East Coast, and south of San Francisco on the West Coast, where marine borers can affect them. This includes areas with creosote tolerant Limnoria tripunctata but excludes borers listed under UC5C. It encompasses pilings, bracing, bulkheads, and other constructions that are periodically exposed to saltwater.

While it seems, the industry is shifting away from CCA, it remains the term most contractors use for non-creosote materials. Our regulations do not explicitly prohibit CCA, unlike creosote, and although CCA-treated lumber has not been used for residential applications (like decks and playgrounds) since the EPA's prohibition in 2004, it is still permissible for marine pilings.