



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

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SECRETARY

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Secretary's Order No: 2024-W-0032

RE: Application of Matthew Eisenmann for a Subaqueous Lands Lease Permit

Date of Approving: September 3, 2024

Effective Date: September 3, 2024

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department," "DNREC") pursuant to *Delaware's Subaqueous Lands Act* (7 Del.C. Ch. 72) and the Department's *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504) and all other relevant statutory authority, the Department issues this Order, approving the application submitted by Matthew Eisenmann ("Applicant," "Eisenmann") for a Subaqueous Lands Lease Permit to construct a pier extension, a floating platform, and a boat lift in Herring Creek at Lot# 48, 34477 Skyler Drive, Lewes, Sussex County, DE ("Application"). The following findings of fact based on the record, reasons and conclusions are entered as an Order of the Secretary in the above-referenced Subaqueous Lands Lease Permit Application proceeding and support the approval of the Application described herein.

Background, Procedural History and Findings of Fact

The Department's Division of Water, Wetlands and Waterways Section ("WWS") received an application submitted on behalf of the Applicant by Coastal and Estuarine Research, Inc. ("Consultant"), dated April 23, 2020, to install an extension to the existing pier located in Herring Creek (Tax Parcel No. #2-34-18.00-381.00,) as noted above. The existing pier was originally authorized through Subaqueous Lands Lease No. SL-144/07 and SU-223/10, to a previous owner of the property.

The Applicant's existing pier is situated in the shallower end of the cove, measuring 4-foot-wide by 70-foot-long, with a mooring area located 20-feet from the neighboring pier to the east to benefit from the increased water depths compared to the west. At low tide, the current length of the Applicant's pier limits access to waterways, providing only a few inches for vessel mooring. These shallow depths are detrimental to the seabed and pose risks to boats. The Applicant proposes to extend the existing pier to achieve fair and equitable access to deeper, navigable waters for safe vessel mooring and to facilitate kayaking and paddleboarding.

The Department received the initial application dated April 23, 2020, proposing to construct a 4-foot-wide by 10-foot-long fixed pier extension, install a 3-foot-wide by 10-foot-long gangway, and a 6-foot-wide by 25-foot-long floating dock, all arranged linearly, measuring a total of 115 feet over water. The mooring area will remain to the east of the dock, towards the channelward end.

The Department began a technical review of the Application and advertised the above-described Application in the News Journal and Delaware State News for a 20-day public notice period from May 13, 2020, through June 2, 2020. During that time, the WWS received written comments in opposition to the proposed project. The objectors raised concerns about potential conflicts with the existing easement agreement, encroachment of the proposed structures on adjacent properties, and possible harm to nearby wetlands and wildlife. A public hearing was requested. The Department then placed a public notice of the hearing in the Delaware State News and News Journal on April 28, 2021.

Apart of the technical review, the Department conducted an onsite review of the proposed project that included a review of the property lines and the Applicant's equitable apportionment of water access. It should be noted that the Department received similar applications in the Herring Creek area. Upon review of the pending applications, the Department discovered conflicting property line illustrations, revealing that the properties in Herring Creek encompass issues with encroachment by the adjacent structures.

The Department determined that the Applicant's existing structure resides on a portion of the equitable apportionment of their adjacent neighbor to the west, the Villages at Herring Creek Homeowners Association ("HOA") parcel. Moreover, the adjacent neighbor to the east (Lot #47,) has a structure that resides partially on the Applicant's equitable apportionment. Both the Applicant and Lot #47 have submitted an Application to the Department with the intention of extending their structures for the purpose of increased water depth. The information amongst the applications posed discrepancies. Therefore, under the authority of 7 *Del.C* § 7207, the Department engaged a third-party service provider to conduct a bathymetric survey. This survey aimed to ensure fair and adequate water depths were considered for all pending applications. In addition, the Department relied upon an Opinion of the Delaware Department of Justice, dated Jun 9, 2006, ("2006 DOJ Opinion"), regarding riparian boundaries on navigable rivers and across accretions for consistency amongst all pending Applications.

In the interest of the Applicant and other property owners in Herring Creek, the Department's WWS held multiple Microsoft Teams meetings to discuss the pending applications, and the property lines established in the 2006 DOJ Opinion. During these meetings the Department illustrated the equitable apportionment of property lines extended and addressed the intent of the Applicant's aiming to gain adequate water depths. The property owners in Herring Creek with pending Applications were encouraged to consider potential compromises and to suggest alternative solutions due to the existing structures residing outside of their property lines.

Following these discussions, and in response to the concern that were raised, the Applicant submitted a revised application. The revised application proposes to construct a 4-foot-wide by 45-foot-long fixed pier extension that maintains the overall length of the initial proposed structure. The Applicant also revised the proposed floating platform to be installed to the west of the dock and measures 6-foot-wide by 12-foot-long. In addition, the Applicant is also proposing to install a 4-piling boat lift that measures 12-foot-long by 12-foot-wide and will be located at the end of the fixed pier on the northwest side. The intention of relocating the mooring area to the west of the pier is to facilitate safer vessel mooring with the use of a boatlift. In addition, elevating the vessel above the seabed with a boatlift reduces hazards to both the boat and seabed, particularly in the shallower depths to the west, as mentioned above.

In accordance with Section 4.9 of 7 DE Admin Code 7504, the proposed revised structure, in total, will extend 115 feet channel ward 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 will accommodate mooring at mean low water level by adding 6 inches of water depth.

On May 19, 2021, the Department held a virtual public hearing. The Department's WWS, primarily responsible for reviewing this Application, developed the hearing record ("Record") with the relevant documents in the Department's files. There were thirteen (13) members of the public in attendance at the virtual hearing, along with the Applicant and the Department's staff. There were five verbal comments from the public at the time of the public hearing.

The record remained open through February 25, 2022, and in total the Department received 16 written comments that were incorporated into the Record. Proper notice of the hearing was provided as required by law. Following the close of record, and at the request of Hearing Officer Theresa Smith, the technical experts in WSS provided a Technical Response Memorandum ("TRM"). The Department's TRM addressed the concerns raised by providing an evaluation of the proposed project in accordance with Delaware's *Subaqueous Lands Act (7 Del.C. Ch.72)* and the Regulation. The Department's TRM, dated October 1, 2023, and received by Hearing Officer Smith on October 9, 2023, is discussed in greater detail below.

Hearing Officer Smith prepared a Hearing Officer's Report dated May 29, 2024 ("Report"). Mrs. Smith's Report set forth the procedural history, summarized and established the Record relied on in the Report, and provided findings of fact, reasons, and conclusions that recommend the Department approve this revised Application, subject to the conditions set forth in the draft permit. The Report concluded that the revised draft Subaqueous Lands Lease permit is protective of human health and the environment while being consistent with applicable state laws and regulations. The Report, along with its Appendices, are incorporated herein by reference.

Reasons and Conclusions

Currently pending before the Department is the proposed revised Application for a Subaqueous Lands Lease to construct a 4-foot-wide by 45-foot-long fixed pier extension, install a 6-foot-wide by 12-foot-long floating platform and a 4-piling boat lift that measures 12-foot-long by 12-foot-wide, in Herring Creek at Lot# 48, 34477 Skyler Drive, Lewes, Sussex County, DE.

I find that the Applicant is required to obtain a Subaqueous Lands Lease for the proposed project described above, along with the reasons thereof. As such, I further find that the above-described proposed project is subject to various state and federal regulatory requirements, including, but not limited to, the requirements of Delaware's *Subaqueous Lands Act* (7 Del.C. Ch. 72 and the *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504), and as provided for under 7 Del.C. Ch. 60.

As previously mentioned, the Department received similar applications to the one submitted by Matthew Eisenmann in the Herring Creek area, all aiming to gain adequate water depth. Additionally, the pending applications provide conflicting water depths amongst the documentation submitted. Based on the comments received and the conflicting information within the pending Application, the Department engaged a third-party service provider to conduct a bathymetric survey to ensure fair and adequate water depths.

In accordance with 7 Del.C § 7207, the Department referenced the 2006 DOJ Opinion and bathymetric survey results to assess the equitable apportionment of adequate water depth while reviewing the revised proposed Application, as well as the other pending applications. As the burden of proof rest with the Applicant to demonstrate compliance with the statutes and regulations, the Department requested that the applicant provide a portrayal of the proposed structure as it would appear based on survey imagery. The Applicant complied.

The Department's TRM provides a thorough review of the proposed project in light of the applicable statutes and regulations associated with the Applications and the concerns voiced in the public comments received in this matter. The regulations outline the criteria for evaluating projects that are proposed to be constructed in public or private subaqueous lands.

The Department received five comments in support and eight comments in objection to the proposed project. The objections raised concerns regarding the proposed structure encroaching on adjacent properties, the dock extension potentially harming the wetlands and wildlife within the cove, and conflicts with community or private interest. Some private interest concerns included decreased property values, potential harm to aesthetics, and concerns for safety and navigation.

The Department addressed the concerns regarding the impact to the HOA's plans for a community pier and navigation by the neighbor at Lot #47. It was noted that the Applicant's existing structure encroaches on the HOA property lines extended. There was concern raised that the proposed dock would limit the direction in which the HOA could build a structure to access navigable waters, as their equitable apportionment is being encroached upon by the Applicant.

The Department determined that the proposed structure would leave 45 feet between the most encroaching piling and the north property line extended of the HOA parcel. Accounting for setbacks, that leaves a width of 15 feet accommodate the HOA parcel to construct a convenience structure. Moreover, the revised proposed structure also leaves approximately 195 linear feet of unobstructed space from the shoreline to the "mouth of cove" in the HOA's equitable apportionment of property lines extended. In addition, the revised proposed structure leaves 28 feet available to maneuver a 22-foot vessel onto the adjacent neighbor's existing boatlift. Therefore, it would not alter the navigation for Lot #47, as they would be able to continue to access their existing boatlift from the south only.

Another concern was the potential impact of the proposed extended dock on safely navigating the cove due to the dock's length. The Department determined that while operators need to abide by the *Delaware Boater's Handbook* for speed in the proximity of docks and structures, the revised proposed project meets the regulatory requirements for proper navigation. As such, the structure will not interfere with public use any more than the other five structures within the cove, considering that very shallow water depths are not utilized at unsafe speeds.

Public concern also was raised regarding the use of a motorized vessel by the Applicant in shallow water depths. While this may be an issue for the existing structure, the Applicant is aiming to extend the length of the dock to gain adequate water depth, thus reducing potential harm to the seabed and wildlife within the cove. Moreover, the revised proposed structure's length would obtain adequate water depth at mean low water, for the draft of the proposed vessel to be berthed, avoiding the need for dredging, and without impacting aquatic vegetation or wetlands.

The Applicant has riparian rights to gain adequate water depth with a water access structure. The proposed structure resides within the equitable apportionment for adequate water depths, as feasibly possible given the surrounding existing structures. The proposed structure would gain 6 inches in water depth at mean low water for mooring, while also preventing the proposed floating kayak platform from resting on bottom at mean low water. Additionally, the structure is comparable in linear footage of other piers in the cove. The Department concluded that the proposed revised structure is consistent with the applicable regulations, guidance documents, and nearby structures. It will not substantially affect the navigational uses of the public or the adjacent neighbors and maintains the opportunity for additional water access for either adjacent neighbor.

Based on the Record developed by the Department's experts and established by the Hearing Officer's Report, and under the authority of 7 *Del.C* Ch. 72, I find that the Record developed in this matter indicates that the Applicant has adequately demonstrated their compliance consistent with Delaware's *Subaqueous Lands Act* (7 *Del.C.* Ch 72) and the Department's *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504). I find and conclude that the Record supports approval of the revised proposed Application as submitted to the Department's Division of Water, WWS, in this matter and the recommendations of the Hearing Officer are hereby adopted. Accordingly, I direct that the Application for a Subaqueous Lands Lease Permit be issued, with the appropriate conditions as set forth herein, to Matthew Eisenmann to construct a 4-foot-wide by 45-foot-long fixed pier extension, install a 6-foot-wide by 12-foot-long floating platform and a 4-piling boat lift that measures 12-foot-long by 12-foot-wide, in Herring Creek at Lot# 48, 34477 Skyler Drive, Lewes, Sussex County, DE.

I further direct that the following reasons and conclusions are entered:

1. The Department has jurisdiction under Delaware's *Subaqueous Lands Act* (7 *Del.C.* Ch. 72) and the *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504) and all other relevant statutory authority, to make a final determination of the Application after holding a public hearing, considering the public comments, and reviewing all information contained in the Record generated in this matter;
2. The Department provided proper public notice of the Application submitted by Matthew Eisenmann and of the public hearing held on May 19, 2021. Further, the Department held said hearing to consider all public comment that may be offered on the Application, in a manner required by the law and regulations;

3. The Department has carefully considered the factors required to be weighed in issuing the Subaqueous Lands Lease Permit required by this Application, and finds that the Record supports the approving of the Application and the issuance of the Subaqueous Lands Lease Permit associated with the same;
4. The Department shall issue the Subaqueous Lands Lease Permit to the Applicant, Matthew to construct a 4-foot-wide by 45-foot-long fixed pier extension, install a 6-foot-wide by 12-foot-long floating platform and a 4-piling boat lift that measures 12-foot-long by 12-foot-wide, in Herring Creek at Lot# 48, 34477 Skyler Drive, Lewes, Sussex County, DE, consistent with the Record developed in this matter. Furthermore, said permit shall include all conditions as set forth in the Department's draft permit, to ensure that Delaware's environment and public health will be protected from harm;
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.



Shawn M. Garvin
Secretary