



STATE OF DELAWARE
**DEPARTMENT OF NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL**
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OFFICE OF THE
SECRETARY

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Secretary's Order No: 2024-W-0033

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

Date of Denial: 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 7 *Del.C.* Ch. 60 and 7 DE Admin. Code Ch.7504, Section 4.0 - *Criteria of Permits, Leases and Letters of Authorization* and all other relevant statutory authority, the Department issues this Order, denying the application submitted by Carlo and Teresita Businelli ("Applicant," "Businelli") for a Subaqueous Lands Lease Permit 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 relocate an existing personal watercraft ("PWC") lift in Herring Creek at Lot# 47, 23962 Sundance Lane, Lewes, Sussex County, DE ("Application") in accordance 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). 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 supports the denial of the Application described herein.

Background, Procedural History and Findings of Fact

Pursuant to 7 *Del.C.* Ch. 60, the Department's Division of Water, Wetlands and Waterways Section ("WWS") received an application submitted by Carlo and Teresita Businelli 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 relocate an existing PWC lift. The property located at 23962 Sundance Lane, Lewes, DE in Herring Creek was sold to the Applicants in 2018 with an existing pier structure that was authorized through Subaqueous Lands Lease Permit # SL-384/09. The existing structure consists of a 55-foot wetland walkway over federal wetlands, a 4-foot-wide by 70-foot-long pier with a 6-foot-wide by 30-foot-long dock to the east of the pier, in an L – shaped configuration. The structure provides a water depth of 0.0 to -0.1 feet at mean low water to allow access to their PWC lift and boatlift, both located on a seaward side of the dock.

The Department received the Application submitted by the Applicant to extend their dock to create additional mooring space when their boat lift is inaccessible and to also install a floating kayak. The proposed extension will continue to run eastward, parallel to the shoreline, with an additional 6-foot-wide by 20-foot-long dock. The proposed dock will extend 74 feet of the mean high mark and would gain a maximum of 1.2 inches in water depth at mean low water. In addition to creating additional space for mooring, the extension will also serve as space to install a new floating kayak launch, measuring 6-foot-wide by 12-foot-long and to relocate their existing PWC lift. Both the floating kayak and PWC lift will be located on the landward side of the dock.

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 January 19, 2022, through February 8, 2022. During that time, the WWS received a written comment in opposition to the proposed project. The objector raised concern with the Applicant's proposed project being constructed in the adjacent neighbor's appropriated area and suggested that there were discrepancies in the property lines referenced in the Application. A public hearing was requested. The Department then placed a public notice of the hearing in the Delaware State News and News Journal on January 19, 2022.

As part of the technical review, the Department conducted an onsite inspection of the proposed project that included a review of the property lines and the Applicant's equitable apportionment of water access. The Department determined that the Applicant's existing structure resides on two parcels, partially on the equitable apportionment of the adjacent neighbor to the west, Lot #48 and their own lot. Both the Applicant and the owner of Lot #48 have submitted an Application to the Department with the intention of extending their structures for the purpose of increased water depth. In addition, the Department received other similar applications from property owners in the Herring Creek area. 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. The Applicant proceeded without modifying the proposed Application.

On February 10, 2022, 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 five (5) members of the public in attendance at the virtual hearing, along with a representative of the Applicant, the Applicant, and the Department's WWS staff. One verbal comment was given at the virtual public hearing.

The record remained open through February 25, 2022, and no additional comment was received from the public; however, the Department's Division of Fish and Wildlife submitted a comment to request a limitation be added to the draft permit for the protection of anadromous fish species. This comment along with the comments received prior to, and during the hearing 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 Smith, the technical experts in WSS provided a Technical Response Memorandum ("TRM"). The Department's TRM addressed the concerns by providing an evaluation of the proposed project with respect to the requirements of the *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.

Thereafter, Hearing Officer Smith prepared a Hearing Officer's Report dated May 29, 2024 ("Report"). Ms. 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 support the decision that the objective of the proposed project can with realized with an alternative plan that could minimize the impacts on the public and environment and that the request for a permit is denied. The Report, along with its Appendix, is incorporated herein by reference.

Reasons and Conclusions

Currently pending before the Department is the Application for a Subaqueous Lands Lease 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 relocate an existing PWC lift, in Herring Creek at Lot# 47, 23962 Sundance Lane, 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 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*.

The Department's TRM provides a thorough review of the proposed project with respect to the requirements of 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)* that are associated with the Application and the public concerns received in this matter. The comments received expressed concerns regarding the proportional property lines presented in the Application and the potential impact the proposed dock extension may have on adjacent properties.

In response to these concerns, the Department reviewed the Applicant's illustration of the property lines, which projected the lines linearly into the cove. The Department's WWS determined that these projections did not consider the properties to the east and west, where the extended lines would intersect, nor did they account for water depths. As a result, under the authority of 7 *Del.C* § 7207, the Department referred to the 2006 DOJ Opinion to evaluate the equitable apportionment of the Applicant's parcel and impacts to adjacent properties.

As mentioned above, the Department determined that the Applicant's existing structure lies outside of the parcel's equitable apportionment, occupying the equitable apportionment of two parcels: their Lot and Lot #48. Although the proposed structure adheres to the maximum linear footage and falls well within the 20% limit of the waterbody's width limit, the Department determined that if the dock extension is constructed as proposed, it would extend 74 feet of the mean high-water mark towards Lot #46. Based on the 2006 DOJ Opinion, extending the structure eastward, parallel to their property line, would limit the navigable area available to Lot #46 for building a structure within their equitable apportionment.

As previously mentioned, the Department engaged a third-party service provider to conduct a bathymetric survey in the area of Herring Creek. As the burden is on the Applicant to prove that the requirements of the statutes and regulations have been met, the Department requested that the Applicant provide an image of their proposed structure represented on the bathymetry survey results.

The Applicant provided an image illustrating that the current mooring area has 0.0 to -0.1 feet of water at mean low water, and the proposed mooring location has -0.1 to -0.2 feet of water at mean low water. The Department determined that the proposed structure would not significantly increase the available water at mean low water and would provide the same mooring opportunity as the boatlift, in the same single direction. Furthermore, since it does not significantly increase water depth for mooring, the Department concluded that the proposed project's goal may not be realized without future dredging to enable the dock extension use for mooring when their boatlift is unavailable. Consequently, such dredging in the future could negatively impact the aquatic vegetation and wetlands in this area.


In accordance with *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504), the Department must assess whether the proposed project can be accomplished with an alternative plan that minimizes impacts on the public and environment. The Department determined that reconfiguring the proposed structure in a linear channelward fashion would allow the Applicant to achieve their goal of creating a mooring space when their lift is inaccessible, provide increased water depths for mooring and navigation, and eliminate the need for future dredging. Additionally, this configuration maintains the opportunity to relocate the existing lift, enhancing overall usability, and creating more space between the applicant's structure and any future structure on Lot #46, thereby reducing potential conflicts.

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 and conclude that the Record developed in this matter does not support the issuance of the pending Subaqueous Lands Lease Permit Application, as submitted by Carlo and Teresita Businelli. As set forth in the TRM and 7 DE Admin. Code 7504, Section 4.0 - *Criteria of Permits, Leases and Letters of Authorization*, the proposed project could cause harm to the environment, either singly or in combination with other activities or existing conditions, which cannot be mitigated sufficiently as proposed. Consistent with the 2006 DOJ Opinion referenced herein, the Department's experts have determined that the Applicant's proposed structure would continue to occupy the equitable apportionment of their Lot #47 and Lot #48 and would also limit the navigable area available to Lot #46 for building a structure within their equitable apportionment. Additionally, the proposed structure does not significantly increase water depth for mooring and navigating when their boatlift is inaccessible, thus creating potential harm to the seabed and vessel. Moreover, the depth of the proposed structure may require future dredging that could negatively impact aquatic vegetation or wetlands.

Lastly, in accordance with the aforementioned Regulation, the Department finds that the objective of the proposed project can be realized with an alternative plan that would minimize the negative impacts on the public and environment. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the above-described Application for a Subaqueous Lands Lease Permit, as submitted by Carlo and Teresita Businelli, in this matter be denied.

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 Carlo and Teresita Businelli and of the public hearing held on February 10, 2022. 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 denial of the Application;
4. The Department hereby denies the Subaqueous Lands Lease Permit Application as submitted by Carlo and Teresita Businelli, consistent with the Record developed in this matter and the reasons noted above;
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