

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

DELMARSH LLC,)	
)	
Appellant,)	
)	
v.)	
)	
DELAWARE DEPARTMENT)	EAB Appeal No. 2020-03
NATURAL RESOURCES AND)	
ENVIRONMENTAL CONTROL)	
)	
Appellee.)	

APPELLANT’S MOTION *IN LIMINE*

Appellant Delmarsh, LLC (“Delmarsh”), by its undersigned counsel, moves the Delaware Environmental Appeals Board (“EAB”) *In Limine* for an Order ruling that certain evidence and testimony proposed to be presented by Appellee Delaware Department of Natural Resources And Environmental Control (“DNREC”) not be admitted at the Appeal Hearing, based upon the following:

1. This Appeal is scheduled to be considered by the EAB at an Appeal Hearing on Tuesday, August 11, 2020 beginning at 9:00 a.m. (the “Hearing”).
2. DNREC has included a letter dated January 30, 2020 and an undated On-Site Investigation Summary as 2 exhibits that it intends to seek to be introduced into evidence at the Hearing. The documents are attached as Exhibits A and B, respectively.
3. The letter contains the decision (the “Decision”) denying Delmarsh’s request for a change to the State Wetlands Map regarding 6 residential building lots (the “6 Lots”) in Bowers Beach, Delaware.
4. The On-Site Investigation Summary (“Site Summary”) contains an explanation of the basis for DNREC’s conclusion contained in the Decision.

5. The Site Summary references an alleged 1926 aerial photograph (the “Old Aerial Photo”) as the basis for DNREC’s conclusion that the 6 Lots should remain designated as State Wetlands, which is the seminal issue in this Appeal. The Site Summary alleges that the Old Aerial Photo shows “a clear channel coming from the St. Jones River and running along what is now Flack Avenue into the sites in question.”

6. Based on the Old Aerial Photo, DNREC alleges that “in this century” all of the 6 Lots were “connected to tidal waters” under 7 *Del. C.* § 6603(h)(definition of the term “Wetlands”).

7. DNREC first provided Delmarsh with the Old Aerial Photo via email on Friday, July 24, 2020 at 4:52 p.m. *See Exhibit C attached.*

8. When subpoenaed, DNREC merely referred to an internet URL address. *See Exhibit D attached, at para. 9.* But the URL address has: (1) no verification as to the year of its preparation; and (2) no identification of who prepared the aerial photographs. *See Exhibit E attached.* No *indicia* of reliability regarding the Old Aerial Photo exists.

9. The sponsor of the URL site and the identity of the Old Aerial Photo photographer are unknown. More importantly, DNREC has not identified any witness who can testify about the accuracy of the Old Aerial Photo. *See Exhibit F attached.*

10. *First, the Old Aerial Photo should not be admitted into evidence since it is unauthenticated and unauthenticatable.* Rule 901 of the Delaware Rules of Evidence (“DRE”) imposes an authentication requirement as a condition of the admission of an item into evidence. It is well settled in Delaware that photographs which are sought to be admitted into evidence require a sponsoring witness who can testify that the photographs constitute an accurate depiction of what the party submitting the evidence contends that the photograph shows. *Green v. St.*

Francis Hosp. Inc., 791 A.2d 731, 738 (Del. 2002)(Nurse who worked in intensive care unit of hospital had knowledge regarding accurate depiction of photograph of hospital room).

11. It is evident that neither of the 2 witnesses DNREC has identified would have personal familiarity with the area of Bowers Beach at issue circa 1926. Nor is it apparent that either of 2 witnesses DNREC has listed would have the ability to authenticate the Old Aerial Photo in some other fashion permitted by DRE Rule 901.

12. The purpose of the authentication requirement is to impose the burden on the sponsoring party to eliminate the possibilities of misidentification and adulteration, by a reasonable probability. *Fountain v. State*, 2004 WL 1965196, *1 (Del., Aug. 18, 2004). The sponsor of the evidence bears the burden of proof to establish that the matter in question is what it is claimed to be. *Id.*

13. Here, DNREC proposes to submit a photograph whose lineage and accuracy are unestablished and unknown. Consequently, the EAB should exclude the Old Aerial Photo on the grounds that DNREC cannot establish that it constitutes an accurate depiction of the area of Bowers Beach in question at any time, let alone the purported 1926 vintage date alleged.

14. Second, the Old Aerial Photo is inadmissible based upon its lack of relevance under DRE Rule 403. Rule 403 provides that evidence may be excluded even if it is logically relevant “if its probative value is substantially outweighed by a danger of...unfair prejudice [or] confusing the issues... .”

15. The Old Aerial Photo will unduly prejudice Delmarsh and confuse the issues by permitting evidence to be presented to the EAB which has no reasonable reliability or foundation. The Old Aerial Photo may or may not be from 1926. And it may or not accurately depict what DNREC surmises it does. Only reliable documents and testimony should be allowed by the EAB.

16. Third, the Old Aerial Photo is inadmissible based upon the need for an expert witness to provide an interpretation of it. Interpretation of aerial photographs requires testimony by a trained, experienced professional. Aerial Photograph Interpretation is a recognized field of expertise. See Exhibits G and H attached. DNREC's 2 witnesses lack the requisite expertise to testify and give an opinion on what is depicted on the Old Aerial Photo.

17. Interpretation of what the Old Aerial Photo depicts regarding conditions on the ground requires an expert - one "based on scientific, technical, or other specialized knowledge within the scope of Rule 702." See DRE Rule 701(c). DRE Rule 702 requires that a person must have adequate "knowledge, skill, experience, training, or education" to qualify as an expert in order to provide an opinion.

18. The DNREC employees who prepared the Site Summary are not expert Aerial Photograph Interpreters. Instead, they are mere lay-witnesses.

19. The interpretation of the nearly 100 year old Old Aerial Photo requires specialized knowledge, training, and/or experience since the grainy, black and white photograph is not capable of reliable interpretation by a non-expert. An expert is needed to make sure that dark areas relied upon by DNREC are not merely shadows, stormwater swales, or puddles of runoff.

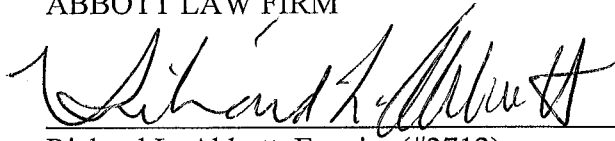
20. Without an expert, interpretation of the Old Aerial Photo is mere guesswork. Only an expert witness can provide an opinion on what the Old Aerial Photo shows on the issue of "connected to tidal waters." So the Old Aerial Photo should not be admitted into evidence.

21. The Site Summary cannot be admitted into evidence since it is premised on the Old Aerial Photo. The Site Summary is inadmissible since its fundamental foundation – the Old Aerial Photo – is not admissible.

22. In turn, the Decision is inadmissible on the grounds that the Site Summary and the Old Aerial Photo are not admissible. The Decision is based upon both the inadmissible Site Summary and Old Aerial Photo.

WHEREFORE, Delmarsh respectfully requests that the EAB enter an Order in accordance with the form attached, barring the Old Aerial Photo, Site Summary, and Decision from admission into evidence at the Hearing.

ABBOTT LAW FIRM

A handwritten signature in black ink, appearing to read "Richard L. Abbott", written over a horizontal line.

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Dated: July 29, 2020

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v.)

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NATURAL RESOURCES AND)
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Appellee.)

EAB Appeal No. 2020-03

ORDER IN LIMINE

AND NOW, this _____ day of _____, 2020, Appellant Delmarsh, LLC (“Delmarsh”) having moved *In Limine* for an Order prohibiting the Appellee from introducing certain documents and testimony into evidence at the Appeal Hearing, and it appearing that the evidence: 1) is not authenticated, so as to ensure an accurate depiction; 2) would be unduly prejudicial to Delmarsh and confuse the issues; and 3) lacks necessary expert testimonial support,

IT IS ORDERED that Delmarsh’s Motion *In Limine* is **GRANTED**, and that the 1926 Aerial Photograph, the Site Summary based thereon, and the final Decision issued by the Appellee that is on Appeal in this action may not be admitted into evidence at the Appeal Hearing.

Dean Holden, Board Chairman


CERTIFICATE OF SERVICE

I, Richard L. Abbott, Esquire, do hereby certify that on this 29th day of July, 2020, I caused a true and correct copy of the foregoing **Appellant's Motion *In Limine*** to be served upon the below-listed individual via electronic mail only:

Kevin Maloney, Esquire Kevin.Maloney@delaware.gov

Kayli Spialter, Esquire Kayli.Spialter@delaware.gov

Sascha Mohammed Sascha.Mohammed@delaware.gov



Richard L. Abbott, Esquire