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STATE OF DELAWARE
DEPARTMENT OF JUSTICE
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WILMINGTON, DELAWARE 19801

DIRECT DIAL: ^

577-2500

February 1, 1994

Jeanne L. Langdon
Deputy Attorney General
Department of Natural Resources
and Environmental Control
89 Kings Highway
Dover, DE 19901


Mr. Thomas J. Cooper
Cooper Realty Associates
615 Stein Highway
Seaford, DE 19973

Re: Thomas J. Cooper
EAB Appeal No. 93-13

Dear Ms. Langdon and Mr. Cooper:

Enclosed please find the Board's Final Order regarding the above appeal. It was issued today.

Very truly yours,


Steven C. Blackmore
Deputy Attorney General

SCB/rt/
cc: ✓ Ellen Morris
Administrative Assistant

BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE

IN RE:

THOMAS J. COOPER

)
)
) Appeal No. 93-13
)
)

FINAL ORDER

The Environmental Appeals Board ("Board") held a hearing on this appeal on December 7, 1993. The Board members present were Clifton H. Hubbard, Jr., Chairman, Robert S. Ehrlich, Joan Donoho, Charles Morris and Robert I. Samuel. Steven C. Blackmore, Deputy Attorney General, advised the Board. Thomas J. Cooper appeared and represented himself. Jeanne L. Langdon, Deputy Attorney General, represented the Department of Natural Resources and Environmental Control ("DNREC").

SUMMARY OF THE EVIDENCE

Mr. Cooper appealed from DNREC's denial of his application for a permit to install a bulkhead for his residence on the Nanticoke River in Seaford, Delaware. Mr. Cooper complained that DNREC's decision was unfair since his next door neighbor had previously been granted a bulkhead permit by DNREC. Mr. Cooper wanted a consistent decision. Also, there are other bulkheads on properties within a mile of his residence. DNREC conceded that there were other bulkheads in the area, but argued that these were constructed before the effective date of the present regulations, which control Mr. Cooper's application. For the reasons that follow, the Board affirms the decision of DNREC.

FINDINGS OF FACT

1. Mr. Cooper's shoreline is eroding. The erosion is visible along the shoreline. If left unchecked, the erosion may damage the improvements which Mr. Cooper has constructed in his backyard, including steps, landscaping and a sprinkler system. The erosion will gradually undermine his backyard since his property occupies a bluff approximately 8-10 feet above the Nanticoke River.

2. The character of the shoreline and lands of Mr. Cooper are essentially similar to those of his neighbor, Dr. Palmer, to whom DNREC gave approval to install erosion control measures. Mr. Cooper played a video tape (Cooper Ex. 4) showing these similarities. The photographic evidence submitted by both parties also showed the Nanticoke River area and the undermining of the shoreline caused by erosion.

3. Dr. Palmer's permit, SP-1507/90, authorized him to construct a rip-rap revetment and a bulkhead. Cooper Ex. 5. The rip-rap will prevent erosion at the toe of the bulkhead.

4. As this Board has previously indicated, a review of the erosion control options shows that bulkheads are not the environmentally preferred solution due to the rebounding of the waves, erosion at the toe and leaching of the treatment chemicals used on bulkheads. In most situations, rip-rap has less impact on the environment yet it offers equal erosion control.

5. Mark Allen, an experienced contractor hired by Mr. Cooper, indicated that rip-rap would be feasible here, although

he testified it would be more expensive to install. DNREC's witnesses also agreed rip-rap was feasible. Mr. Allen believed that a bulkhead would suffer little erosion at the toe since there is less wave action than in the tidal areas. He also testified that DNREC should be more consistent in its permitting decisions.

6. Tracy Skrabal, a former program manager for DNREC, testified by video tape and then by telephone where she was cross-examined. She stated that Mr. Cooper's application did not satisfy the burden of proof for bulkheads in the 1992 regulations. She indicated that rip-rap would solve all the erosion problems here but indicated that many landowners prefer the aesthetics of bulkheads. She was also concerned that a bulkhead on Mr. Cooper's property would set a bad precedent.

7. Mrs. Skrabal was also involved with Dr. Palmer's application, which she had recommended denying. However, the Secretary issued a permit which was essentially a compromise between a blanket approval and a blanket denial. Dr. Palmer's permit allowed a bulkhead to be constructed, but rip-rap was to be placed channelward of the bulkhead. While Dr. Palmer and/or his legislator brought the permit application to the attention of the Secretary of DNREC, Ms. Skrabal denied that any improprieties occurred. She understood that Dr. Palmer's application was approved out of a concern that a denial would result in litigation which DNREC would lose under the standards then applicable. Dr. Palmer's application had been filed under the

old regulations while Mr. Cooper's was filed under the newer, more stringent regulations.

CONCLUSIONS OF LAW

At the hearing there was a discussion about the scope of this appeal. Mr. Cooper contended that he had orally amended his appeal during the pre-hearing conference and DNREC was obligated to grant his amended application under its precedents. (i.e., *stare decisis*). Mr. Cooper's oral request mirrored Dr. Palmer's application which DNREC had approved. The pre-hearing conference is scheduled by the Board's counsel to resolve procedural issues, see 7 Del. C. §6007(b). While a settlement discussion occurred at the pre-hearing conference, DNREC never agreed to accept an amended permit application or grant Mr. Cooper a revised permit. DNREC indicated that it would not settle this appeal. Therefore, DNREC is not bound under estoppel or *stare decisis* grounds.

DNREC based its denial of Mr. Cooper's application on the law, 7 Del. C. §7201 et seq., the 1992 Regulations Governing the Use of Subaqueous Lands ("Regulations") and its analysis of the erosion control options available to Mr. Cooper. Subaqueous land permits are required under 7 Del. C. §7205. Section 3.04 (A) (4) of the Regulations states:

4. Vertical-walled structures shall be allowed only where a non-vertical structure, designed to equal standards, would be ineffective to control erosion, where deleterious environmental effects associated with the construction of vertical structures would be less than the impacts on the adjacent environment during construction of a non-vertical structure, where functionally, no practical alternatives exist for certain

water-dependent facilities or activities, or where generally accepted engineering practices would preclude the use of non-vertical walled structures.

Here, there are alternatives other than bulkheads available to achieve the desired erosion control. The Board agrees with DNREC that rip-rap revetment or gabions (stones encased in wire casing) would be feasible for this site and an environmentally preferred alternative. Under the Regulations, bulkheads should only be used when other options are unavailable. Id.; see also §3.04 (A) (2).

Denying Mr. Cooper a bulkhead would be inconsistent with past practice. There are other bulkheads in this area. It is also inconsistent with DNREC's treatment of Dr. Palmer, which raised an inference that political influence may be used to sway a permit decision. However, the 1992 Regulations, adopted May 8, 1991 and amended September 2, 1992, are more stringent than the prior regulations. The enactment of the Regulations has not been challenged. Mr. Cooper's application was received by DNREC on January 14, 1993, after the effective date of the Regulations. In contrast, Dr. Palmer's application was submitted July 12, 1990. Cooper Ex. 5. Also, a large portion of the Nanticoke River shoreline has not been altered by erosion control structures. DNREC's concern about potential environmental impact is justified.

While stricter environmental regulations will lead to inconsistencies between practices accepted today and practices previously accepted, these differences do not make DNREC's

decision reversible. DNREC did not act in an arbitrary or capricious manner here based upon the facts and applicable law. Mr. Cooper wanted DNREC to act in a manner consistent with its past practices. However, DNREC followed the standards imposed by the existing Regulations, which it should continue to do during the life of these Regulations. In appeals to the Board, the appellant has the burden of proof to show that DNREC's decision was not supported by the evidence. 7 Del. C. §6008(b). Mr. Cooper did not satisfy that burden here.

CONCLUSION

Therefore, for the foregoing reasons, the Board affirms DNREC's denial of Mr. Cooper's permit application. Mr. Morris dissents from this decision.

Clifton H. Hubbard, Jr.
Clifton H. Hubbard, Jr. 1/26/94
Chairman

Joan Donoho

Robert S. Ehrlich

Charles Morris

Robert I. Samuel

DATE: January _____, 1994

CONCLUSION

Therefore, for the foregoing reasons, the Board affirms DNREC's denial of Mr. Cooper's permit application. Mr. Morris dissents from this decision.

Clifton H. Hubbard, Jr.
Chairman

Joan Donoho

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Robert S. Ehrlich

Charles Morris

Robert I. Samuel

DATE: January _____, 1994

CONCLUSION

Therefore, for the foregoing reasons, the Board affirms DNREC's denial of Mr. Cooper's permit application. Mr. Morris dissents from this decision.

Clifton H. Hubbard, Jr.
Chairman

Joan Donoho

Robert S. Ehrlich

Charles E. Morris

Charles Morris

Robert I. Samuel

DATE: January 27, 1994

CONCLUSION

Therefore, for the foregoing reasons, the Board affirms DNREC's denial of Mr. Cooper's permit application. Mr. Morris dissents from this decision.

Clifton H. Hubbard, Jr.
Chairman

Joan Donoho

Robert S Ehrlich

Robert S. Ehrlich

Charles Morris

Robert I. Samuel

DATE: January 27, 1994

CONCLUSION

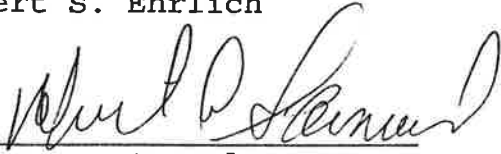
Therefore, for the foregoing reasons, the Board affirms DNREC's denial of Mr. Cooper's permit application. Mr. Morris dissents from this decision.

Clifton H. Hubbard, Jr.
Chairman

Joan Donoho

Robert S. Ehrlich

Charles Morris



Robert I. Samuel

DATE: January 26, 1994