

BEFORE THE ENVIRONMENTAL APPEALS BOARD

FOR THE STATE OF DELAWARE

ROBERT K. BOWIE AND JOYCE L. BOWIE,)
)
Appellants,)
v.) Appeal No. 2003-03
)
SECRETARY OF THE DEPARTMENT OF)
NATURAL RESOURCES AND ENVIRONMENTAL,)
CONTROL OF THE STATE OF DELAWARE,)
)
Agency-Below,)
Appellee,)

FINAL ORDER AND DECISION

Pursuant to due notice of time and place of hearing served on all parties in interest, the above stated cause came before the Environmental Appeals Board on October 28, 2003, in the Auditorium, Richardson & Robbins Building, 89 Kings Highway, Dover, Kent County, Delaware.

PRESENT:

Donald E. Dean, Chairman
Stanley Tocker, Ph.D., Member
Peter McLaughlin, Member
Gordon Wood, Member
Harold Gray, Member
Tjark Batemen, Member

Kevin R. Slattery, Attorney for the Board.

APPEARANCES:

Robert K. Bowie and Joyce L. Bowie, *Pro se.*
Matthew P. Chesser, Deputy Attorney General, for the Agency

A hearing was held before the Environmental Appeals Board on October 28, 2003, pursuant to the appeal by Robert and Joyce Bowie ("the Bowies" or "appellants") of the denial of their permit application to construct a wetlands walkway, pier and dock to provide water access from their property to Pepper Creek in Sussex County, Delaware.

The appellants, Robert and Joyce Bowie, contend that in 1999 they located a property in the Point Farm development. Prior to purchasing the lot, they contacted (via telephone) "someone" (unnamed) at the Department of Natural Resources and Environmental Control ("DNREC" or "the agency") to determine the process for having the lot approved for building a pier and dock. The person seemed aware of the development and the location. The Bowies state they were told by this unnamed person that there should be no problem in obtaining approval for the walkway, pier and dock. Further, they state they were told that they would have to be in the process of building a home before they could apply for the permit. They obtained permission from the homeowner's association to build their walkway, pier and dock. Once they started building their home, they applied for the permit. They did not want to join in with the homeowner's association to build a joint dock. Shortly thereafter, the permit was denied. They feel they were not treated fairly because of their prior telephone contact with DNREC. They have since built their home.

It is the agency's contention that the appellants are not riparian owners. One DNREC point of opposition is that they feel the size of the structure is overreaching. The structure would be 210 feet long, with a 50 foot dock, two boat lifts and a lift for a personal watercraft. In addition, the Bowies do not want to join with the homeowner's association

in a joint project. The agency cannot be bound by the appellants' reliance on a conversation over the telephone with an unknown individual at DNREC. There were measures the appellants could have taken to protect themselves prior to purchasing the lot. The agency has the legal responsibility to protect wetlands and the inland bays.

SUMMARY OF THE EVIDENCE

The Board considered the testimony of Mr. Robert K. Bowie.

Mr. Bowie testified that he felt he did his due diligence in pursuing the walkway. There have been several docks and walkways built in the neighborhood that were of significant length. Existing walkways in the subdivision vary from 23 feet to 180 feet. The Blanchett's lot (Lot #40 which is 6 lots down from the Bowies' lot) was approved for a 135 foot structure. Based upon the telephone conversation with the unnamed person at DNREC, they believed they were going to be able to build the structures. They then purchased a boat and a jet ski. In December 2002, they contracted to build a home. They also received permission from the homeowner's association to build the structure, and an application was submitted to DNREC. Shortly after their application was submitted, they received a call from Jennifer Johnson of DNREC who suggested that they join in with the owners of lots 50 to 58 in building a community pier and dock. The Bowies do not want to build such a pier as they would have to walk through others' backyards in order to access their boats.

On cross examination, Mr. Bowie testified that he has a 23 foot motor boat and a jet ski. He does not own a sailboat, and he knows of no documentation that would suggest he owns a sailboat. He does not know the section of the agency he contacted. He wants

to say the person he spoke with at the agency was a man, but he is not sure. The terminology used by the unnamed person at DNREC was "it should not be a problem". He knew he had to go through the permit application process. At the time, he did not know the size of the structure to be proposed. He estimated it might be 150 feet over wetlands. The structure, in total, would actually be 250 feet long. His call to DNREC was an inquiry type of telephone call. There are a number of structures in Point Farm.

On examination by the Board, Mr. Bowie testified that he gave his best possible guess to the person at DNREC in order to see if it was going to be possible. He did not plan on building a house at the time he bought the lot. The position taken by DNREC was that they could not build until they started constructing a house. He has no evidence that there is no place to build a community pier. He does not know whether at the time he made the telephone inquiry, that DNREC could, or would, have given him an opinion letter regarding a proposed dock and walkway.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the conclusion of the appellants' case, the agency renewed its Motion to Dismiss.

The agency argues that the appellants have not established a *prima facie* case of discriminatory treatment. There is no evidence that DNREC approved the construction of other piers or docks similar in length or during a similar time frame. The Board agrees.

Pursuant to 7 Del. C. § 6008(e), the appeal in this matter is limited to the sole issue of whether the decision of the agency in denying the permit application was discriminatory. It is the burden of the appellants to establish that their circumstances are "like and similar"

to those of other applicants, and that they were not afforded "like and similar" treatment.¹

The appellants' case consists of the testimony of Mr. Bowie that docks exist in the development extending up to 180 feet long. He also testified that a 135 foot structure exists just six lots down from his own. Unfortunately for the appellants, this testimony is simply not sufficient to overcome the burdens of production and proof in this matter.

The fact structures exist in the development of up to 180 feet long does not establish by a preponderance of the evidence that the appellants were not afforded like and similar treatment. Accepting Mr. Bowie's testimony as fact, the appellants' structure would have been 250 feet long when completed. This is 70 feet longer than the longest existing structure in the development. The difference in the length of the structure alone makes it significantly distinguishable from the previously constructed piers and docks in the development. In addition, the appellants have not provided the Board with any evidence as to when these pre-existing structures were approved and built.

The courts of this state have recognized the agency's more restrictive application of its statutory authority and regulations with respect to subaqueous lands in the last several years. See e.g., The Glade v. DNREC, 2001 WL 845750 (Del. Super. 2001). Without knowing when the pre-existing structures were approved and constructed, the Board is unable to make the comparison between the Bowies' application and the applications of the other property owners.

¹Even if the Board had considered a possible claim of estoppel based upon the telephone call to an "unnamed" person at DNREC, insufficient evidence was provided by the appellants to support such a claim.

Given the only issue before the Board is the question of whether there was discriminatory treatment, and as the appellants' have not established a *prima facie* case of such discriminatory treatment, the Board has no choice but to grant the agency's motion.

STATEMENT OF DETERMINATION

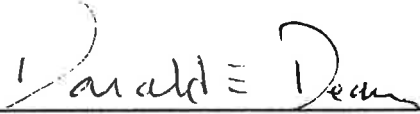
Due to the lack of sufficient evidence before the Board to demonstrate discrimination by the Secretary in denying the appellants' permit, the Board by unanimous vote grants the agency's Motion to Dismiss the appeal.

SO ORDERED this 2nd day of December, 2003.

ENVIRONMENTAL APPEALS BOARD

The following Board members concur in this decision.

Date: 11/21/03

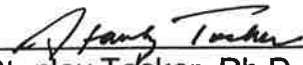


Donald E. Dean
Chairman

Bowie

Environmental Appeals Board
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Date: 11/21/03



Stanley Tocker, Ph.D.
Board Member

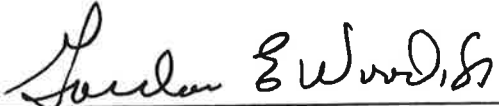
Environmental Appeals Board
Appeal No. 2002-03

Date: 25 November 2003


Peter McLaughlin
Board Member

Environmental Appeals Board
Appeal No. 2002-03

Date: Nov 23, 2003



Gordon Wood
Board Member


Environmental Appeals Board
Appeal No. 2002-03

Date: 11/25/2003


Harold Gray
Board Member

Environmental Appeals Board
Appeal No. 2002-03

Date: 11/21/03



Tjark Batemen
Board Member

