BEFORE THE ENVIRONMENTAL APPEALS BOARD

OF THE STATE OF DELAWARE

IN RE:	)	
	)	
	)	Appeal No. 92-11
APPEAL OF JOHN W. GROVES,	)	
PERMIT NO. SP-3702/92	)	
	)	
	)	

FINAL ORDER

The Environmental Appeals Board ("Board") held a hearing on this appeal on June 30, 1992, which it then continued and concluded on July 14, 1992. The Board members present were Thomas J. Kealy, Chairman, Edward Cronin, Joan Donoho, Clifton H. Hubbard, Jr. and Richard Sames. Steven C. Blackmore, Deputy Attorney General, advised the Board. Appellant, John Groves ("Groves"), was represented by John Sergovic, Esquire and Roger Truitt, Esquire. The Secretary of the Department of Natural Resources and Environmental Control ("DNREC") was represented by Deputy Attorney General Jeanne Langdon. The Permittee, Victorine Mertes ("Mertes"), was represented by John Noble, Esquire. This appeal involves a permit authorizing the installation of rip-rap revetment, which is a barrier of stones designed to prevent shore erosion. The Board affirms DNREC's issuance of the Permit.

SUMMARY OF THE EVIDENCE

Mertes owns property on Rehoboth Bay in Sussex County, Delaware. Groves is a neighbor who lives nearby, but his property does not touch the Bay or Mertes' property. The present controversy arose when Mertes determined that her property was being damaged by erosion and she needed to consider installing a protective barrier. After consultation with a DNREC employee and a representative of Anchor Way, her neighbor to the north, Mertes hired Grafton Heather ("Heather") to apply for a rip-rap permit. Heather completed the application, DNREC granted the Permit and Heather installed the rip-rap. Groves, who was not specifically notified of the application, learned of the issuance of the permit when he saw the rip-rap being installed. Groves then appealed the lack of notice, the lack of need for the rip-rap protection and DNREC's lack of concern for the public interest in the beach. Groves, Mertes and DNREC presented evidence concerning the applicable Rehoboth Bay beach area, its historical uses, development, erosion and accretion.

FINDINGS OF FACTS

1. Mertes' property is located at 109 Sea Gull Drive. She traces her interest in this property back to 1949.

2. Groves purchased his property at 106 Sea Gull Drive in 1957. Prior to this time he had visited and rented property in this area. Groves' property does not share a common boundary with Mertes' property.

3. Sea Gull Drive is a private road.

4. Groves and other landowners living on Sea Gull Drive have an easement right which entitles them to access on Sea Gull Drive to Rehoboth Bay. This easement was established by litigation in the Delaware Chancery Court and a January 9, 1959 Amended Final Judgment.

5. Groves and other neighbors have historically used the beach at the end of Sea Gull Drive, as well as the beach on Mertes' property, for walking, boating, fishing and crabbing access, and other recreational activities. However, this recreational activity is occasional and limited; the beach along Rehoboth Bay is not as popular as the nearby ocean beaches.

6. The evidence indicated that Mertes' property had increased by approximately 100 feet from 1949 until 1980. The Board did not attempt to determine the cause of this accretion or the title implications, or the extent of any easement right

Groves may have in the beach area. Groves identified these issues to preserve his rights on appeal. The Board gave Mertes a presumption that she held title to the mean low water mark on Rehoboth Bay. Mertes built a second house on her property in this area of accretion around 1980.

7. The evidence concerning erosion at Mertes' property was conflicting. The witnesses for Mertes testified that beach erosion was present and that in the past they had enough sand to park sailboats on the sandy beach. Testimony from Mertes' expert, Victor J. Schuler, also indicated that erosion control measures were necessary. Groves and his witnesses testified that there had been accretion until approximately 1980 and little gained or lost since then. Tracy Skrabal, Program Manager for the Wetlands and Aquatics Division of DNREC, testified that she believed erosion control measures were necessary, based upon her visits to the area over the years and photographic evidence. She stated that the majority of the erosion was caused by storm surges and resulting damage. Vegetation or other natural remedies would be insufficient to stop this erosion. Groves' expert, Cyril Galvin, believed that the sand erodes by drifting along the shore and that the sand drift would be contained by the repair of the sea wall to the north and the elimination of groins to the south. Photo-

graphic evidence was helpful, but variables such as tides, seasons, etc. could not be identified and therefore the erosion and amount of visible beach could not be conclusively determined. However, the Board found sufficient evidence that erosion existed here.

8. Vegetation and other natural alternatives are the preferred methods of controlling erosion. Rip-rap will help preserve the sandy beach and it is more preferred than bulkheading. The majority of inland erosion projects now involve rip-rap. Rip-rap here will hinder the public's access and ability to walk along the beach, but the public will still be able to pass through along the beach or in shallow water.

9. The evidence indicates that groins and other materials and debris have been historically placed into the Bay to try to prevent sand drift. These will affect sand migration by preventing sand drift on one side of the barrier; they starve the sand on the other side.

10. Mertes requested a rip-rap permit after discussions with her neighbor to the north, Anchor Way. Heather, a contractor approved by DNREC, was hired to submit permit applications for Anchor Way and Mertes. These applications were submitted after consultation with DNREC. Heather, not Mertes, prepared the application forms. DNREC granted both permit applications. Mertes received Subaqueous Land Permit No. SP-3702/92 (the "Permit"). Anchor Way has yet to install its rip-rap.

11. Groves did not receive mail notice of the Permit application but newspaper notice was published in accordance with Delaware law.

12. Shortly after Mertes received the Permit, Heather constructed the rip-rap on Mertes' property. Evidence was presented which indicated that the construction might not have complied with the Permit and its conditions and a gap was left in the middle of the rip-rap, which had not been requested, to create a private boat launch for Mertes. The Board did not consider construction evidence in reaching its decision on the Permit. If DNREC takes enforcement action and Mertes appeals, the Board will resolve those issues at a later date.

13. Tracy Skrabal (DNREC), testified that she and DNREC always evaluate the public interest prior to granting a subaqueous lands permit. DNREC did evaluate the public interest here. Two conditions were specifically included in the Permit to lessen the hindrance to the public. These required the rip-rap "to be constructed so that no more than 60% of the overall width is channelward of mean high water" and a DNREC representative was required to "stake the rip-rap revetment alignment at the site location." See Permit, Special Conditions No. 5, 9.

CONCLUSIONS OF LAW

The Rehoboth Bay subaqueous lands at issue here are tidelands, defined as "lands lying between the line of the mean high water and the line of mean low water." 7 Del. C. sec. 7202(f). A permit is required for depositing materials or constructing a structure on these tidelands. 7 Del. C. sec. 7205(a). The permit may include reasonable conditions designed to protect the public interest. Id. Permit applications should be evaluated in light of the public trust doctrine which provides the people with a right of passage over the sand and soil between the high and low water marks in navigable waters. See Bickel v. Polk, Del. Super., 5 De. 325 (Harr. 1851), which involved fishing rights, but the same principles can be applied to recreational activities in Rehoboth Bay.[1] The Board believes that Delaware courts would apply the public trust doctrine to evaluate the rights of the public affected by the Permit. DNREC recognizes the public trust doctrine. See Regulations Governing the Use of Subaqueous Lands dated May 8, 1991 (the "Regulations").

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[1] Under the public trust doctrine, the State owns the land over which tidal waters flow and the State holds these lands in trust for the people, who have the right to use these lands for navigation, fishing and other recreational uses. The genesis of this doctrine can be traced to Roman jurisprudence. Matthews v. Bay Head Improvement Assoc., 471 A.2d 355, 358-60 (N.J. Supr. 1984). This doctrine grants rights to all the people in the State; it is not limited to individuals who own property close to the beach.

The public trust doctrine does not prohibit installation of a structure such as rip-rap channelward of the mean high water mark, even though such a structure will hinder the public's rights. However, the public's rights should be carefully considered by DNREC when it evaluates permit applications. DNREC should seek to minimize the restrictions on the public's rights by granting maximum public access under the circumstances. The public might also be entitled to some inseparable, incidental use of the dry sandy beach area above the tidelands. See Matthews, 471 A.2d at 363-65. Rip-rap applications should not be approved if they will deny the public reasonable access to the dry beach area. Here, the rip-rap does not block the Sea Gull Drive easement beach area.

The laws governing subaqueous lands authorize DNREC to place reasonable limits on structures in subaqueous lands and to protect the public interest therein. 7 Del. C. secs. 7201, 7205. Under the Regulations, DNREC is required to find a need for proposed structures when permit applications are received. Regulations sec. 3.01. As shown in Finding No. 7, the Board finds sufficient evidence of the need here for an erosion control device. DNREC is also required to consider the effect of the structure on the public interest, including the effect

on land use recreation and aesthetic enjoyment and the extent and duration of the disruption. Regulations sec. 3.01(A).

The Board's decision here, and DNREC's below, involved balancing the public interest and private property rights. The disruption here will be material and of a permanent nature, but stabilizing beach erosion also offers benefits to the public. The public's passageway is not eliminated, only pushed more channelward. Hopefully, the rip-rap will stabilize sand in front of it and add to the beach and provide long-term benefits to the public. Admittedly, rip-rap involves the introduction of stones which are not as aesthetically pleasing as sand, but rip-rap is preferred over more intrusive methods like sea walls or bulkheads. Groves' aesthetic objections are insufficient here. The Board finds that rip-rap is the preferred erosion control method for the Mertes property and justified under the facts here.

Groves' other objections concerning location and interference are also insufficient. Rip-rap must be placed below the mean high water mark to be effective. Tracy Skrabal (DNREC) testified that she considered the public interest and imposed Special Conditions Nos. 5 and 9 to limit the effect of the rip-rap on the public's access. She also informed Heather where the rip-rap should be located and gave other advice at

the site. The Board cannot conclude that the location as authorized by the Permit is improper. Walking along the beach is still possible although peoples' feet might get wetter than they did in the past. While a dry sandy passageway is preferred, the difference between walking in very shallow water and wet sand is not significant enough to compel a different result here. The Board assumes that DNREC will insure that rip-rap, when installed correctly, will not prevent reasonable access to the dry sandy beach area. DNREC did consider the public interest prior to issuance of the Permit and DNREC complied with the applicable law and regulations.

Under the statute and regulations, DNREC was not required to provide notice to Groves of the Mertes' permit application. DNREC did publish notice in the newspaper as required by 7 Del. C. sec. 7207(d). DNREC might wish to consider adopting a mechanism for providing nearby property owners with an opportunity to comment on permit applications. No public hearing was required here because the permit was for the creation of the rip-rap. The permit was for a three year time period; it did not exceed the ten year threshold which would have mandated a public hearing. 7 Del. C. sec. 7208(a)(1). Under section 7208, a public hearing was not required. Also, Groves is not an adjacent property owner who would have received notice. Section 7208(b).

Groves had the burden of proof to show that the Secretary's decision was not supported by the evidence before the Board. 7 Del. C. sec. 6008(b). While Groves presented evidence supporting his argument for a reversal or remand, the evidence in total failed to satisfy Groves' burden of proof. The Board affirms the decision of the Secretary, by a vote of 4 to 1. Edward Cronin dissented.

Thomas J. Kealy, Chairman

Edward Cronin

Joan Donoho

Clifton H. Hubbard, Jr.

Richard Sames

DATED: 29 Aug 92

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Thomas J. Kealy, Chairman

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Clifton H. Hubbard, Jr.

Richard Sames

DATED: 8/28/92