

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

MARTIN LAMPNER, et al.,)	
)	
Appellants,)	
)	
v.)	EAB Appeal No. 2019-02
)	
DELAWARE DEPARTMENT)	
OF NATURAL RESOURCES AND)	
ENVIRONMENTAL CONTROL,)	
)	
Appellee.)	

DECISION AND FINAL ORDER

Pursuant to due and proper notice of time and place of hearing served on all parties in interest, and to the public, the three above-stated cause of action came before the Environmental Appeals Board (“Board”) on July 9, 2019, 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: Dean Holden (Chair), Michael Horsey, Robert Mulrooney, Guy Marcozzi, Randall Horne and Frances Riddle. No Board Members disqualified themselves or were otherwise disqualified. Deputy Attorney General Kevin P. Maloney represented the Board.

Kenneth T. Kristl, Esquire represented Appellants Martin Lampner et al. (“Appellants”). Deputy Attorney General Kayli H. Spialter represented Appellee Delaware Department of Natural Resources and Environmental Control (“DNREC”).

STATEMENT OF THE CASE AND PROCEEDINGS

Secretary's Order No. 2019-W-0015

On March 5, 2019, DNREC issued Secretary's Order No. 2019-W-0015 (the "Secretary's Order") which granted the application of TAC Beacon 1, LLC (the "Applicant") for 1) a Marina permit, and 2) a Subaqueous Lands Lease, allowing the applicant to construct a minor marina by the construction and operation of a community structure, 12 slip marina (10 boat slips and 2 personal watercraft slips), and a single lane boat ramp in White Creek (the "Project") located at The Solitudes of White Creek Community, Ocean View, Sussex County, Delaware. On April 5, 2019, Appellants filed a Notice of Appeal of the Secretary's Order, pursuant to 7 *Del. C.* §§ 6008 and 6009 (the "Appeal").

BACKGROUND FACTS

On November 16, 2016, the Wetlands and Subaqueous Lands Section ("WSLS"), Division of Water, DNREC received an application (Chronology Exhibit 1) from Environmental Resources, Inc. submitted on behalf of Applicant to construct a minor marina by constructing a 20 slip marina, consisting of 12 boat slips, 8 jet-ski slips, and a single lane boat ramp in White Creek located at the Solitudes on White Creek Community, Ocean View, Sussex County, Delaware. Applicant proposed removing existing structures previously authorized by DNREC under WSLS permits SL-021/11 and SL-024/15, and then construct a 20 slip minor marina consisting of one 6 by 155 foot dock, one 6 by 280 foot dock, one 6 by 45 foot pier, one 6 by 40 foot pier, and a 16 foot by 60 foot boat ramp. (See diagram at Chronology Exhibit 1, Page 28.) The project was publicly noticed on March 7, 2017, and over 100 written comments against the project were received.

A public hearing was noticed on May 3, 2017 and held on June 6, 2017. At the hearing, the Applicant's consultant gave a presentation. He explained that The Solitudes on White Creek will consist of 119 residential homes in which all residents will have common riparian rights to 1,140 linear feet of shoreline along White Creek. Under the proposed marina plan, the homeowner's association for The Solitudes on White Creek would own the riparian buffer, eliminating the possibility of any individual dock approvals within the community. He suggested that one common marina minimizes the amount of structure over subaqueous lands while still satisfying the demand from the community.

The majority of the objections received during the notice period claimed that White Creek is already inundated with boat traffic, which leads to unsafe conditions for water dependent activities such as boating, paddle-boarding, canoeing, and kayaking. In addition, concerns were expressed regarding land disturbance during construction, loss of habitat for nesting birds, impaired boaters leaving the proposed tiki bar, light pollution, and enforcement of a no-wake zone along the creek.

Subsequent to the public hearing, Applicant requested a meeting with WSLS to address the concerns raised during the hearing. As a result of this meeting, the overall design of the marina was reduced by realigning the proposed structures as follows: the slip capacity was decreased from 20 to 12, consisting of 10 boat slips and 2 personal watercraft slips; the two proposed floating docks were shortened from 155 to 130 feet on the east side and from 280 to 235 feet on the west side; and the proposed boat ramp was minimized by 32 square feet in public subaqueous lands. The new design falls within the same limit of disturbance as the original proposal, but decreases the Project's overall channelward encroachment. Applicant submitted a revised permit application reflecting these changes on July 31, 2017.

WSLS then prepared a Technical Response Memorandum (“TRM”) (Chronology Exhibit 6) to address concerns voiced by DNREC and the public about this project, provide formal regulatory review of the project, and offer the Division of Water’s conclusions and recommendations. The TRM was incorporated into the Hearing Officer’s Report. (Chronology Exhibit 7). The Secretary’s Order approving the marina permit and subaqueous land lease was issued on March 5, 2019 (Chronology Exhibit 8). The Secretary found that Applicant had adequately demonstrated compliance with all the relevant statutes and regulations and DNREC had properly recognized and balanced the public’s concerns.

POSITIONS OF THE PARTIES

Appellants are individuals who recreate or own boat slips or docks on White Creek. Appellants and DNREC stipulated that Appellants each have standing as “a person whose interest is substantially affected by” an “action of the Secretary” pursuant to 7 *Del. C.* §§ 6008(a) and 7210. Appellants allege that the Secretary’s Order failed to comply with the Marina Regulations, 7 *Del. Admin. C.* § 7501, and the Regulations Governing the Use of Subaqueous Lands, 7 *Del. Admin. C.* §7504, in three ways: 1) lack of compliance with provisions requiring notice and comment, 2) failure to adequately consider the public interest and impact on the environment by use of the subaqueous lands, and 3) failure to adequately consider siting, planning and design, and public interest in permitting the marina.

DNREC contends that the evidence of record supports the Secretary’s decision. DNREC asserts it was tasked with balancing the competing rights of the public to use White Creek and the residents to wharf out. DNREC contends it evaluated the application, and properly considered all relevant environmental and public interest impacts. DNREC determined that a single marina best balances these competing rights by ensuring fewer impacts and increased oversight and that the

reduced footprint of the revised application properly struck the balance between the competing legal interests. According to DNREC these conclusions, and the subsequent Secretary's Order granting the subaqueous land lease and marina permit, are based on substantial evidence. DNREC further contends the public was provided with proper notice of the application and opportunity to comment as required by law. DNREC contends that because the revised application reduced the footprint and environmental impacts of the Project as compared to the original application it was unnecessary to re-notice it.

SUMMARY OF THE EVIDENCE

In its case-in-chief, appellants presented evidence of six witnesses: Martin Lampner, William Anderson, John McAleer, Karen Pennypacker, James Knittle and Matthew Jones.

Mr. Lampner testified that:

- (1) He lives in White Creek Manor and that he is a frequent user of Whites Creek for recreational purposes, primarily using a kayak for the last seven years. Tr. at p. 48.¹
- (2) He uses the Whites Creek Marina boat ramp to launch his kayak and will need to travel on the creek past the Project to reach Indian River Bay and due to a number of factors, including but not limited to tides, wind, visibility and the shallowness and narrowness of the creek navigation is currently challenging and the Project will make it worse. Tr. at 53-85.

On cross-examination, Mr. Lampner acknowledged that:

- (1) He had expressed his concerns to DNREC through the public hearing process although he felt that they were not adequately addressed. Tr. at 88.

¹ The abbreviation "Tr." is used throughout this Order to refer to the transcript of the Board's hearing on February 12, 2019.

In response to Board member questioning, Mr. Lampner testified that:

- (1) He had experienced problems maneuvering when he encountered other boats, primarily on outbound trips and that the Project would exacerbate the problem. Tr. at 108.

Mr. William Anderson testified that:

- (1) He lives in Whites Creek Manor, is familiar with boating on Whites Creek, has been boating on the creek for about 15 years and currently owns a 17-foot Carolina Skiff.. Tr. at pp. 111-112.
- (2) The net width of the water on the creek presently that is navigable is insufficient for two boats to safely pass. Tr. at p. 114.

In response to Board member questioning, Mr. Anderson testified that:

- (1) The average high tide to low tide in the Creek at the area of the Project is about 8-10 inches. Tr. at p. 129.

Mr. John McAleer testified that:

- (1) He lives in Whites Creek Manor but does not use the existing Whites Creek Marina because he has a dock at his house and has been boating on the creek for 7 years. Tr. at 132.
- (2) His current boat is a 2017 Sweetwater tri-toon with a motor that drops down 36 inches below the waterline so if the water is 3 feet deep he is right near the bottom and that maneuverability is a concern especially with the winds that can occur on the creek. Tr. at pp. 135-136.

(3) He thinks he is typical of boaters in the area in “liking to hug the middle of the creek” where the deepest water is and that the presence of crab traps set near the edges of the creek creates added incentive to stay in the middle. Tr. at p. 137.

(4) He does not believe two boats can pass each other if there was a boat tied up at the existing dock. Tr. at 141.

On cross-examination, Mr. McAleer stated that:

(5) His current practice is to “take his boat out on an incoming tide where it’s going into high tide and bring it back before low tide.” Tr. at 143.

Ms. Pennypacker testified that:

(1) She lives in White Creek Manor and she and her husband have operated a boat, currently a 21-foot V-hull for about 45 years and she currently manages the Whites Creek Marina which has 149 boat slips. Tr. at pp, 152-155.

On cross-examination, Ms. Pennypacker testified that:

(1) There are two high tides and two low tides daily and that the majority of boats are going to come and go during high tide. Tr. at 161.

Mr. Knittle testified that:

(1) He lives in White Creek Manor at a house with a pier and a dock which he uses to boat and kayak and has done so for ten years and it has been his experience that when you get some current or some wind it is difficult to navigate especially if another boat is approaching you. Tr. at pp. 165-167.

Mr. Jones testified that:

- (1) He is an Environmental Scientist III with DNREC's WSLs and that he drafted the Technical Response Document for the Hearing Officer based off of the revised application. Tr. at 181.
- (2) He conducted two site visits to the area of the Project which included actually being on the water, the taking of various measurements and photographs and personal observation of low tide conditions. Tr. at pp, 184-189.
- (3) He met with the applicant on site on July 18, 2017 "to discuss the realignment and minimization of the proposed marina to accommodate all the concerns that were raised", including but not limited to, decreasing the number of slips from 20 to 12. Tr. at pp. 195-197.
- (4) The Project "has the potential for increased risk of collision or other unsafe condition" but the "addition of 12 boats should not have a significant adverse impact on the environment." Tr. at pp, 241-248.

In response to Board member questioning Mr. Jones testified that:

- (1) Generally speaking when a proposed project has been publicly noticed and is subsequently reduced in scale DNREC does not re-notice the proposed project because "it's a reduction" and that what happened with this Project is fairly typical. Tr. at p. 271.
- (2) If a proposed change was for a larger structure or contemplated additional structures it would be re-noticed. Tr. at p. 273.
- (3) He had no difficulty navigating the creek during his site visit. Tr. at p. 283.

Upon questioning from Ms. Spialter, Mr. Jones testified that:

(1) He took every public comment into consideration during his development of the TRD and he is confident that he had all of the necessary information to determine that the Project met all of the regulatory requirements and properly balanced the public interests. Tr. at pp. 293-294.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Prior to the July 9, 2019 hearing and in accordance with the Board's Regulations, DNREC provided the Board the Chronology consisting of the record before the Secretary with respect to the Secretary's Order. In deciding the appeal, in addition to considering the Chronology, the Board considered the written submissions of the Parties, the testimony of all witnesses and the oral argument from the Parties. Following the presentation of evidence and closing arguments by each of the Parties, the Board entered into executive session as permitted by 7 *Del. C.* § 6008(a) to deliberate.

After deliberation and careful review of Parties' respective arguments and evidence, the Board, for the reasons that follow, votes 6 to 0, to affirm the Secretary's Order.

On appeal to the Board, the appellant bears the burden of proving that the "the Secretary's decision is not supported by the evidence on the record before the Board."² When making factual determinations, the Board "shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted."

The Board finds as a matter of fact that the revised application represents a downsizing of the original Project proposal because the revised application reduced the footprint and environmental impacts of the Project. Accordingly, the Board concludes as a matter of law that

² 7 *Del. C.* § 6008(b).

DNREC's decision not to re-notice the revised application or to subject the Project to an additional public hearing is reasonable and supported by the evidence and the law.³

The Board finds as a matter of fact that DNREC evaluated the Project, and properly considered all relevant environmental and public interest impacts. The Board concludes as a matter of law that DNREC determined that a single marina best balances competing rights by ensuring fewer impacts and increased oversight and that the reduced footprint of the revised application properly struck the balance between the competing legal interests.

³ The issue of when a revised application must be re-noticed has been brought to the Board's attention in a couple of recent appeals. The Board encourages DNREC to address the issue through the rulemaking process.

IT IS SO ORDERED, this 3rd day of October, 2019.

Dean Holden, Chairperson

The following five Board members concur in this decision:

Date: _____

Robert Mulrooney
Board Member

Date: _____

Michael Horsey
Board Member

Date: _____

Frances Riddle
Board Member

Date: _____

Guy Marcozzi
Board Member

Date: _____

Randall Horne
Board Member

EAB Appeal No. 2019-02 Decision and Final Order


Date: 10/3/19



Dean Holden, Chairman

EAB Appeal No. 2019-02 Decision and Final Order

Date: 10/2/2019


Robert Mulrooney, Board Member

EAB Appeal No. 2019-02 Decision and Final Order

Date: 9/4/19



Michael Horsey Board Member

EAB Appeal No. 2019-02 Decision and Final Order

Date: 10/1/19


Frances Riddle, Board Member

EAB Appeal No. 2019-02 Decision and Final Order

Date: 10/02/19

A handwritten signature in cursive script, appearing to read "Guy Marcozzi".

Guy Marcozzi, Board Member

EAB Appeal No. 2019-02 Decision and Final Order

Date: 10/3/19

Randall J. Horne
Randall Horne, Board Member