

BEFORE THE ENVIRONMENTAL APPEALS BOARD
STATE OF DELAWARE

Appeal of North Pickering Beach)
Homeowners Association.) NO. 87-11
February 16, 1988)

FINAL ORDER

This matter came before the Environmental Appeals Board on November 30, 1987. The following board members were present: Thomas J. Kealy, Chairman; Evelyn H. Greenwood; Ray K. Woodward; Harry Derrickson. James T. Vaughn, Jr., Esquire represented the appellant. Appearing on behalf of the appellant was Francis Messina and her husband Phillip Messina. The applicant, Pickering Beach Water Company, was represented by James D. Griffin, Esquire. Sally D. Dickerson appeared on behalf of the applicant. The Department of Natural Resources and Environmental Control ("DNREC") was represented by Jeanne Langdon, Deputy Attorney General. The Board was advised by Deputy Attorney General Ann Marie Johnson.

SUBJECT OF THE APPEAL

The question presented for appeal was whether the Secretary had erred in granting the Pickering Beach Water Company a Certificate of Public Convenience and Necessity (CPCN) to operate a public water utility at Pickering Beach. The Secretary's authority to issue such certificates derives from Senate Bill 730 as amended,

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which was passed in 1976. The standard set forth in the Bill is, in pertinent part, as follows:

... no water utility shall begin the business of the water utility, nor shall any water utility begin an extension of its business or operation without having first obtained from the Secretary a certificate that the present or future public convenience and necessity require (sic) or will require the operation of such business or extension.

The appellants took the position at the hearing that the sole issue was whether the substitution of the Pickering Beach Water Company corporate entity for the original applicant, Pickering Beach Water Works, Inc. was valid and proper. The appellant did not dispute that it was in the best interest of public convenience and a necessity to have a centralized water system at Pickering Beach. For the reasons stated below, the Board unanimously affirms the Secretary's order.

SUMMARY OF THE EVIDENCE

The Board submitted the chronology as Board Exhibit-1. The applicant originally filed an application for a CPCN on January 30, 1987 in the name of Pickering Beach Water Works, Inc. The application states that the applicant intended to file Articles

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Although this law was originally believed to have been vetoed by then Governor Tribbitt, a Supreme Court subsequently held that it had been improperly vetoed, and therefore, was, in fact, the law of the State. See, Opinion of the Justices, Del. Supr., 405 A.2nd 694(1979)

of Incorporation in February of 1987 and that a Certificate of Good Standing would be supplied as soon as it was received. The original Certificate of Incorporation, filed in May of 1986, was submitted as appellant's Exhibit No. 7. Attached to the applicant's application, however, was a proposed restated Certificate of Incorporation for Pickering Beach Water Works, Inc. The restated Certificate of Incorporation was for a "for-profit" corporation. Sally Dickerson was listed as President of the corporation.

The water system was begun over thirty years ago by the Haas and Draper families in a joint effort to serve South and North Pickering Beach. The system has never been year round and serves approximately thirty-seven homes. Currently, Sally Dickerson owns seven eighths of the water system and the other one eighth is owned by Marion Haas. Francis Messina, President of the North Pickering Beach Homeowner's Association testified that in April of 1986, Mrs. Dickerson made a proposal to sell "membership" in the Pickering Beach Water Works, Inc. The letter dated April 16, 1986 is the applicant's Exhibit No. 1. It states that:

It is contemplated that there will be created a non-profit, non-stock corporation to be known as Pickering Beach Water Works, Inc. It is our proposal that everyone owning a home or lot would become a member of Pickering Beach Water Works, Inc.. An initial assessment of \$410 per lot would be paid by each lot owner to defray the cost of acquisition

Subsequently, Mrs. Messina and her husband purchased the lot on which their home was located from Sally Dickerson. Paragraph 4 of Mr. and Mrs. Messina's deed states that "by acceptance of delivery of this deed, the parties of the second part acknowledge

membership in the corporation, Pickering Beach Water Works, Inc. and the rights and obligations of the members thereof." According to Mrs. Messina, although she was aware that the South Pickering Beach residents had not agreed to the offer, she was "assured that the deal would be honored." Mr. Philip Messina testified that he had had a conversation with Mr. Dickerson and had been assured that the deal would be honored.

Sally Draper Dickerson testified about the history of the Pickering Beach Water Company ownership. She stated that the terms of the offer made to all Pickering Beach residents were that if everyone did not participate that there would be no deal. She stated that all money received by her was put into escrow. By letter dated August 1, 1986, (applicant's Exhibit No. 2), the residents of South Pickering Beach rejected the offer. She also stated that she was made aware in May of 1986, that the Water Company was a de-facto public utility and had to obtain a Certificate of Public Convenience and Necessity. Mrs. Dickerson returned all the money held in escrow to the various homeowners and essentially withdrew her offer to sell membership in the water company by letter dated April 10, 1987. On May 28, 1987, she created a profit corporation called Pickering Beach Water Works, Inc. Mrs. Dickerson testified that she and Mrs. Haas still own the utility. She indicated that the assets of the utility had never been transferred to the non-profit corporation.

Philip Cherry of the DNREC testified that he had reviewed the application. In doing so, he noted that the residents at Pickering Beach had been obtaining the water from this system for

the past 30 years. It was his opinion that there was no viable alternative to the water system in the area, particularly in light of the fact that it was a centralized system. He stated that DNREC generally prefers centralized systems. He noted that he understood that Mrs. Dickerson was the operator of the company both before and after the amendment of the name on the application. Finally, he testified that there had been no applications before or since the CPCN had been issued to Pickering Beach Water Company.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Secretary has the authority and jurisdiction to issue a Certificate of Public Convenience and Necessity to a Water Utility. See Senate Bill No. 730. According to 7 Del. C. Sec. 6006, the Secretary is required to give 20 days notice before a hearing on any application. Content of that notice is described in 29 Del. C. Sec. 10122, which states in relevant part that: "(1) The notice shall describe the subject matters of the proceedings...." The notice for the applicant's hearing indicated that the applicant was Pickering Beach Water Works, Inc. At the public hearing before Rod Thompson, the applicant changed the applicant entity's name to Pickering Beach Water Company.

The Board finds that Pickering Beach Water Company is essentially the same corporate entity as the Pickering Beach Water Works, Inc. The record indicates that the principals and the proposed assets of the companies are the same. Testimony at

the hearing indicates that Mrs. Dickerson and Mrs. Haas continued to hold the assets in the water company and that the assets had never been transferred to the non-profit corporation. The only apparent difference between the corporations was the names and the Board so finds. Given the close relationship between these two corporations, there was no defect in notice to the public of the nature of the hearing created by substituting the new corporate entity.

The Board further finds that the Pickering Beach Water Company is the most qualified entity to operate a year round water system in Pickering Beach and that this system is necessary and desirable. This finding is based upon the testimony that the company has been providing water services for the past 30 years under ownership of the Draper and Haas families. The parties did not dispute that the year round centralized system was necessary and desirable in Pickering Beach, nor was any evidence submitted that the system proposed was not the best system to serve those needs.

The appellant's actual dispute is over the ownership of the water company itself, regardless of its name or its form. This matter is not before the Board, and even if it were, the Board has no jurisdiction or authority to determine what is essentially a contract matter. The Board is satisfied that the current applicant for a CPCN is the owner of the water system, and is the best qualified party to operate the water system.

STATEMENT OF BOARD ACTION

For the foregoing reasons, the Board affirms the Secretary's order.

Clifton H. Hubbard 2/4/88

Clifton H. Hubbard, Jr.

Richard Sames

Mary J. Sheldrake 2/16/88

Mary J. Sheldrake

Thomas J. Kealy

Thomas J. Kealy

Harry Derrickson

Evelyn Greenwood

Evelyn Greenwood

Ray K. Woodward 2/16/88

Ray Woodward

DATE: February 16, 1988

