

BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE

IN RE:

APPEAL OF GORDON E. WOOD, SR.
Letter of Authorization No. R0025/92)

)
)
)
) Appeal No. 92-II
)
)

FINAL ORDER

The Environmental Appeals Board ("Board") held a hearing on this appeal on October 13, 1992. The Board Members present were Thomas J. Kealy, Chairman, Edward Cronin, Joan Donoho, Clifton H. Hubbard, Jr., and Richard C. Sames. Steven C. Blackmore, Deputy Attorney General, advised the Board. Appellant, Gordon E. Wood, Sr., was present and represented himself. The permittee, Foreside Group, L.P. ("Foreside"), was represented by J. Joseph Tansey and the Secretary of the Department of Natural Resources and Environmental Control ("DNREC") was represented by Deputy Attorney General Kevin P. Maloney. This appeal involves a letter of authorization for repair or replacement of a boat docking facility. These letters of authorization are authorized for structures which are serviceable. Therefore, the issue here is whether the original dock was in a serviceable condition at the time of issuance of the letter of authorization.

The Board affirms the decision of DNREC.

SUMMARY OF THE EVIDENCE

On June 18, 1992, DNREC issued Letter of Authorization No. R0025/92 ("Permit") to Foreside for repair or replacement of a boat docking facility and pier ("Dock") located in Foreside Commons in Ocean View, Delaware. The Dock extended into White's Creek. Mr. Wood, who owns property in Foreside Commons, presented evidence that the Dock had originally been a three slip boathouse, but this was damaged and virtually destroyed by a fire over 40 years ago. Mr. Wood testified that he witnessed the fire which burned the old boathouse. He also stated that the Dock had not been in a serviceable or usable condition due to the fire, the deteriorated and scattered condition of the wooden planks on the Dock and lack of access. The original owner had abandoned the Dock after the fire.

Mr. and Mrs. Seamans, the owners of the lot adjacent to the Dock, also testified that the Dock was not serviceable or usable prior to its reconstruction under the Permit. The Seamans were primarily concerned about the Dock's lack of access and deteriorating condition. While there had been one or two boats docked there recently, the Dock was rarely used. The Seaman's indicated that the only way to gain access to the Dock was to walk along planks or catwalks which crossed over the muddy shoreline. Mr. Wood stated that anyone walking

on the Dock was risking severe personal injury. Numerous photographs were offered to show the deteriorated condition of the Dock. Foreside's prior request to build a new dock had been denied because the Dock connected to a lot which was not large enough to support an authorized structure under current regulations.

Tracy Skrabal, Program Manager of the Wetlands and Aquatics Division of DNREC, testified that Pat Emory, a Field Inspector for DNREC, had visited the Dock during November, 1991. He determined that the Dock was in serviceable condition. The testimony indicated that the strong January, 1992 storm which battered Delaware did scatter some planking from the Dock and contribute further to its deterioration, but this storm was not the primary reason for the issuance of the Permit. DNREC issued the Permit based primarily on the assessment of Mr. Emory after his site visit during November, 1991. DNREC also reviewed photographs of the Dock and its condition in 1992 prior to issuance of the Permit.

Foreside presented the testimony of Demmy Merritt, the marine contractor who repaired/replaced the Dock. During the construction period, he had tied his boat to the Dock. He also walked on it and the planks which provided access to the shore. He found the Dock to be serviceable. He indicated that he has walked on and worked on docks which were in poorer condition. Similarly, Peter DeMarie, a nearby landowner, testified that he walked on the Dock and access planks. He found the Dock to be in usable condition although in need of improvement. Foreside

also offered photographs to show that the Dock was in service-able condition.

FINDINGS OF FACT

1. The Permit authorized repair or replacement of the Dock.

2. The Dock had been damaged by a fire approximately 40 years ago, and it was clearly in a state of deterioration. However, it could be used for receiving and tying of boats.

3. The deteriorating condition of the wood in the Dock made walking on it more difficult, but the Dock could be used by careful individuals.

4. Access to the Dock was also made more difficult by the planking or catwalks used for access. While there was testimony that these planks must have been connected to or placed on the Dock in violation of DNREC's regulations, Pat Emory visited the site for DNREC and apparently concluded that no violation existed.

5. The repair or reconstruction of the Dock did not pose additional environmental, safety or navigational risks because it occupied the same area and it did not exceed the scope of the original Dock.

6. The photographic evidence and especially the witnesses' testimony were conflicting on the subject of serviceability and usability of the Dock.

7. After a field inspection and review of the photographs from 1991 and 1992, DNREC made its determination that the Permit should be authorized. The damage or deterioration would have been clearly evident from an inspection and review of photographs, but DNREC concluded the structure was serviceable.

CONCLUSIONS OF LAW

Under 7 Del. C. sec. 7205(a), a permit or letter of authorization is required before a person may construct, modify, repair or reconstruct any structure or facility upon submerged lands or tidelands.¹ Under section 1.04(B)(12) of DNREC's regulations, a letter of authorization is required for "repair or replacement of a serviceable structure on public subaqueous lands." DNREC's regulations also state:

For repair and replacement projects of serviceable structures, servicability (sic) must be proven to the satisfaction of the Department. A serviceable structure includes existing structures which are intact and functioning for the original intended design purpose. For structures which are no longer intact, due to a specific and catastrophic water event or activity, camera-dated photographs or aerial photography must clearly indicate the servicability of said structure (as defined by the criteria above) within six (6) months prior to the date of application. (Emphasis added).

1

By its terms, the section 7205(a) requirement does not apply to repairs or replacements above the mean low tide mark which do not increase the dimensions or change the use of the facility.

DNREC Regulations sec. 3.01. Therefore, the issue here is whether the Dock was "serviceable."

DNREC considers a serviceable structure to be one which is intact and functioning for its original intended design purpose. ² Id. Foreside argued that serviceability should be defined here as usable, regardless of condition, for docking boats. Mr. Wood argued that serviceability should be defined as safely usable as is, or with some maintenance, but not so degraded as to essentially require reconstruction. He looked to 33 C.F.R. Part 330, Appendix B, for guidance in formulating this definition.

Under Delaware law, words which are not specifically defined should be construed by following their common and ordinary definition. 1 Del. C. sec. 303. The ordinary definition of serviceable includes being ready for service; usable. The American Heritage Dictionary of the English Language (New College Edition). Usable is defined as "1. Capable of being used. 2. In a fit condition for use; intact or operative." Id. There is no doubt that the Dock was not in its original condition or equal to the condition of a new docking facility. However, the Dock was in a usable condition and it had been used by other boats and individuals. DNREC's regulations do not extensively define serviceability and the Board generally

2

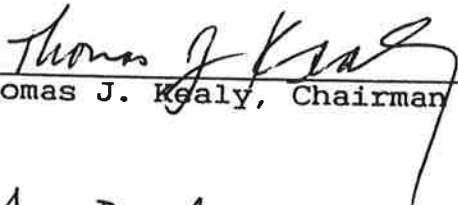
The six month period for structures which are no longer intact is not relevant here because the January, 1992 storm occurred more than six months prior to the Permit application.

accepts reasonable interpretations by DNREC of its own regulations. The Board will defer to DNREC's reasonable interpretation here, based substantially on a personal inspection. We note that DNREC could do more to clarify the standards behind serviceability. Also, the Permit only results in incidental environmental harm or interference with the natural resources of the State, in accordance with general purposes behind 7 Del. C. sec. 6001 et seq. The burden of proof was on the appellant (Mr. Wood) to show that the decision below was not supported by the evidence. 7 Del. C. sec. 6008(b). While the parties offered evidence to support their positions, the Board was not convinced that DNREC erred here.

Mr. Wood also argued that the Permit was unauthorized because it violated federal law and regulations. He argued that permits related to structures in navigable waters must be issued or authorized by the federal government. Therefore, Mr. Wood argues that the federal definition of "serviceable" applies here and the structure must be currently serviceable (usable as is or with some maintenance) to qualify under the nationwide permit issued by the Army Corps of Engineers. Whether the Dock would qualify under a regional federal permit was never clearly addressed. The Board has not considered federal law in its decision here. The Permit issued by DNREC

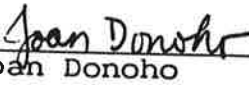
was not issued under the Commerce Clause of the United States Constitution or any other federal authorization. It was issued under State law and Delaware's inherent power to issue such permits. The Dock may continue a slight intrusion into the navigability of White's Creek, but any interference with federal commerce or navigation powers is merely incidental. If federal permit laws have been violated here, there should be federal remedies available through forums better equipped to resolve those issues.

Therefore, the decision of DNREC to issue the Permit is unanimously affirmed.




Thomas J. Kealy, Chairman

Edward Cronin



Joan Donoho

Richard C. Sames



Clifton H. Hubbard, Jr.
11/29/92

DATE:

was not issued under the Commerce Clause of the United States Constitution or any other federal authorization. It was issued under State law and Delaware's inherent power to issue such permits. The Dock may continue a slight intrusion into the navigability of White's Creek, but any interference with federal commerce or navigation powers is merely incidental. If federal permit laws have been violated here, there should be federal remedies available through forums better equipped to resolve those issues.

Therefore, the decision of DNREC to issue the Permit is unanimously affirmed.

Thomas J. Kealy, Chairman

Edward Cronin

Joan Donoho



Richard C. Sames

Clifton H. Hubbard, Jr.

DATE:

was not issued under the Commerce Clause of the United States Constitution or any other federal authorization. It was issued under State law and Delaware's inherent power to issue such permits. The Dock may continue a slight intrusion into the navigability of White's Creek, but any interference with federal commerce or navigation powers is merely incidental. If federal permit laws have been violated here, there should be federal remedies available through forums better equipped to resolve those issues.

Therefore, the decision of DNREC to issue the Permit is unanimously affirmed.

Thomas J. Kealy, Chairman

Edward Cronin

Edward Cronin

Joan Donoho

Richard C. Sames

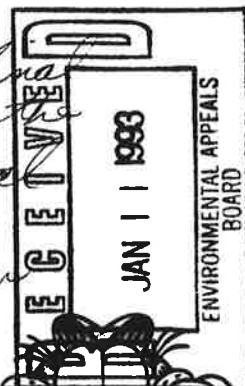
Clifton H. Hubbard, Jr.

DATE:

Eller,
Please add this final
signature page to the
Gordon Wood appeal

Thanks,
Ralim

P.S. These post-it note
came in my
stocking from Santa



READ MY LIPS



P-798 © 1978 United Feature Synd. Inc.

TM & © 1975