

HEARING OFFICER'S REPORT

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

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

RE: Subaqueous Lands Lease Application for Matthew Eisenmann

DATE: May 29, 2024

I. BACKGROUND AND PROCEDURAL HISTORY:

A virtual public hearing was held on Wednesday, May 19, 2021, 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 comments on the Subaqueous Lands Lease application submitted by Matthew Eisenmann (“Applicant”) to construct a pier extension, a floating platform, and a boat lift in Herring Creek, at 34477 Skyler Drive, Lot #48, The Villages at Herring Creek, Lewes, DE, (“Application”) pursuant to 7 *Del.C.* Ch. 72 and 7 DE Admin. Code 7504 - *Regulations Governing the Use of Subaqueous Lands* (“Regulation”).

The Applicant’s existing dock measures 4-foot-wide by 70-foot-long, with a mooring area located to the east of the dock to take advantage of the increased water depths compared the lower water depths to the west of the pier. The Applicant has approximately 20-feet between the existing dock and the neighboring dock to moor a vessel. The adjacent pier is owned by the property owner (Lot #47), located east of the Applicant’s pier. The property to the west is owned by the Homeowner’s Association (“HOA”) for Herring Creek visitors and currently does not have a pier.

Based on the legal opinion from the State of Delaware Department of Justice to DNREC dated June 9, 2006, referencing Riparian Boundaries on Navigable Rivers and Across Accretions (“2006 DOJ Opinion”), the pier structures at Lots 47 and 48 reside outside of their respective lots’ equitable apportionment. The neighboring pier to the east, Lot #47, appears to encroach upon the Applicant’s navigable water rights. Similarly, the Applicant’s pier encroaches on the riparian water rights of the westward adjacent HOA property. Both structures are located in the shallower end of the cove with the shortest existing structures. At low tide, the length of the Applicant’s pier limits access to waterways, leaving only a few inches for mooring a vessel. These shallow water depths are harmful to the seabed and pose a risk to boats.

In accordance with 7 *Del.C.* Ch. 72, the Department received the initial Application submitted on behalf of the Applicant by Coastal and Estuarine Research, Inc. (“Consultant”), dated April 23, 2020. The initial Application proposed to install an extension to the existing pier by adding a 4-foot-wide by 10-foot-long fixed pier, a 3-foot-wide by 10-foot-long gangway, and a 6-foot-wide by 25-foot-long floating dock. In addition to the existing pier, the proposed extension of the pier, along with the gangway and floating dock, will extend a total of 115 linear feet over water. The Applicant’s proposed pier extension enables the Applicant to gain fair and equitable access to the navigable water depths for safe mooring of a boat and provides access for kayaking and paddleboarding.

The Department’s Division of Water, Wetlands and Waterways Section (“WWS”) placed the initial application on public notice in the Delaware State News, the News Journal, and the Department’s website on May 13, 2020. To that, the Department received 3 letters of objection from the members of the public and a request for the Department to hold a hearing in regard to the Application. The objectors raised concerns about potential conflicts with the existing easement agreement, encroachment of the proposed structures on adjacent properties, and possible harm to nearby wetlands and wildlife. A public hearing was requested. The Department then placed a public notice of the hearing in the Delaware State News and News Journal on April 28, 2021.

Prior to the public hearing, the Department's Division of Water, WWS held two Microsoft Teams meetings: one with the applicant and one with both adjacent landowners. During these meetings the Department illustrated the equitable apportionment of property lines extended and addressed the intent of the Applicant's aiming to gain adequate water depths. The property owners in Herring Creek with pending Applications were encouraged to consider potential compromises and to suggest alternative solutions due to the existing structures residing outside of their property lines.

Following these discussions, and in response to the concern that were raised, the Consultant submitted a revised Application to the Department, on behalf of the Applicant. The revised Application proposes to install a 4-foot-wide by 45-foot-long fixed pier extension that maintains the overall length of the initially proposed structure. Additionally, the revised fixed pier will include a floating platform that measures 6-foot-wide by 12-foot-long and a 4-piling boatlift, both structured to the west of the pier. The relocation of the mooring area to the west of the pier facilitates safer vessel mooring with the use of a boatlift. Elevating the vessel above the seabed with a boatlift reduces hazards to both the boat and seabed, particularly in the shallower depths to the west, as mentioned above.

In accordance with Section 4.9 of 7 DE Admin Code 7504, the proposed revised structure will extend 115 feet in total, channel ward of the mean high mark, less than the maximum linear footage permissible and well within the 20% limit of the waterbody's width. Moreover, the extended length will accommodate mooring at mean low water level by adding 6 inches of water depth from the existing dock.

The Applicant submitted a revised application to minimize impacts on future water access for the adjacent property to the west and to ensure that the neighbor to the east can continue using their boat lift. The revised structure proposal will maintain a 45-foot distance between the most encroaching piling and the extended north property line of the HOA parcel. Considering setbacks, this leaves 15 feet of width available for a pier, platform, or a combination of both. Additionally, the proposed structure preserves approximately 195 linear feet of unobstructed space from the shoreline to the "mouth of the cove" within the HOA's equitable

apportionment of extended property lines. For navigation purposes, the neighbor at Lot #47 will still be able to access their existing boat lift, but only from the south side.

The revised application maintains the opportunity for additional water access for either adjacent neighbor, achieves mooring at increased water depths at mean low water, prevents the proposed floating kayak platform from resting on bottom at mean low water, and is comparable in linear footage of other piers in the same cove.

On May 19, 2021, the virtual public hearing was held by the Department. There were five (5) members of the public in attendance at the virtual hearing, along with a representative of the Applicant and Division of Water's staff. The record remained open through June 3, 2021, 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 the Department's 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; nine documents introduced by responsible Department staff at the public hearing held on May 19, 2021, and marked by this Hearing Officer accordingly as "Department Exhibits 1-9"; (3) two documents introduced by the Applicant and marked by this Hearing Officer as "Applicant Exhibit 1 and 2"; (4) the TRM from Rebecca Bobola, Environmental Program Manager, Division of Water ; and (5) the draft Permit prepared by the Department's WWS regarding the proposed revised Subaqueous Lands Lease Application of Matthew Eisenmann. The Draft Permit is expressly incorporated into this Report and attached hereto as Appendix "B". The Department's person primarily responsible for reviewing the Application, Mrs. Bobola, developed the Record with the relevant documents in the Department's files.

Following the presentation of Mrs. Bobola, on behalf of the Department, (and the introduction of the Department's exhibits to be entered into the Record), the Applicant proceeded with a presentation of Application. The Consultant of the Applicant provided a detailed overview of the history of the property and the Herring Creek Development. The consultant attested that the use of Exhibit 1, was historically used for the Applicant's and adjacent neighbor's current structures. The Applicant then provided an overview of the proposed Application and insight on the revision made to the proposed structure. In response to the comments received by the Department prior to the hearing, the Applicant introduced submitted a written response and introduced the statement into the record by this hearing officer, as Applicant's Exhibit #2.

Thereafter the public hearing, the Department received eight comments regarding the matter. The Record closed with regard to public comment 15 days following the public hearing, on June 3, 2021.

Subsequent to the close of the Record as noted above, this Hearing Officer requested a Technical Response Memorandum ("TRM") from the 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 Application; 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, attached hereto as Appendix "A," acknowledges the comments received prior to the public hearing notice as well as the fifteen comments (two of which were duplicates) received through the duration of the hearing. Of the comments received, eight comments objected the proposed Application, and five comments were in support. The TRM addresses the public concerns of the proposed 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.

In addition to the proposed Application, the Department also received similar Applications within the same vicinity of Herring Creek. These Applications shared common concerns of the public, necessitating formal public hearings. The records from these hearings presented conflicting surveys of the Herring Creek area and presented discrepancies of the adequate water depths for mooring and or navigating at mean low water in the general area. To ensure accuracy of the pending Applications, the Department enlisted the services of Plitko, LLC to conduct a bathymetric survey of Herring Creek, encompassing the proposed project site and other relevant locations. Upon review of the survey, the Department determined the Applicant's revised proposed structure is within the equitable apportionment for adequate water depths as feasibly possible given the surrounding existing structures.

The Department received comments that addressed concerns regarding the easement, property lines, the potential harm to the adjacent wetlands or wildlife within the cove, and conflicts to community and or private interest. To that, the Department conducted a review of the Application, utilizing the bathymetric survey conducted by Plitko, plot plan, deeds, and the 2006 DOJ Opinion. The Department determined that the proposed structure is within the equitable apportionment for adequate water depths, as feasibly possible.

The proposed structure will extend approximately 115 feet channelward of the mean high-water mark and is far from exceeding 20 percent of the width of the waterbody. The length of the structure is justified due to the shallow water depths, allowing the Applicant to gain 6 inches of water depth at mean low water for mooring. Furthermore, based on 2006 DOJ opinion and property delineations, the proposed structure will provide the adjacent neighbor with 45 feet between the closest piling and the northern property line extended of the HOA parcel. Accounting for setbacks, that leaves a width of 15 feet to accommodate a pier or platform or a combination thereof. Additionally, the proposed structure also leaves approximately 195 linear feet of unobstructed space from the shoreline to the "mouth of cove" within the HOA's fair distribution of extended property lines, that will allow for community access in the future.

Additionally, as a part of the aforementioned review, the Department determined that the proposed structure will not require dredging, therefor there will be no impact to the wetlands.

Although the proposed dock may cause some shading, it is anticipated that aquatic vegetation will not be negatively impacted, allowing the continued utilization of the area by benthic organisms. For the protection of aquatic wildlife, more specifically the diadromous fish species, the Department has included a restriction to the construction activity for the proposed structure, between March 1st through June 30th. This restriction mitigates the protentional harm to this species during their migration and spawning seasons.

In conclusion, DAQ drafted the permit, in accordance with applicable state and federal laws, ensuring its effectiveness in the protection of human health, welfare, and the environment. The revised proposed Application meets the laws and regulation established in *7 Del.C. Ch. 72* and *7 DE Admin. Code 7504 - Regulations Governing the Use of Subaqueous Lands*. Moreover, the proposed structure achieves mooring at increased water depths at mean low water, prevents the proposed floating kayak platform from resting on the seabed at mean low water, maintains the opportunity for additional water access for either adjacent neighbor, and it is comparable in linear footage of other peers in the same cove.

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. Accordingly, the Department's TRM, dated October 1, 2023, and provided to this Hearing Officer by WWS on October 9, 2023, is attached hereto for the Secretary's review as Appendix "A," and is hereby expressly incorporated herein. Furthermore, the Department's Draft Subaqueous Lands Lease is also attached hereto for the Secretary's review as Appendix "B" and is expressly incorporated herein as well.

III. RECOMMENDED FINDINGS AND CONCLUSIONS:

Currently pending before the Department is the above-described Application for a Subaqueous Lands Lease permit to construct a pier extension, a floating platform, and a boat lift in Herring Creek, at 34477 Skyler Drive, Lot #48, The Villages at Herring Creek, Lewes, DE. I find that the Applicant's revised proposed Application meets the requirements established in 7

Del.C. Ch. 72 and 7 DE Admin. Code 7504 - Regulations Governing the Use of Subaqueous Lands.

The Department's TRM acknowledges the comments received from the public and thoroughly responds to them. For the purposes of brevity, this Report defers to the attached TRM in its entirety for a comprehensive understanding of the concerns raised in the public comments received by the Department in this matter, as well as the Department's formal responses to the same, as provided by the technical experts in the Department's Division of Water.

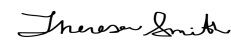
I find and conclude that the Record supports approval of the revised proposed Application as submitted by the Applicant to the Department's Division of Water, WWS, in this matter. Upon approval, the permit authorization to be issued by the Department would be reflective of the revised proposed Application submitted by the Applicant, consistent with the draft permit authorization prepared by the Department's experts in the WWS, with appropriate conditions, to ensure continued protection of public health and the environment, and reflective of the Record developed in this matter.

Accordingly, this Report recommends the issuance of a Subaqueous Lands Lease to construct a pier extension, a floating platform, and a boat lift in Herring Creek, at 34477 Skyler Drive, Lot #48, The Villages at Herring Creek, Lewes, DE, with the appropriate conditions as set forth herein, consistent with the draft permit authorizations prepared by the Department's WWS, and consistent with the Record developed in this matter.

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

1. The Department has jurisdiction under *7 Del.C. Ch. 72, 7 DE Admin. Code 7504 - Regulations Governing the Use of Subaqueous Lands*, and all other relevant statutory authority, to make a final determination on the aforementioned pending Application after holding a public hearing, considering the public comments, and all information contained in the Record generated in this matter;

2. The Department provided proper public notice of the Application submitted by Matthew Eisenmann and of the public hearing held on May 19, 2021, and held said hearing to consider all public comments 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 Permit and finds the Record supports approval of the same;
4. The Department shall issue the Subaqueous Lands Lease Permit to the Applicant, Matthew Eisenmann to authorize the construction of a pier extension, a floating platform, and a boat lift in Herring Creek, at 34477 Skyler Drive, Lot #48, The Villages at Herring Creek, Lewes, DE, consistent with the Record developed in this matter. Furthermore, said permit shall include all conditions as set forth in the Department's Draft Permit, 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

Public Hearing Officer

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Attachments/Appendices:

Appendix A: Technical Response Memorandum (received 10/09/2023)

Appendix B: draft Subaqueous Lands Lease Permit - Eisenmann