

HEARING OFFICER'S REPORT

TO: The Honorable Shawn M. Garvin
Cabinet Secretary, Department of Natural Resources and Environmental Control

FROM: Theresa L. Smith
Regulatory Specialist, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: Application of Carlo and Teresita Businelli for Subaqueous Lands Lease Permit

DATE: May 29, 2024

I. BACKGROUND AND PROCEDURAL HISTORY:

A virtual public hearing was held on Thursday, February 10, 2022, at 6:00 p.m. via the State of Delaware Cisco WebEx Meeting Platform by the Department of Natural Resources and Environmental Control (“DNREC,” “Department”) to receive comments on the Subaqueous Lands Lease application submitted by Carlo and Teresita Businelli (“Applicant”) to construct a 6 by 20-foot-long dock extension, install a 6 by 12 foot-long floating kayak launch and relocate an existing personal watercraft (PWC) lift in Herring Creek at Lot# 47, 23962 Sundance Lane, Lewes, Sussex County, DE, (“Application”) pursuant to 7 *Del.C.* Ch. 72 and 7 DE Admin. Code 7104 - *Regulations Governing the Use of Subaqueous Lands* (“Regulation”).

The Applicant purchased their home in 2018 with their property’s waterfront measuring 73.44 feet, adjacent to subaqueous lands. The property has an existing convenience structure that was approved under Permit # SL38049, and subsequently transferred to the Applicant at the time of sale. The Applicant’s existing structure consist of a 55-foot wetland walkway, a 10-foot pier with a 30-foot dock to the west of the pier. The current structure allows access to the PWC

lift from a single direction and the PWC lift area has a water depth of 0.0 to -0.1 feet at mean low water.

In accordance with 7 *Del.C.* Ch. 72, the Department received the Application submitted by the Applicant to construct a 6-foot-wide by 20-foot-long dock extension, install a 6-foot-wide by 12-foot-long floating kayak launch and to relocate the existing PWC lift, both positioned to the left of the extended pier. The proposed dock extension will run parallel to the Applicant's property shoreline, continuing eastward of the existing dock. The Applicant seeks to extend their existing dock to achieve mooring when the PWC lift is unavailable and to enable the relocation of their PWC lift to then accommodate space for the proposed floating dock.

In accordance with Section 4.9 of 7 DE Admin Code 7104, the proposed structure, in total, will extend 74 feet channelward of the mean high mark, less than the maximum linear footage permissible and well within the 20% limit of the waterbody's width. Moreover, the extended length would gain 1.2 inches in water depth at mean low water for mooring.

The Department's Division of Water, Wetlands and Waterways Section ("WWS") placed the application on public notice in the Delaware State News, the News Journal, and the Department's website on September 15, 2021. To that, the Department received 1 letter of objection from a member of the public and a request for the Department to hold a hearing regarding the Application. The Department placed a public notice of the hearing in the Delaware State News and News Journal on January 19, 2022.

In addition to the Application received, the Department also received similar applications for proposed structures within the same vicinity of Herring Creek. These applications shared common concerns of the public that necessitated formal public hearings. Prior to the public hearings, the Department's Division of Water, WWS held a Microsoft Teams meetings with the adjacent landowners. The purpose of the meeting was to review the issue of the existing structures encroaching upon the riparian rights of the adjacent neighbors. During this meeting WWS encouraged all parties involved to consider protentional compromises and to suggest

alternative solutions. It was acknowledged that the existing structures aren't optimal, thus prompting the exploration of better paths forward.

On February 10, 2022, the virtual public hearing was held by the Department. There were five (5) members of the public in attendance at the virtual hearing, along with a representative of the Applicant and Division of Water's staff. The record remained open through February 25, 2022, and comment was received from the public. Subsequent to the record closing, this Hearing Officer requested a Technical Response Memorandum ("TRM") from the expert staff of the Department's WSS that will be discussed in further detail below. Proper notice of the hearing was provided as required by law.

II. SUMMARY OF THE PUBLIC HEARING RECORD:

The public hearing record ("Record") consists of the following documents: (1) a verbatim transcript; nine documents introduced by responsible Department staff at the public hearing held on February 10, 2022, and marked by this Hearing Officer accordingly as "Department Exhibits 1-5"; (3) three documents introduced by the Applicant's Consultant, Robert Whitford with Precision Marine Construction and marked by this Hearing Officer as "Applicant Exhibit 1-3"; and (4) the TRM from Rebecca Bobola, Environmental Program Manager, Division of Water. The Department's person primarily responsible for reviewing the Application, Mrs. Bobola, developed the Record with the relevant documents in the Department's files.

Following the presentation of Mrs. Bobola, on behalf of the Department, (and the introduction of the Department's exhibits to be entered into the Record), the Consultant, Mr. Whitford, proceeded with a presentation explaining the history of the structures in the Herring Creek development. The Consultant is the contractor for the existing structures mentioned herein, as well as the proposed structure. Mr. Whitford attested that the property line guidance included in the Application was used to construct the existing structures on Lot #48 and Lot #47, built in 2007 and 2009, respectively. Mr. Whitford introduced a document illustrating the riparian property lines extended linearly channelward of the cove for each property and

suggested that the document was more accurate than what is being used by the Department for other Applications. Mr. Businelli concluded the presentation on behalf of the Application, with providing the reasons the extension is being requested, and responded to comments received prior to the hearing.

Thereafter the public hearing, the Record closed with regard to public comment 15 days following the public hearing, on February 25, 2022, with no additional comments received by the Department.

Subsequent to the close of the Record as noted above, this Hearing Officer requested a Technical Response Memorandum (“TRM”) from the technical experts in the Department’s Division of Water to: (1) address the concerns associated with this pending Application, as set forth in the public comment received by the Department; (2) provide a formal regulatory review of the Application; and (3) offer the Division of Water’s conclusions and recommendations with regard the pending Application for the benefit of the Record generated in this matter.

The Department’s TRM, attached hereto as Appendix “A,” acknowledges the comments received prior to and during the public hearing, addressing the public concerns of the proposed Application and provides a thorough and balanced response to the same, accurately reflecting the Record generated in this matter. Rather than attempting to relay each of the public comments received in this matter, this Order will highlight the Department’s responses to the same, as provided for in full within the Report’s Appendices, as referenced above.

As previously mentioned, the Department received similar applications for the same area in Herring Creek that necessitated formal public hearings. The records from these hearings presented conflicting surveys of the Herring Creek area and presented discrepancies of the adequate water depths for mooring and navigating at mean low water in the general area. To ensure accuracy of the pending applications, the Department enlisted the services of Plitko, LLC to conduct a bathymetric survey of Herring Creek, encompassing the proposed project site and other relevant locations. In addition, the Department requested the Applicant to provide an image of their proposed structure represented on the bathymetry survey provided by Plitko, LLC.

The Department received comments in objections to the Application due to inconsistencies of the portioned property lines. The Applicant provided a document with the property lines inconsistent with the 2006 DOJ Opinion document, used by Department.

The Department conducted a review of all currently pending application in the area of Herring Creek, as it pertains to the Regulations and comments received. As previously mentioned, the Consultant presented an illustration of the property lines channelward of the cove for each property; however, the Department identified that there was no consideration for water depths within the cove within this drawing. Additionally, the drawing does not consider the properties to the east and west whose linear property lines are extended in the same fashion and would intersect. Because of this reason, the Department referred to the 2006 DOJ Opinion and Plitko's bathymetry survey for accuracy of the portioned property lines.

The Department confirmed that the existing structures of the pending applications do not lie within the equitable apportionment relative to each parcel. Utilizing the 2006 DOJ opinion the Applicant's proposed structure, extended parallel to the shoreline, would extend more into the riparian rights of Lot #48. Moreover, using Plitko's bathymetry survey the proposed structure's mooring location for a vessel (that will remain accessible from one direction) would only make available -0.1 to -0.2 feet of water at mean low water.

Apart of the Regulatory review, the Department must determine if the applicant's primary purpose and objectives can be realized by alternatives, i.e. minimize the scope or extent of an activity or project and its adverse impact. The Department determined that the orientation Applicant's proposed dock extension (to increase their access to their vessel) does not take into consideration available water in the proposed location. The proposed structure's orientation does not significantly increase water depth available at mean low water, thus does not eliminate the potential need for dredging in the future, which could impact aquatic vegetation or wetlands. Additionally, based on the 2006 DOJ opinion, their existing structure occupies almost all the adjacent neighbor's equitable apportionment and the proposed extension structure parallel with the shoreline, will continue to occupy Lot #48.

The Department concluded the structure dimensions are not consistent with the guidance documents, and the nearby structures. The Department recommends that the Applicant reconfigure the proposed structure, in a channelward fashion, that would not only achieve their goal of a mooring space when their lift is inaccessible, but it would also allow for increased water depths for mooring and navigating, as well as allow opportunity to relocate the existing lift, adding usability. The increased water depth would also avoid the need for any future dredging. It should also be mentioned, a linear reconfiguration would also allow for more space between the applicant's structure and any future structure proposed by the owners of Lot #46 to the southeast of the applicant.

I find that the Division of Water's TRM offers a detailed regulatory review of all aspects of the Applicant's proposed revised Application, identifies all the concerns raised by the public and responds to them in a balanced manner, with accurately reflecting the information contained in the Record. Accordingly, the Department's TRM, dated October 1, 2022, and provided to this Hearing Officer by WWS on October 9, 2023, is attached hereto for the Secretary's review as Appendix "A," and is hereby expressly incorporated herein.

III. RECOMMENDED FINDINGS AND CONCLUSIONS:

Currently pending before the Department is the above-described Application for a Subaqueous Lands Lease permit to construct a 6 by 20-foot-long dock extension and to install a 6 by 12-foot-long floating kayak launch and to relocate an existing PWC lift in Herring Creek at 23962 Sundance Lane, Lewes, Sussex County, DE. I find that in accordance with 7 DE Admin. Code Ch.72, Section 4.0 - *Criteria of Permits, Leases and Letters of Authorization*, the Department may deny an Application if the activity of a proposed Application could cause harm to the environment, either singly or in combination with other activities or existing conditions, which cannot be mitigated sufficiently.

I also find that the Department's TRM acknowledges the comments received from the public and thoroughly responds to them, in the same. Moreover, the TRM provides a well-

balanced explanation of Record, and the Department's recommendation is supported by the finding of the Record developed.

I conclude that the Record supports denial of the proposed Application as submitted by the Applicant to the Department's Division of Water, WWS, in this matter. The denial of the Application is necessary to ensure continued protection of public health and the environment, and reflective of the Record developed in this matter.

Accordingly, this Report recommends the denial of a Subaqueous Lands Lease to construct a 6 by 20-foot-long dock extension and to install a 6 by 12-foot-long floating kayak launch and to relocate an existing PWC lift in Herring Creek at 23962 Sundance Lane, Lewes, Sussex County, DE.

Further, I recommend the Secretary adopt the following findings and conclusions:

1. The Department has jurisdiction under *7 Del.C. Ch. 72*, *7 DE Admin. Code 7104 - Regulations Governing the Use of Subaqueous Lands*, and all other relevant statutory authority, to make a final determination on the aforementioned pending Application after holding a public hearing, considering the public comments, and all information contained in the Record generated in this matter;
2. The Department provided proper public notice of the Application submitted by Carlo and Teresita Businelli and of the public hearing held on February 10, 2022, and held said hearing to consider all public comments that may be offered on the Application, in a manner required by the law and regulations;
3. The Department has jurisdiction under *7 DE Admin. Code Ch.72, Section 4.0 - Criteria of Permits, Leases and Letters of Authorization* to deny an Application if the activity of a proposed Application could cause harm to the environment, either singly or in combination with other activities or existing conditions, which cannot be mitigated sufficiently;

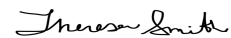
4. The Department has thoroughly considered all relevant factors required to be weighed in regarding the Subaqueous Lands Lease Permit as requested by this Application. Upon review, the Record supports denial of the Application and therefore denies the issuance of Department of the Subaqueous Lands Lease Permit for the following reasons, herein:

The proposed Application is not consistent with the 2006 DOJ Opinion and documents, and the nearby structures.

The proposed structure does not achieve the Applicant's goal of a mooring space when their lift is inaccessible, as it does not significantly increase water depth for mooring and navigating, potentially causing harm to the seabed and vessel.

The proposed structure poses a potential future need for dredging that may negatively impact aquatic vegetation or wetlands.

The proposed structure's configuration limits space between the applicant's proposed structure and any future structure proposed by adjacent neighbors to the southeast of the applicant;
5. The Department has an adequate Record for its decision, and no further public hearing is appropriate or necessary; and
6. The Department shall serve and publish its Order on its internet site and shall provide legal notice of the Order in the same manner that the Department provided legal notice of the Application.



Theresa L. Smith

Public Hearing Officer