

1-11-1990 KED

BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE

APPEAL OF:)
ENVIRONMENTAL RESOURCES) Appeal No. 89-17
) December , 1990
)

FINAL ORDER

This matter came before the Environmental Appeals Board on March 27, 1990 and November 27, 1990. The following Board members were present: Thomas J. Kealy, Chairman; Clifton H. Hubbard, Jr.; Ray Woodward; and Edward W. Cronin. Deputy Attorneys General Jeanne Langdon, Keith Trostle and Robert S. Kuehl represented the Department of Natural Resources and Environmental Control ("DNREC"). Robert Tunnell, Esquire, a principal of Tunnell Companies, the owner of the project, represented the appellant, Environmental Resources, Inc, ("ERI"). Edward Launay also spoke on behalf of and as agent for ERI.

SUBJECT OF THE APPEAL

In this matter, ERI appealed DNREC's denial of its application to build a "boardwalk and observation deck" at Indian Landing North over wetlands located in that area. The specific question for the Board was whether the denial was consistent with Wetland Laws and Regulations in 7 Del. C. sec. 6600, et seq. and Department of Natural Resources and Environmental Control Wetlands Regulations adopted December 23, 1976 and revised June 29, 1984. For the reasons stated below, the Board affirms the

Secretary's decision. The Board also finds that the appeal was timely filed.

THE BOARD'S JURISDICTION

As a preliminary matter, DNREC moved to dismiss for failure to timely file the appeal. Seven Del. C. sec. 6610 states that any person who's interest is substantially affected by any action of the Secretary may appeal to the Environmental Appeals Board within twenty (20) days after the Secretary has announced the decision. The Board has interpreted "announced" to be the time that the applicant receives notice of the Secretary's decision.

Mr. Moyer sent the denial letter to Mr. Launay on December 6, 1989. The "final" letter of appeal reached the Board on December 29, 1990, 23 days later.¹ The Moyer letter was sent by certified mail and could have been mailed on the 6th (a Wednesday) or the 7th.²

¹ Mr. Launay did send a letter requesting an appeal to Mr. Moyer which was received at the Wetlands and Aquatic Protection Branch on December 23, 1989. It was received by the Planning and Support Section on December 26. DNREC. 2 Robert MacPherson, Manager of Planning and Support Section, wrote to Mr. Launay on that day to inform him that his appeal request had to be submitted with a check and in the proper form. DNREC 3.

² The certificate of receipt could not be located by DNREC officials, so the actual date of receipt by the appellant could not be determined.

As the letter had to travel out of state, (Salisbury, Maryland) it is reasonable to conclude that with the intervening weekend, the letter could have taken 2 or 3 days to reach the appellant, and have been received as late as December 11, 1989, the following Monday. The appellant testified that he does not have a date stamp and could not determine the actual date of receipt. Without conclusive proof that the Moyer letter was received earlier than the 11th, the Board concludes the appeal letter was timely filed.

SUMMARY OF THE EVIDENCE

The Board submitted the chronology, including the applicant's letter of appeal, as Board Exhibits "1" and "2" respectively.³ ERI testified that it submitted its first wetland application, on behalf of Tunnell Companies for a "proposed nature boardwalk and observation deck" for its Indian Landing North trailer home park on June 20, 1989. This application was submitted after a pre-application meeting with DNREC officials. According to the application, ERI proposed to build a 1110 foot boardwalk. The boardwalk would be 4 feet wide and elevated 2 feet above the existing marsh surface. Another 420 feet of

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References to documentary evidence will be as follows: Board Exhibit 1 will be designated "Bd.1"; Appellant's Exhibits as "App. ____" and DNREC's exhibits "DNREC ____."

boardwalk were proposed to provide access to two proposed 8 x 12 foot observation decks. The applicant stated that the purpose of the boardwalk and observation decks was to "provide expanded recreational opportunities to the residents of Indian Landing North Community...[the] bay walk will allow access to the water's edge for crabbing off the proposed decks." The first proposed walk is designated on a map attached to the application at Bd. 1, Exhibit B.

On August 17, 1989 Charles McNally, Environmental Scientist the Wetlands and Aquatic Protection Branch, responded to ERI with a letter (Ex. G, Bd. 1) requesting modification of the location and design of the proposed boardwalk. Attached to the letter was a copy of ERI's original plan with pencil drawing indications of where alternative boardwalks might be placed Ex. H, Bd. 1. On October 2, 1989, Mr. Launay submitted a revised plan for a boardwalk which he contended met the Department's concerns. This plan differed from that proposed by the Department. (Bd. 1, Exhibit J). Subsequently on December 6, 1989, William Moyer, Manager of the Wetlands and Aquatic Protection Branch denied ERI's request pursuant to Wetlands Regulations. (Bd. 1, Exhibit K). The letter outlined how the application failed to meet the criteria in section 7 of the Wetland regulations.

Mr. Launay, president of ERI testified first. Mr. Launay has a Bachelor of Science degree in Environmental Science,

Management Planning, a Bachelor of Arts degree in Wildlife Biology, and fourteen years of experience in wetlands restoration. He testified that the proposed project was a "non-intensive recreational use of privately owned wetland area" that complied with the regulations. It was one of the only reasonable uses of the privately owned wetland and was designed in such a way so as to minimize the adverse impact to the environment.

Disputing specific paragraphs in the denial letter, Mr. Launay put photographs into the record of the site for the Board's review. He indicated that the location of the boardwalk would not detrimentally affect shore birds and other wildlife, who congregate in the rear marsh area, which was more secluded. He disagreed that the boardwalk would create "shading of productive areas," (sec. 7.02), citing the Pot Nets North boardwalk as an example.

Mr. Launay argued that the bay walk was of great aesthetic value and had been intentionally moved away from the water area at the suggestion of the Department in order to encourage passive recreation. He pointed out that such passive use had less impact than a marina. In his view, the recreational value of the land had great economic impact upon the value of the development to the residents of Indian Landing North.

On cross-examination Mr. Launay admitted that one could obtain a view of the water from the road running through the

development out to the water's edge; that there were other locations on the property on which the residents could crab; that the proposed bay walk would be open to the Pot Nets residents; and that the bay walk currently existing at Pot Nets would be open to the Indian Landing North residents.

Mr. Tunnell argued that the application as proposed did not create loss or despoliation of wetlands; that the proposal was for a foot bridge, not a bay walk and therefore was exempt from regulation; that the foot bridge met the criteria of the State's outdoor development plan; that as a pleasure walk it provided a positive contribution to society; and that the walk as proposed does not infringe on the right of the State to regulate.

In support of this, he cited several publications. One commentator suggested that as most of the traffic on the boardwalk would be during the summer, a time during which the least amount of nesting and wildlife use occurs, that the use of the boardwalk would have minimal impact upon nature. Other commentators indicated that the opportunity to see and enjoy the wetlands would encourage the public to favor protection of the environment.

DNREC argued that the walk as proposed destroyed habitats and had an undesirable impact upon the area; and other outdoor educational opportunities for residents of Indian Landing North. Dave Saveikis, an environmental scientist and wildlife expert

with the Wetlands Branch, reviews potential projects. He testified that the proposed boardwalk area is upland which gradually changes to salt water habitat. It is composed of salt bay grasses and typical salt marsh grasses. The wildlife at this site included wading birds, shore birds, herons, minnows, clapper rails and willets in the summer. It also is very productive for waterfowl and black duck nests. Black ducks, a species of special concern because the current breeding levels are so low, would have disrupted nesting patterns. Also important in this area are mallard, blue teal and gadwall ducks, marsh sparrows, seaside sparrows, marsh wrens and small songbirds.

In addition to birds, the area is used by raccoons, red fox and deer as a migration corridor. The boardwalk would create a barrier or inconvenience to the deer and other animal passage. Food left in the area would attract predators such as a raccoons and red fox.

On cross-examination, Mr. Saveikis admitted that he had not personally seen any black ducks or deer in the vicinity of the proposed boardwalk but he explained he had not done a wildlife study or survey. He maintained however these were the type of habitats in which the animals existed. He also admitted that part of the boardwalk was within 300 feet of residential property and that the residential property had already created an impact

upon wildlife. He further admitted that the area was not a major migration corridor for deer.

Charles McNally an Environmental Scientist for the Wetlands Branch testified next. Mr. McNally evaluates applications. He was familiar with the site and testified that his understanding was that the application was for nature study and not crabbing. He testified that as a crabbing pier the boardwalk was not designed properly, and that there were other places where residents could crab. He also testified that there were other parks in the area that could afford an opportunity for nature study. He concluded by testifying that the walk as proposed was not acceptable for either nature study or for crabbing. The walk could not be placed closer to the water, due to requirements of the Army Corp of Engineers, which require it to be at the high water mark.

William Moyer, manager of the Wetlands and Aquatic Branch, testified that the purpose of the Wetlands Act was to prevent despoliation, loss and degradation of wetlands.

Applicable Law

Wetlands are governed by 7 Del. C. ch. 66, "The Wetlands Act," (hereinafter "Act"). The purpose of the Act is to prevent future loss or despoliation of important wetland areas. The Act goes on to state that;

it is hereby determined that the coastal areas of Delaware are the most critical areas for the present and future quality of life in the State and that the preservation of the coastal wetlands is crucial to the protection of the natural environment of these coastal areas. Therefore, it is declared to be the public policy of this State to preserve and protect the productive public and private wetland and to prevent their despoliation and destruction consistent with the historic right of private ownership of land.

7 Del. C. sec. 6602.

The Secretary is empowered to adopt regulations to enforce this chapter. His authority is accorded wide latitude and the Act is to be liberally construed in order to achieve its end of preserving coastal wetlands. Appeal of Department of Natural Resources, Del. Super., 401 A.2d 93, 95 (1978).

In reviewing an application for a permit, the Secretary is required to consider the following factors

- (1) Environmental impact, including but not limited to, likely destruction of wetlands, flora and fauna; impact of the site preparation on tidal ebb and flow and the otherwise normal drainage of the area in question, especially as it relate to flood control; impact of the site preparation and proposed activity on land erosion; effect of site preparation and proposed activity on the quality and quantity of tidal waters, surface, ground and sub-surface water resources and other resources;
- (2) Aesthetic effect, such as the impact on scenic beauty of the surrounding area;
- (3) The number and type of public and private supporting facilities required and the impact of such facilities on all factors listed in this subsection;

- (4) Effect on neighboring land uses, including but not limited to, public access to tidal waters, recreational areas and effect on adjacent residential and agricultural areas;
- (5) State, county, and municipal comprehensive plans for the development and/or conservation of their areas of jurisdiction;
- (6) Economic effect, including the number of jobs created and the income which would be generated by the wages and salaries of the jobs in relation to the amount of land required, and the amount tax revenues potentially accruing to the state, county and local governments.

Footbridges are specifically exempted from regulation. 7 Del. C. sec. 6606. They are defined as " a simple structure, no wider than three feet, designed for pedestrian traffic." Regulations, p. 5.

Findings of Fact
and Conclusions of Law

The Board finds that DNREC's reasons for denial of the permit are amply supported by the record. As a preliminary matter, the Board rejects ERI's argument that their proposal was a footbridge, and therefore exempt from regulation. The boardwalk as proposed was four feet wide, and therefore beyond the three foot limitation in the regulations. While both parties provided evidence as to the potential effect of the proposed Boardwalk, the Board was better persuaded by DNREC's experts. The proposed boardwalk would have significant negative impact

upon wildlife, especially the nesting birds of the area. The Board further finds that while the proposed boardwalk may provide certain aesthetic benefits to residents of Indian Landing North, those benefits are outweighed by the disruptive and negative impact to wildlife in the area. Moreover, they already have such opportunities to enjoy wetlands at Mr. Tunnel's other development, and at a number of State parks. Finally, the Board agrees that the aesthetics of the tidal marsh will be adversely impacted by the existence of such a boardwalk. For these reasons the Secretary's decision is affirmed.



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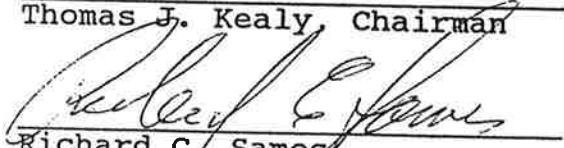
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