

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

DELMARSH, LLC

Appellant,

v.

**DELAWARE DEPARTMENT
OF NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL,**

Appellee.

EAB Appeal No. 2020-03

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 above-stated cause of action came before the Environmental Appeals Board (“Board”) on August 11, 2020, via remote Web conferencing.

Members of the Board present and constituting a quorum were: Dean Holden (Chair), Frances Riddle, Michael Horsey, Randall Horne, Guy Marcozzi and Robert Mulrooney. No Board Members disqualified themselves or were otherwise disqualified. Deputy Attorney General Kevin P. Maloney represented the Board.

Richard Abbott, Esquire represented Appellant Delmarsh, LLC (“Delmarsh”). Deputy Attorney General Kayli H. Spialter represented Appellee Delaware Department of Natural Resources and Environmental Control (“DNREC”).

STATEMENT OF THE CASE AND PROCEEDINGS

DNREC issued a letter decision dated January 30, 2020 (“Decision”) in response to Delmarsh’s request for a mapping change to the State of Delaware Wetland Map DNR-183 denying the request. Delmarsh timely filed a Statement of Appeal dated February 17, 2020 from the decision pursuant to 7 *Del. C.* § § 6008 and 6610 and the Environmental Appeals Board Regulations, 7 Del. Admin. Code 105.

The Relevant Statute: The Definition of the Term “Wetlands”

Seven Del. C. § 6603(h) provides that “Wetlands” must satisfy 3 criteria: (1) the lands must be situated between mean low water and high water elevations; (2) the lands must be “subject to tidal action” or “areas which are now or in this century have been connected to tidal waters”; and (3) lands upon which may grow, or which are capable of growing, certain plant types. The parties agree that this appeal does not involve either the water elevation or plant criteria.

POSITIONS OF THE PARTIES

DNREC contends that the evidence of record supports the Secretary’s decision that the parcels in question constitute wetlands as that term is defined at 7 Del. C. § 6603(h).

Delmarsh argues that the sole issues before the Board are whether: 1) at any time “in this century”; 2) all “areas” of Delmarsh’s lands were; 3) “connected to tidal waters”. Delmarsh argues that “this century” should be interpreted as the 21st century. Delmarsh further contends that the 6 lots at issue lack “areas which ... have been connected to tidal waters”.

SUMMARY OF THE EVIDENCE

In its case-in-chief, appellant Delmarsh presented evidence of two witnesses: Jeff Liberto and James McCulley.

(A) Mr. Liberto testified that:

- (1) He is the owner of Delmarsh, LLC which in turn makes him the owner of the six lots which are the subject of this appeal and that those lots are lots 22, 23, 24, 25, 32 and lot D (“the lots at issue”). Tr. at p. 40.¹
- (2) There is a ditch which is evidenced in Exhibit 6 which appears to run underneath Flack Avenue and into the marsh on the west side of Flack Avenue. Tr. at 44.
- (3) He was present on-site when DNREC conducted soil borings on lot 26. Tr. at p. 46.
- (4) His review of Exhibit 6 (the Charles Shore subdivision) did not show any connection between the ditch running to the St. Jones River and his six lots with Flack Avenue appearing to be “laid out at 30 feet wide.” Tr. at p. 44.
- (5) DNREC approved an earlier wetland map change request involving some other lots in the area in or around April 2013. Tr. at p. 48.
- (6) He applied for an additional wetland map amendment in June of 2019 and that application is the subject of this appeal. Tr. at p. 50.
- (7) There are two houses at the end of Flack Avenue which were purchased by the State in about 2018. Tr. at p. 51.

¹ The abbreviation “Tr.” is used throughout this Order to refer to the transcript of the Board’s hearing on August 11, 2020.

- (8) A document entitled Bowers Beach Map Changes-Map 2 shows “the areas that have been taken off the state’s map and reclassified as ‘uplands’ ” and that there are houses built on the area that used to be designated as state wetlands that “front and take access from Flack Avenue” and Bayshore. Tr. at p. 55, 57.
- (9) Dozens of houses have been built on what was previously designated as state wetlands and that during DNREC’s reclassification of those areas the existence of the 1926 aerial photograph that DNREC relied on, at least in part, for this decision “never came up.” Tr. at p. 58.
- (10) That based on his 21 years of familiarity with the six lots at issue in this appeal they have never been connected to tidal water. Tr. at p. 59.
- (11) That there is a drainage swale that he presumes is in the Flack Avenue right-of-way which collects water intermittently depending on weather conditions and that water comes onto his property from Bayshore. Tr. at p. 60.
- (12) That at a DNREC site visit to discuss the application that is the subject of this appeal Mr. Brown stated that he would “not support” the sought reclassification. Tr. at p. 61.
- (B) On cross-examination, Mr. Liberto testified that:
 - (1) He had “never observed the tide from the back-bay flood across Flack Avenue” and that he had “seen the Bay breach the dunes and flood the area during one of those major storms” back in 2016. Tr. at p. 64.
 - (2) He had seen the dunes breached during storm events and had attempted to pump it off his property. Tr. at p. 64.

- (3) That prior to applying for the reclassification that is the subject of this appeal he had no reason to believe that the application would be denied and that “there is no reason why the application should have been denied.” Tr. at p. 67.
- (C) Upon questioning from the Board Mr. Liberto testified that:
- (1) The State, according to his understanding, bought the two houses to protect red knots and horseshoe crabs. Tr. at p. 67.
- (D) Mr. McCulley testified that:
- (1) He has 32 years of experience in fields related to wetland science in addition to his educational background and currently owns his own consulting company. Tr. at p. 69.
- (2) He has previously been recognized as an expert witness in environmental matters in both court and administrative tribunal contexts. Tr. at p. 71.
- (3) He is familiar with lots 22 through 25, 32 and Parcel D beginning in “around 2006” when he was hired to do the wetlands delineating and permitting for those lots and other lots in the area which involved the participation of both DNREC and the United States Army Corps of Engineers (“COE”). Tr. at p. 72.
- (4) He worked on the 2013 map amendment that was approved by DNREC as well as “permitting up and down Bowers.” Tr. at p. 73.
- (5) He had a conversation on-site in which Mr. Brown of DNREC told Mr. McCulley that Mr. Brown would not have approved the 2013 map change despite the “sand wash in” and elevation change. Tr. at p. 74.

- (6) He is familiar with the topographic survey done by Miller & Lewis located in binder Exhibit 3 and the houses existing in and around the lots at issue. Tr. at p. 77.
- (7) He has seen the feature designated as “Ditch” on Exhibit 6 but there is “no ditch that is present in the field anymore” but “it appears from this old survey that it was a connection between the marsh that’s west of Flack Avenue and the St. Jones River. Tr. at p. 77.
- (8) He prepared a wetlands report for Delmarsh for the purpose of having the lots at issue removed from the state wetlands map which included a history of the site, the review of aerial photos, the review of soils mapping among other things. Tr. at p. 79.
- (9) He concluded that there was “[n]o tidal connection” based at least in part on elevation and that “there’s really no way for the tide to get to the site on a regular basis, unless it breaches either the dunes or it goes over Flack Avenue.” Tr. at p. 82.
- (10) “Under an extreme high tide or a storm tide there is evidence that sand does get washed onto the site.” Tr. at p. 84.
- (11) The COE would probably allow houses built on pilings. Tr. at p. 89.
- (12) He routinely relies upon aerial photography but only rarely uses an expert aerial photography interpreter and would not want to rely solely on the 1926 aerial photo to make a definitive decision on the question of tidal connection to the lots at issue. Tr. at p. 92.

- (E) On cross-examination, Mr. McCulley testified that:
- (1) The surveyor who prepared Joint Exhibit 3 determined a mean highwater line somewhere in the 3.5 to 4 range on the topographical map. Tr. at p. 97.
 - (2) His Report, Joint Exhibit 2, concluded that DNREC “had determined that the mean high tide is at elevation 2.3 feet.” Tr. at p. 101.
 - (3) The portion of Flack Avenue in front of the lots at issue is “barely” less than two feet above mean high tide. Tr. at p. 112.
- (F) Upon questioning from the Board, Mr. McCulley testified that:
- (1) The lots at issue constitute federal Section 404 wetlands which are not tidal wetlands. Tr. at p. 117.
- (G) In their case-in-chief, appellee DNREC presented evidence of Tyler Brown. Tyler Brown testified that:
- (1) He is employed at DNREC presently as a manager in the drainage section but previously as a program manager in the wetlands-subaqueous lands section and in that role he signed the document denying the application to amend the map at issue. Tr. at p. 121.
 - (2) DNREC typically evaluates aerial photography before physically visiting the site and attempt to verify what was submitted with the application. Tr. at p. 124.
 - (3) He reviewed the application and supporting documents and identified them through his testimony including the fact that he believed he was on site for both inspections conducted on August 13th and September 18th of 2019 respectively. Tr. at p. 125.

- (4) During the site visits it was difficult to identify vegetation on the lots at issue due to previous herbicide spraying but he was able to identify lush, healthy spartina roughly 5 to 6 feet tall on an adjacent property which is typical tidal marsh vegetation. Tr. at p. 127.
- (5) DNREC looks at all available aerial photography as part of their review using GIS software including the 1926 photo which reveals “a small feature coming off of the St. Jones River ... similar to any other ditch that runs throughout other marshes throughout the state.” Tr. at p. 134.
- (6) Joint Exhibit 6 looks like a 1950 plat of the lots in issue and the area demarcated as “DITCH” appears to be in the same location as the darkened area referred to as ditch in the 1926 photo. Tr. at p. 136.
- (7) DNREC requests for additional information regarding Joint Exhibit 3 regarding elevations and mean high tide were not responded to by the applicant. Tr. at p. 142.
- (8) The three criteria for state regulated wetlands are elevation, vegetation and connection to tidal waters which were met here. Tr. at p. 144.
- (9) From a review of the 1926 aerial photo is apparent that the ditch is a tidal waterway and tidal wetlands do not necessarily get the daily ebb and flow every day and that there are thousands of acres of tidal wetlands that only get tidal waters on them during above average high tides or storm events. Tr. at p. 146.
- (10) There is no portion of the lots in issue, other than the dune system, that is more than 2 feet above local mean high tide and that the ditch would cause

tidal action on the lots in issue and thus make the lots in issue state jurisdictional tidal wetlands. Tr. At p. 148.

(H) On cross-examination, Mr. Brown testified that:

- (1) He requested information from the applicant which was not provided and DNREC and the applicant had different opinions on the relevancy of the information requested. Tr. at p. 153.
- (2) He was aware that Mr. McCulley concluded in his report that there was no basis to designate any of the lots in issue as state wetlands but that in his opinion tidal connection can be established “pursuant to a few-time-a-year events.” Tr. at p. 170.
- (3) There is a ditch that runs parallel to Flack Avenue that is a dark area in the 1926 photo that connects to the St. Jones River. Tr. at p. 181.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Prior to the August 11, 2020 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 Decision. In deciding this 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, by a vote of 6 to 0, affirms the Secretary's decision in EAB Appeal 2020-03.

The Board concludes as a matter of law that the lots at issue constitute Delaware wetlands and is not inclined to substitute its judgment for that of the Secretary's based on the record evidence. The Board agrees with DNREC's conclusion that the 1926 photo shows what appears to be a tidal ditch that flows along or near or adjacent to the lots at issue. The Board also agrees with DNREC's conclusion that the 1950 subdivision survey seems to indicate a ditch in the same location. The Board finds as a matter of fact that the Appellant's own topographical survey supports the conclusion that the majority of the lots in issue are within 2 feet of the mean high tide line and that the low elevation of Flack Avenue supports the conclusion that it has limited or no impoundment value.

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." 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." Substantial weight is granted to an agency's construction of its own rules, such that the agency's construction will only be reversed if it is "clearly wrong." See, Div. of Soc. Servs. v. Burns, 438 A.2d 1227, 1229 (Del.1981). DNREC's determination is not unreasonable or clearly wrong.

The Board finds from the evidence presented that Appellant has failed to carry its burden of demonstrating that the Secretary's decision is not supported by the evidence on the record before the Board. The Board finds that Mr. Brown is a credible witness whose testimony was supported by the totality of the evidence presented. The Board recognizes both his strength of memory and

his opportunity to personally observe conditions at the site. The Board also finds that his testimony was reasonable and that he was a responsive witness during the hearing. The Board finds Mr. Brown's conclusions determining the lots at issue to constitute Delaware wetlands to be supported by the law and the facts presented.

After deliberate and careful review of Parties' respective arguments and evidence, the Board, by a vote of 6 to 0, affirms the Secretary's decision in EAB Appeal 2020-03.

IT IS SO ORDERED, this 05TH day of November, 2020.

/s/ Dean Holden
Dean Holden, Chairperson

The following four Board members concur in this decision:

Date: _____
Robert Mulrooney
Board Member

Date: _____
Michael Horsey
Board Member

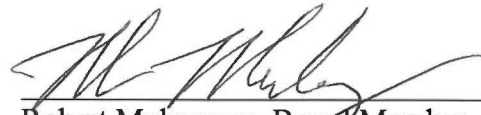
Date: _____
Frances Riddle
Board Member

Date: _____
Randall Horne
Board Member

Date: _____
Guy Marcozzi
Board Member

EAB Appeal No. 2020-03 Decision and Final Order

Date: 10/26/2020


Robert Mulrooney, Board Member

EAB Appeal No. 2020-03 Decision and Final Order

Date: 11/5/2020



Michael Horsey, Board Member

EAB Appeal No. 2020-03 Decision and Final Order

Date: 10/21/20



Frances Riddle, Board Member


EAB Appeal No. 2020-03 Decision and Final Order

Date: 11/5/2020

Randall M. Horne
Randall Horne, Board Member

EAB Appeal No. 2020-03 Decision and Final Order

Date: 10-21-2020

A handwritten signature in blue ink, appearing to read "Guy F. Marozzi", is written over a horizontal line.

Guy Marcozzi, Board Member