

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
FOR THE STATE OF DELAWARE**

LIGHTHOUSE COVE INVESTORS, LLC,)

Appellant,)

v.)

Appeal No. 2011-02

SECRETARY OF THE DEPARTMENT)
OF NATURAL RESOURCES AND)
ENVIRONMENTAL CONTROL OF)
THE STATE OF DELAWARE,)

Appellee,)

and)

LIGHTHOUSE VIEW CONDOMINIUM)
ASSOCIATION OF OWNERS, LLC,)

Permittee/)
Intervenor.)

DECISION AND FINAL ORDER

Introduction

Pursuant to due and proper notice of time and place of hearing provided to all parties in interest, and to the public, the above-captioned matter came before the Environmental Appeals Board ("Board") on November 8, 2011, in the Auditorium of the Richardson & Robbins Building, located at 89 Kings Highway, Dover, Kent County, Delaware.

Members of the Board present and constituting a quorum were Nancy J. Shevock (Chair), Gordon E. Wood, Sr., Harold Gray, Sebastian LaRocca, Michael Horsey, Dean Holden, P.E., and Andrew J. Aerenon, Esquire. No Board Members disqualified

themselves or were absent. Deputy Attorney General Frank N. Broujos served as counsel to the Board.

In this proceeding, John A. Sergovic, Jr., Esquire represented Appellant Lighthouse Cove Investors, LLC ("Lighthouse Cove"); Deputy Attorney General David L. Ormond, Jr. represented Appellee Secretary Collin P. O'Mara ("Secretary") of the Department of Natural Resources and Environmental Control of the State of Delaware ("DNREC"); and Stephanie Hanson, Esquire represented Intervenor Lighthouse View Condominium Association of Owners, LLC ("Lighthouse View").

Statement of the Case

On June 5, 2009, Lighthouse View submitted to DNREC an administratively complete application for a Wetlands and Subaqueous Lands Section ("WSLS") Lease and Marina Permit (collectively the "Permit") to construct a 24-slip marina consisting of twelve (12) 4 by 20 foot finger piers and 26 freestanding pilings in Lighthouse Cove, Little Assawoman Bay, at Beacon Drive, Fenwick Island, Sussex County, Delaware (the "Permit Application"). The proposed project for which the WSLS Permit was sought is subject to the requirements of the Subaqueous Lands Act (7 Del.C. ch. 72), and the State of Delaware's *Regulations Governing the Use of Subaqueous Lands* ("Subaqueous Lands Regulations"), and *Delaware Marine Regulations*. (7 Del.C. chs. 60, 66 and 72).

DNREC Public Hearing Officer Lisa A. Vest (the "Hearing Officer") conducted a public hearing in Fenwick Island, Delaware, on April 22, 2010 in order to receive public comment concerning Lighthouse View's Permit application and to address public comment previously received during the standard 20-day public hearing notice period. At that public hearing, both Lighthouse View and DNREC made presentations to the

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public, and introduced exhibits into the record. Additionally, members of the public, including Mr. Sergovic on behalf of Lighthouse Cove, provided comment and introduced exhibits regarding the Permit application. Lighthouse Cove's comments and submissions, as well as testimony elicited by Mr. Sergovic from Mr. Charles Adams and Mr. Howard Abbott, pertained entirely to ownership of the subject subaqueous lands.

Following receipt and review of a Technical Response Memorandum dated October 21, 2011¹ from DNREC Environmental Scientist Melanie Tymes that addressed regulatory criteria and recommended one permit condition, the Hearing Officer prepared and submitted a report dated December 17, 2010 (the "Hearing Officer's Report") to the Secretary, setting forth Background Findings, Summary of the Record (including public comments and submission by Lighthouse Cove), and Conclusions and Recommendations regarding the issuance of the requested permit. The Secretary subsequently issued Order No. 2011-W-0002 (the "Secretary's Order") on January 14, 2011 (with an effective date of same) regarding the Permit Application. The Secretary's Order incorporated the Hearing Officer's Report and approved Lighthouse View's Permit Application, setting forth his Findings and Conclusions in support of his decision. In addressing Lighthouse Cove's public comments, the Secretary stated DNREC's position that ". . . *after careful and thorough review of this application and the challenges made by [Lighthouse Cove], that the subaqueous lands upon which [Lighthouse View] proposes to construct marina slips is, in fact, State of Delaware public subaqueous land, and is not privately owned by [Lighthouse Cove].*"

¹ It is readily apparent from the Chronology that the Technical Response Memorandum was prepared by DNREC Environmental Scientist Melanie Tymes in 2010 not 2011.

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On February 8, 2011, Appellant Lighthouse Cove filed with the Board a timely statement of appeal of the Secretary's Order, docketed by the Board as EAB Appeal No. 2011-02 (the "Appeal"). The Appeal challenges the Order as improper because it authorizes a permit and lease on private subaqueous lands; the Appeal does not challenge any other aspect of the issuance of the Permit, or any condition thereof. In pertinent part, the Appeal states that "*the Secretary's Order is improper because it authorizes a permit and a lease on the private subaqueous lands of Lighthouse Cove . . . [and also because] it found erroneously that the area of underwater lands where the proposed project is situated consists of wholly of public subaqueous lands.*" The Appeal also states that "*the Secretary's Order deprives Lighthouse Cove of its private subaqueous lands without compensation and invites [Lighthouse View] to utilize its land in violation of Lighthouse Cove's interested in such lands.*"

By motion dated June 9, 2011, and without objection from either party, Lighthouse View sought the Board's approval to intervene in this matter in its capacity as the permittee that was granted the Permit effectuated by the Secretary's Order and whose interests are directly affected by the Appeal. By Order dated October 21, 2011, the Chair on behalf of the Board granted Lighthouse View's motion to intervene.²

Matters Before the Board

A hearing on the merits of the Appeal was scheduled for November 8, 2011. However, prior to that date, and pursuant to a schedule stipulated to by the parties,

² Even absent intervention, the Board's Regulations would permit Lighthouse View, as the permittee, to be heard and to present evidence in this matter. "Following opening statements, each party shall have an opportunity to produce evidence in support of such party's position. The appellant(s) shall produce evidence first followed by [DNREC] and then followed by the Permittee if any. . ." 7 Del. Admin. C. § 105.5.8.

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DNREC filed a potentially case-dispositive motion. Specifically, DNREC filed a “Motion to Dismiss for Failure to State a Claim, Lack of Subject Matter Jurisdiction and Lack of Standing,” along with a supporting legal memorandum on October 22, 2011. Lighthouse Cove filed its response to DNREC’s Motion to Dismiss on October 31, 2011. By letters to the Board’s counsel and to the parties dated October 26, 2011 and November 4, 2011, Intervenor Lighthouse View, through its counsel, stated that it was taking no position on DNREC’s motion or Lighthouse Cove’s response thereto.

The parties, including the Intervenor, agreed that DNREC’s motion to dismiss would be considered by the Board at the November 8, 2011 hearing, and that the Board would hear oral argument on the motion. It was also agreed that the Board would conduct a hearing on the merits of the Appeal at a later date in the event DNREC’s motion was denied in whole or in part.

Summary of DNREC’s Position

In its motion and in oral argument before the Board, DNREC seeks dismissal of the appeal on two grounds: lack of standing and lack of subject matter jurisdiction, either or both of which constitute Lighthouse Cove’s failure to state a claim in its appeal upon which the Board may grant relief.

As to lack of standing, DNREC argues that Lighthouse Cove has not met its legal burden to establish standing to challenge the Secretary’s Order and seek redress from the Board. As the basis of its standing argument, DNREC relies upon 7 *Del.C.* § 7210, which requires that “[a]ny person whose interest is substantially affected by any action of

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the Secretary or of the Department taken pursuant to this chapter [72], may appeal to the Environmental Appeals Board. . .”³.

DNREC contends that the Lighthouse Cove does not have standing to bring its Appeal before the Board because it is not “substantially affected” by the Secretary’s Order as required by § 7210. The phrase “substantially affected,” as interpreted by the Delaware Supreme Court in the case of *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 82 (Del. 1994), requires a party, in order to establish standing, to show that it has suffered an “injury-in-fact” and that the injury is within the “zone of interest” sought to be protected by the statute at issue. DNREC argues Lighthouse Cove has alleged only a pecuniary injury, namely loss of title to real property and related economic loss, and that that type of loss is not within the “zone of interest” that Chapter 72 is intended to protect, which DNREC contends pertains to preservation of the environment and natural resource protection.

As to lack of subject matter jurisdiction, DNREC cites §§ 6008(e)⁴ and 7210⁵ as statutory authority for its position that the Board lacks subject matter jurisdiction to hear this Appeal because, as a general matter, appeals challenging the *denial* of permits involving state-owned subaqueous lands are not permitted, absent a showing of discrimination with respect to the Secretary’s decision. DNREC also argues, however, that under §§ 6008(e) and 7210, appeals of the *granting* of leases involving state-owned

³ All statutory section citations in this Decision and Final Order refer to sections within Chapter 60 (Environmental Control) of Title 7 (Conservation) of the Delaware Code, unless otherwise noted.

⁴ Section 6008(e) provides that “[t]here shall be no appeal of a decision of the Secretary to *deny* a permit on any matter involving state-owned land including subaqueous lands, except an appeal shall lie on the sole ground that the decision was discriminatory in that the applicant, whose circumstances are like and similar to those of other applicants, was not afforded like and similar treatment.” (Emphasis added).

⁵ Section 7210 provides, in part, that “[t]here shall be no appeal of a decision by the Secretary to *deny* a permit on any matter involving state-owned subaqueous lands.” (Emphasis added).

subaqueous lands are likewise not permitted. DNREC contends that the General Assembly when enacting these provisions did not, by negative implication, create a right to appeal decisions by the Secretary *granting* subaqueous land leases on State-owned subaqueous lands. In direct support of its position, DNREC cites *Worldwide Salvage, Inc. v. Environmental Appeals Board*, 1986 WL 3650, *3 (Del. Super. Jan. 30, 1986), as well as a 1997 decision by this Board, *Friends of Herring Creek and Harrison v. Secretary*, EAB Appeal No. 97-02 (Feb. 27, 1998). DNREC also contends that Lighthouse Cove has failed to allege any discriminatory treatment as required under § 6008(e) as the only grounds upon which to bring its Appeal.

Summary of Lighthouse Cove's Position

In its written response to DNREC's motion and in oral argument before the Board, Lighthouse Cove vigorously opposes DNREC's positions with respect to standing and subject matter jurisdiction.

At the heart of Lighthouse Cove's argument in opposition to DNREC's motion is the conclusory language in the Secretary's Order pertaining to the determination of title to the subaqueous lands where Lighthouse View proposes to locate its marina. This is argued by Lighthouse Cove in the context of the broader argument that, although Chapter 72 delegates to the Secretary the authority to make determinations as to what constitutes public and private subaqueous lands, neither Chapter 72 nor the Subaqueous Lands Regulations address who has the burden of placing evidence before the Secretary when ownership of subaqueous lands subject to a permit application is challenged.

Lighthouse Cove contends that, although the Secretary states in his Order that DNREC "performed an exhaustive research and review of the lands in question," there is

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nothing in the record before the Secretary or set forth in the Order to support the Secretary's finding that the subject subaqueous lands are *public* subaqueous lands. Lighthouse Cove argues that such a finding by the Secretary, without evidentiary support or citation to map or documents, constitutes an "injury-in-fact" required under *Oceanport* and establishes the basis for standing to bring the Appeal. To that end, Lighthouse Cove contends it is, in fact, "substantially affected" by the Order because the Secretary has determined title to the subject property without any legal recourse to challenge that determination. Additionally, Lighthouse Cove argues that this "injury in fact" falls under the non-environmental "zones of interest" intended to be protected under Chapter 72. Those non-environmental zones of interests include § 7213, which provides that "[Chapter 72] shall not change the law of this State relating to existing property, riparian or other rights of this State or other persons in submerged, tidelands or filled lands." Because its property rights have been adversely impacted by the Secretary's determination of ownership of the subject subaqueous lands, Lighthouse Cove contends that the Secretary has violated § 7213 and that such violation establishes a basis under *Oceanport* to establish standing to bring this Appeal.

Lighthouse Cove also challenges DNREC's contention that the Board lacks subject matter jurisdiction. To that end, Lighthouse Cove argues that §§ 6008(e) and 7210 are unambiguous and should not be interpreted beyond their plain meanings to be construed, as DNREC argues, to prohibit appeals of the *granting* of a permit involving state-owned subaqueous lands, particularly appeals by a party such as Lighthouse Cove, who claims a private ownership interest in the subject property. Such an interpretation, Lighthouse Cove argues, "eliminate[s] the EAB in any matter involving subaqueous

lands and would further eliminate an appeal from the EAB to the Superior Court on all issues pertaining to subaqueous lands and would make the Secretary omnipotent in this arena.”

Summary of Lighthouse View’s Position

As noted, *supra*, Intervenor Lighthouse View took no position on DNREC’s motion or Lighthouse Cove’s response thereto, and chose not to provide any written submissions (or present oral argument) to the Board.

Findings of Fact and Conclusions of Law

Prior to the November 8, 2011 hearing on DNREC’s motion, and in accordance the EAB Regulations, 7 *Del. Admin. C.* § 105-4.1, DNREC provided to the Board the Chronology consisting of the record before the Secretary.⁶ In addition, in deciding this motion, the Board considered the written submissions of the parties and oral argument from the parties’ respective counsel. No party submitted any evidence upon which the Board relied in reaching its decision on DNREC’s motion.

At the conclusion of argument by the parties, the Board entered into executive session to deliberate as permitted by § 6008(a)⁷. Upon careful review of the Chronology, and the parties’ arguments, and following deliberation, the Board in public session passed a motion by Board Member Harold Gray, by a vote of 4 to 3, to grant DNREC’s motion

⁶ EAB Regulations provide that “[t]he Chronology . . . will be provided to the Board members prior to the hearing.” 7 *Del. Admin. C.* §4.3. For purposes of this appeal, and by agreement of the parties, the Chronology consisted of the (a) Lighthouse View’s Wetlands and Subaqueous Lands Section Application dated June 5, 2010; (b) Transcript and exhibits from DNREC’s April 22, 2010 public hearing; (c) DNREC Technical Response Memorandum dated August 12, 2010; (d) Hearing Officer’s Report dated December 17, 2010; (e) Secretary’s Order No. 2011-W-0002 dated January 14, 2011; and (f) Lighthouse Cove’s Notice of Appeal.

⁷ Section 6008(a) states, in pertinent part, that “[d]eliberations of the Board may be conducted in executive session.”

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to dismiss on the basis that the Board does not have subject matter jurisdiction to hear the Appeal.⁸

As a threshold requirement in any proceeding before the Board, subject matter jurisdiction must be established because absent such jurisdiction being conferred on this Board by the General Assembly, or by a Delaware court interpreting an act of the General Assembly, the Board is powerless to take action. To that end, the pivotal issue posed by DNREC's motion to dismiss is whether the Board has subject matter jurisdiction to hear the Appeal.

The Board concludes that it does not have subject matter jurisdiction to hear this appeal. The Board agrees with DNREC's position that both § 6008(e), as interpreted by the Delaware Superior Court in *Worldwide Salvage*, as well as § 7210, prohibit the Board from hearing appeals of the *granting* of public subaqueous lands leases, and divests it of subject matter jurisdiction to hear this Appeal.⁹ As stated by the Superior Court, "... the Legislature did not intend to create, by negative implication, right of appeal to the Board from decision to grant licenses or permits relating to subaqueous state lands." *Worldwide Salvage*, 1986 WL 3650, at *5.

Section 6008(e) is found in Chapter 60, which is not only the general environmental control statute in Title 7 of the Delaware Code, but also includes the Board's enabling statutes. This section is a provision the Board is bound to follow not only by its terms, but also as interpreted by a Delaware court. Thus, the Board finds that

⁸ Because the Board dismisses the Appeal for lack of subject matter jurisdiction, it need not, and therefore does not, address the question of whether Lighthouse Cove has standing to bring its Appeal.

⁹ It is undisputed that these two provisions prohibit appeals of a decision by the Secretary of the *denial* of a permit or lease on any matter involving public subaqueous lands, except when discriminatory treatment is alleged.

Worldwide Salvage is legal precedent it is bound to follow. The Board acknowledges that *Worldwide Salvage* addressed the Board's jurisdictional authority under § 6008(e) (and not § 7210); however § 7210 is substantially similar in that it contains language that parallels that of § 6008(e) with respect to appeals of matters involving public subaqueous lands. Additionally, this Board relied on *Worldwide Salvage* in deciding *Friends of Herring Creek and Harrison v. Secretary*, EAB Appeal No. 97-02 (Feb. 27, 1998), where the Board dismissed an appeal of a public subaqueous lands lease pursuant to § 7210 based on the Superior Court's interpretation of § 6008(e). In that decision, we concluded that "[t]he decision in *Worldwide [Salvage]* made the interpretation of [§ 7210] clear . . . [i]n fact, the Legislature enacted § 7210 with the same language as had been previously interpreted in *Worldwide [Salvage]*, that is, 'there shall be no appeal of a decision by the Secretary to deny a permit on a matter involving state-owned subaqueous land.'"

At its core, this Appeal is not about the Secretary's authorization of the issuance of the Permit, as Lighthouse Cove contends. The Board recognizes that the sole issue underlying this Appeal is a decade-long dispute as to ownership of the subaqueous lands on which the proposed marina is to be constructed. And as plainly noted by Lighthouse Cove in its Statement of Appeal, it is a dispute that will likely be resolved only through a review of title records and historic aerial photographs, as well as testimony of members of Lighthouse Cove as to the dredging and excavating by Lighthouse Cove's predecessors in title. That being the case, not only is the Board not the proper forum to adjudicate what is ultimately a dispute as to ownership and title to real property, this Board as a quasi-judicial board is not obligated or empowered to determine title.

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MacDonald v. Board of Adjustment of the Town of Dewey Beach, 559 A.2d 1083, 1087-88 (Del.Super. 1989).

Furthermore, despite Lighthouse Cove's contention that the actual issue before the Board is not a title dispute, but rather whether the Secretary had sufficient evidentiary support for his finding that the subject subaqueous lands are publicly owned, in reality there is no discernible distinction.¹⁰ While Lighthouse Cove argues that its Appeal solely concerns whether the Secretary had sufficient evidence to make a determination of ownership of the subaqueous lands in question (and not to resolve a property dispute), the fact that this Appeal came before this Board as one involving public subaqueous lands, determined by the Secretary to be such, does not impose subject matter jurisdiction on this Board to review the Secretary's determination.

As noted, *supra*, disputes involving title to real estate, including subaqueous lands, are properly adjudicated by the Delaware courts, not by the Secretary or this Board. To that end, the Board's denial of subject matter jurisdiction and its refusal to hear the Appeal do not leave Lighthouse Cove without legal recourse to pursue its claim of ownership of the subject subaqueous lands. As discussed by the parties' counsel during oral argument, potential actions include a quiet title action, a trespass action, or an inverse condemnation action brought in the Court of Chancery or the Superior Court.¹¹

¹⁰ Because no other aspect of the Permit was appealed by Lighthouse Cove, a remand by the Board would require the Secretary to make findings of fact with respect to his determination of ownership of the subject subaqueous lands, in essence determining title by interpreting deeds, surveys and making exact delineations. If that determination, whatever it is, is unsatisfactory to Lighthouse Cove, or Lighthouse View for that matter, the Secretary's Order could be appealed back the Board, placing the Board *again* in the position of being asked to resolve a property dispute.

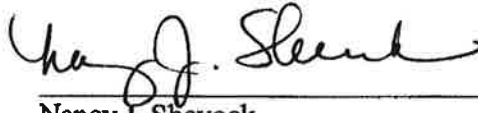
¹¹ The Board takes no position on any potential cause of action pursued by any party.

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For the foregoing reasons, the Statement of Appeal filed by Lighthouse Cove Investors, LLC in Appeal No. 2011-02 is hereby dismissed. **IT IS SO ORDERED**, this 2nd day of February, 2012.

ENVIRONMENTAL APPEALS BOARD

The following Board members concur in this decision:¹²



Nancy J. Shevock
Chairperson

Date: 2/2/2012

¹² Board Members Gordon Wood, Sebastian LaRocca and Michael Horsey voted against granting the motion to dismiss and do not concur in the decision of the Board. However, they are required to sign this Decision and Final Order pursuant to 7 Del.C. § 6008(d), which provides that “[t]he decision of the Board shall be signed by *all members who were present at the hearing.*” (Emphasis added).

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Harold Gray
Board Member

Date: June 27th, 2012

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Dean Holden, P.E.
Board Member

Date: Jan 27, 2012

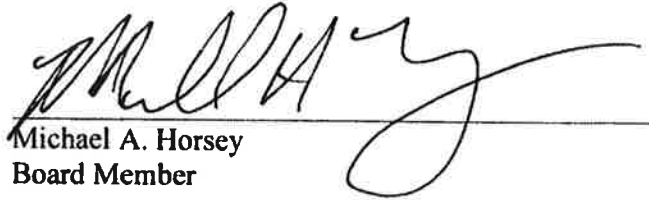
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Andrew J. Aerenson, Esquire
Board Member

Date: 1/27/12

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Michael A. Horsey
Board Member

Date: 1/28/12

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Sebastian Lattocca
Board Member


Date: 1/27/12

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Dissenting Opinion of Gordon E. Wood Sr., Member, Environmental Appeals Board

My dissent is very brief and uncomplicated. I believe the Board was established by the legislature to serve as the first point of appeal of decisions by the Secretary. As such, the Board has a responsibility to act, at least to hear the evidence, and not pass the process immediately to the courts.

This would not have been an easy case to hear and render a decision, but the Board was established with responsibilities. In this case, I believe we did not meet our responsibilities. I do not know what our decision might have been because we denied ourselves and one of the parties the opportunity to have the evidence heard. We made, in my opinion, a premature decision.



Gordon E. Wood Sr.
Board Member

Date: Feb 1, 2012

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The following Board Members do not concur in this decision:



Gordon E. Wood
Board Member

Date:

Feb 1, 2012