BEFORE THE ENVIRONMENTAL APPEALS BOARD

STATE OF DELAWARE

IN THE MATTER OF:	)	
	)	Appeal No. 94-04
JAMES J. AND MARTHA G. TURNER	)	
	)	

FINAL ORDER

The Environmental Appeals Board ("Board") held a hearing on this appeal on October 11, 1994. The Board members present were: Clifton H. Hubbard, Jr., Chairman; Robert S. Ehrlich; Robert I. Samuel; Diana A. Jones; Charles Morris; and Joan Donoho. Diana M. O'Neill, Deputy Attorney General, advised the Board. Lisa Jaeger, Esquire, represented Mr. and Mrs. Turner. Jeanne L. Langdon, Deputy Attorney General, represented the Department of Natural Resources and Environmental Control ("DNREC"). For the reasons that follow, the Board remands this permit for further consideration by DNREC.

SUMMARY OF THE EVIDENCE

The Turners have appealed DNREC's denial of their wetlands permit application for proposed house and walkway improvements to their house and the adjacent dock, which is located along Route 54, approximately two miles west of Fenwick Island, Sussex County. Because the property is situated in and mapped as wetlands under Delaware law, a permit is required for these renovations. The Turners presented testimony by David Lee Hardin, who is part owner of Environmental Resources, Inc., and

who is a specialist regarding wetlands sciences. In conjunction with Mr. Hardin's testimony, many documents were entered into evidence, including enlargements of the Delaware wetlands maps of 1973 and 1988. Historic photographs of the house and surrounding property were presented along with an affidavit from Joseph Endy, who owned the property from 1952 through 1992, when it was purchased by the Turners. Photographs of the property before and after the house was raised nine and one-half feet were also provided to the Board. Various enlarged sketches including original as well as recent proposals regarding renovations were also used. A July, 1992 letter from the Turners requesting that their house footprint be lifted from the wetlands map was also entered as evidence. The Turners also presented as a witness their son, Richard Turner, who is an architect working in the Virginia and District of Columbia areas. Mr. Turner explained recent counterproposals for improvements on the property in response to DNREC's counterproposals to their original application for permit. His testimony included the belief that DNREC's proposal to enter the house by a stairway located underneath the raised house was unworkable. His testimony concluded that the stairs would have to be moved back four feet in order to make this concept workable, but that there were other alternatives that appeared more feasible and aesthetically appealing, as well as more structurally sound. Mrs. Turner testified that her initial inquiry towards application was made

in January, 1993 and that the final permit application was entered June, 1993. Notification of the denial of this permit came in May, 1994 and appeared to be held up until a plant restoration plan was submitted regarding disturbance of the property when the house was physically raised to its present height. Mrs. Turner revealed her frustration and concern regarding the time period that has lapsed between the initial application and now, as well as her concerns about complaints over the appearance of the property that are apparently being received by Sussex County inspectors. She testified to the fact that the parking lot in front of the house did sustain some damage when the house was raised but did not understand until later that effectuating the proposed restoration plan to this area may mean losing the use of the driveway area altogether. Dr. Evelyn Maurmeyer was retained by the Turners and formulated this site plan restoration. Although there was some suggestion that fill was moved or brought onto the property, Mrs. Turner testified that this was not the case. She further testified that there are no steps whatsoever leading to the entrances to the house at present - only a ladder is available to get up and into the house as it currently stands. Mrs. Turner was unclear about the process and effect of having a footprint lifted off the wetlands map and although she understood that this would necessitate permits for any work outside of this footprint area, she did not understand at the time she requested this

footprinting, all that could have been requested and clarified in order to reduce or prevent the current delays that have developed.

On behalf of DNREC, William Moyer testified as to contact with Mrs. Turner as early as 1992, before the property was purchased by the Turners. Mr. Moyer testified that he consulted the 1973 wetlands map, as well as the 1976 and 1988 revisions. Infrared photographs were presented as evidence which indicated upland areas to be revealed as reddish colorings and lowland areas as greenish colorings. Although notified by the Turners of intent to raise the house, Mr. Moyer was surprised when the house was raised nine and one-half feet above its prior location and did not understand that to be the intention of the Turners. Additional photographs showing activity around the immediate vicinity of this house were also produced as evidence of Mr. Moyer's concern that the wetlands were violated when the house was raised. It was at his request that a restoration plan to these wetlands be implemented by the Turners as a result. Mr. Moyer outlined the statutory guidelines and process whereby DNREC evaluated the Turners' application. He suggested that the driveway could be restored to use at some future point. Mr. Moyer explained the statutory process applied to this analysis and testified that the permit was denied because alternative analysis to proposed improvements were incomplete and proposed access points did not minimize disturbance to wetlands. It was

Mr. Moyer's testimony that Mrs. Turner was not entirely forthcoming during the process of explaining what she was seeking or what she wanted to do with the property. He admitted on cross-examination that part of the explanations for denial of this permit could have been better worded for a better understanding by the applicants. Patrick Emory, an environmental scientist and employee of DNREC, testified that he and Mr. McNally from DNREC physically checked the site of the Turner property on various occasions. He considered the action of raising the house by the Turners to be a violation of the surrounding wetlands and concluded that restoration was a compromise to this action and that DNREC's policy is that the application be held until the restoration issue is resolved. His objective is to lessen the impact upon wetlands of any use, although admitting in this particular case that we are speaking of minor square footage. If a proposal would lessen the impact by even one-third, it would be preferable to the one at issue, according to Mr. Emory.

Both parties agree that we are dealing with a relatively small area of the wetlands surrounding and adjacent to a 40-year-old house. It is the Turners' position that their proposed improvements would enhance the property with minimal effect to the wetlands and that DNREC's various suggestions were resulting in their loss of what they originally purchased -- access and use of the house as well as use of a driveway and walkway to the

dock. DNREC admitted that portions of the proposals were approvable but that the Turners insisted the permit be granted as applied for in whole, not in part.

FINDINGS OF FACT

1. Mr. and Mrs. Turner own a small beach house on approximately 1.8 acres which abuts an artificial lagoon and the Assawoman Bay and clearly is designated and situated in Delaware wetlands as outlined in 7 Del. C. ch. 66. Since 1952, the property has been used as a beach home. Included with the small house at time of purchase by the Turners in 1992 was a dock, parking area, an outdoor shower, a cement walkway to a shed, and one or more cement step entrances to the house.

2. After purchasing the property, the Turners raised the house from the original 2.5 feet above ground to 9.5 feet above the ground by increasing the height of the cement columns supporting the home. This action was taken after a "footprint" of the house was lifted from the wetlands map upon request by the Turners dated July 20, 1992. According to this request, a 25-foot by 25-foot section encompassing the house was deleted from wetlands requirements.

3. After months of consultation and inquiry, the Turners submitted an application for a permit on June 28, 1993 for the purpose of renovating this house in keeping with its former use. All but one of the proposed renovations directly affected the house and the immediate area within or around the house. A new

roof was proposed that may involve only inches over the footprint. A proposed deck was included to keep activities off the wetlands and the two former entranceways to the house were combined and proposed as one side entry. The only renovation extending across the land was an elevated walkway leading to a dock which has been subsequently moved by storm activity.

4. The Turners sought the advice of environmental consultants located in DNREC's offices, as well as, in private enterprise in the person of Dr. Evelyn Maurmeyer, in an attempt to comply with the permit requirements. Approximately 266 square feet of wetlands is the amount of area at issue in the proposals included in the permit.

5. In fulfilling its role as an enforcer of the environmental statutes, DNREC applied the statutorily mandated requirements and considerations to this permit and attempted to balance the need to protect wetlands against the desire of the Turners to develop the property. During this consideration, numerous communications in the form of letters and conversations were exchanged between the applicants and DNREC. Proposals and suggestions involving alternative renovations were made by DNREC.

6. Because DNREC believed that the Turner application for renovations was to be taken and accepted or rejected as a whole, and because DNREC did not conclude that each and every proposal best satisfied the requirements of the statute, the permit was denied.

7. In an effort to renovate and regain use of their property, the Turners have continued to seek professional advice, from David Lee Hardin, an expert in wetlands science, and from Richard Turner, an experienced architect.

8. A recent counterproposal by the Turners to the original application was presented at the hearing. Mr. Moyer from DNREC, although given insufficient time to study the proposal in its entirely, concluded that upon its face, it could be considered to be an acceptable alternative to earlier rejected plans.

CONCLUSIONS OF LAW

DNREC maintains that since reasonable alternatives were available, the Turner permit application was properly denied by the Secretary. The Board recognizes that it is the Secretary's obligation to balance public and private interests when granting or denying permits. Matter of Thomas J. Cooper, Environmental Appeals Board, Appeal No. 9313 (1994). The Turners recognize that the intent of the Wetlands Regulatory Program is to prevent despoliation and destruction of public and private wetlands. 7 Del. C. § 6602 (1974). Both parties agree that in the large scheme of regulating and protecting State wetlands, the area at issue is minor in measurable size.

The Board concludes that the primary cause of the failure of this permit to be processed successfully has been a continued lack of effective and knowledgeable communication between DNREC and the applicants. Although the parties have had contact with each other since early 1992, the totality of the evidence

presented before the Board shows both a lack of the property owners' knowledge of what was really and legally significant regarding their proposals and DNREC's lack of specificity as to what their counterproposals involved. In drawing its conclusion, the Board emphasizes one particular example regarding the proposal of the outside stairway leading to the house. In response to the original proposal for a walkway along the side of the house leading to outside stairs, DNREC proposed that the stairs come up from under the house since it is now situated nine and one-half feet above ground. However, the confusion as to the architectural feasibility and wisdom of this suggestion exemplifies the lack of understanding among all parties with the information being so exchanged.

The Board recognizes both DNREC's concern to minimize the impact of these renovations on the environment, as well as the Turners' concern and acceptance of a plan that is sound from an engineering point of view, as well as an esthetic point of view.

The Board remands this issue and urges DNREC to continue to be sensitive to property owners' positions as evidenced at the hearing when the testimony revealed how numerous communications were misinterpreted between and among the parties. Since new proposals currently exist and may be sufficient to satisfy requirements for the issuance of this permit, and since these proposals were not available to the Secretary when the permit was denied, the Board urges, upon remand, that all proposals and counterproposals be clearly delineated until the parties reach

agreement. The Board specifically notes that the Turners need stairway access to their home and that this access be given priority in these negotiations. The Board suggests that since lifting the footprint of the house involved a 25 by 25-foot area, the one extra piling requested within this area and under the decking of the home may be a safer alternative to cantilevering the deck. The Board finds no reason for the Turners to submit new permits when the issues remain the same as those sought in the original permit and when it is recognized that the parties already have begun to compromise.

CONCLUSION

The Board determines that this proceeding be remanded to the Secretary for reconsideration.

Clifton H. Hubbard, Jr.
Chairman

Robert S. Ehrlich

Robert I. Samuel

Diana A. Jones

Charles E. Morris

Charles Morris

Joan Donoho

DATED: November 16, 1994

CONCLUSION

The Board determines that this proceeding be remanded to the Secretary for reconsideration.

Clifton H. Hubbard, Jr.
Chairman

Robert S. Ehrlich

Robert I. Samuel

Diana A. Jones

Charles Morris

Joan Donoho

DATED: November 17, 1994

BEFORE THE ENVIRONMENTAL APPEALS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF	)	
	)	Appeal Nos. 93-08, 93-09
TIDEWATER UTILITIES, INC., et al.	)	and 93-17
	)	

FINAL ORDER

A hearing on this appeal was held on August 24, 1993 by a Panel of four Board members. After this hearing, but before a decision had been drafted, approved and released, new members were added to the Board and old members replaced. The new members were confirmed by the Senate on September 21, 1993. Therefore, since the Board panel which heard this appeal no longer constitutes a quorum of the Board, the present Board reviewed and considered at its October 26, 1993 meeting the Final Order prepared by the prior Panel.

Upon review of the Panel's Final Order and any other items from the record deemed necessary, the Board adopts the attached Final Order and incorporates it by reference herein. The following Board members concur in this decision.

Clifton H. Hubbard, Jr., 10/26/93
Clifton H. Hubbard, Jr.
Chairman

Ray K Woodward 10/26/93
Ray K. Woodward

Joan Donoho
Joan Donoho

Charles E. Morris 10/26/93
Charles Morris

Diana Jones 10/26/93
Diana Jones

Robert S Ehrlich 10/26/93
Robert S. Ehrlich

Robert I. Samuel

DATED: October 26, 1993

BEFORE THE ENVIRONMENTAL APPEALS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF TIDEWATER UTILITIES, INC., et al.	)	Appeal Nos. 93-08, 93-09 and 93-17

FINAL ORDER

The Environmental Appeals Board ("Board") held a hearing on these consolidated appeals on August 24, 1993. The Board members present were Thomas J. Kealy, Chairman, Clifton H. Hubbard, Jr., Richard C. Sames and Ray K. Woodward. Steven C. Blackmore, Deputy Attorney General, advised the Board. Appellant Tidewater Utilites, Inc. ("Tidewater") was represented by Richard J. Abrams, Esquire. The Secretary of the Department of Natural Resources and Environmental Control ("DNREC") was represented by Deputy Attorney General David L. Ormond. Permittee, Wilmington Suburban Water Corporation ("Wilmington Suburban"), was represented by Catherine L. Pape, Esquire. Intervenor, Artesian Water Company ("Artesian"), was represented by Mary B. Graham, Esquire. The Board upholds the decision of DNREC.

SUMMARY OF THE EVIDENCE

These appeals involve a dispute among water utility companies over service to a large area in southern New Castle County. On February 26, 1993, DNREC issued Secretary's Order No. 93-0090 ("Order") which denied Tidewater's application to provide water service to a large portion of southern New Castle County. The Order also granted Wilmington Suburban's application to serve the Grandview Farms II subdivision, which is located within the

area Tidewater had requested. Certificate of Public Convenience and Necessity No. 90-CPCN-11 was issued to Wilmington Suburban on March 12, 1993 to authorize service to the Grandview Farms II subdivision. The Board previously resolved an appeal involving Wilmington Suburban and Tidewater by Final Order issued March 22, 1993 wherein the Board affirmed the DNREC's decision to issue a Certificate of Public Convenience and Necessity ("CPCN") to the water company which had a signed water service agreement for the subdivision at issue.

The parties presented their argument through witnesses, documentary evidence and legal argument. Wilmington Suburban introduced an executed Water Service Agreement for service to the Grandview Farms II subdivision and Artesian introduced two executed Water Service Agreements for subdivisions within the large area Tidewater had requested. The Board had granted Artesian's Petition to Intervene since its interests were substantially affected by Tidewater's appeal. Artesian's role was limited since it had not applied for a CPCN in this region at the time of the hearing before the Board. Tidewater objected to DNREC's failure to grant its application for service to a large area. DNREC has been granting CPCNs within this area on a subdivision by subdivision basis. Tidewater objected to DNREC's Hearing Officer's reopening of the record after the public hearing, allegedly without notice. Tidewater also objected to the allegedly insufficient record behind issuance of the CPCN for Grandview Farms II. The parties also presented testimony

regarding events after the hearing below, including the future plans of the water companies, requested areas of service and approved areas of service and interconnection plans.

FINDINGS OF FACT

1. Wilmington Suburban and the developer of the Grandview Farms II subdivision executed a Water Service Agreement on December 9, 1991.

2. The documents and evidence which Tidewater presented to support its large area CPCN application, including documents presented to the Secretary below, do not demonstrate that Tidewater is the one and only entity which should service this entire area. It appears that this area will be serviced by two or more water utilities which may then decide to interconnect their water lines.

3. Wilmington Suburban's Water Service Agreement for Grandview Farms II was entered into the record after the Hearing Officer, Robert R. Thompson, reopened the record for this purpose. See Order at 3.

4. Despite its allegations, Tidewater did not show misconduct, error or arbitrary action by the Hearing Officer.

5. Wilmington Suburban possesses the financial and operational ability to provide adequate service to Grandview Farms II.

6. Although the Board excluded inquiry into the Hearing Officer's mental processes, Tidewater had a full and fair opportunity before the Board to challenge the activities and

decisions of the Hearing Officer and DNREC.

CONCLUSIONS OF LAW

This is the Board's third hearing involving CPCNs following the enactment of Senate Bill No. 144, as amended, codified at 7 Del. C. §6075 et seq. This statute altered the existing law and practices regarding the issuance of CPCNs. Rather than reiterate the background behind Senate Bill No. 144, the Board adopts the conclusions of law in its previous Final Order involving Tidewater and Wilmington Suburban issued March 22, 1993. There, the Board interpreted Senate Bill No. 144 to require the Secretary to issue a CPCN when an applicant is in possession of a "signed service agreement with the developer of a proposed subdivision or development, which subdivision or development has been duly approved by the respective county government." 7 Del. C. §6077(a)(1)(i). Wilmington Suburban qualified for the CPCN for Grandview Farms II because it had a signed water services agreement for an approved development under this subsection. Therefore, the Secretary was required to issue this CPCN.

Tidewater argues that the Secretary should have approved its large area application under §6077(a)(2), which it argues may override an application under §6077(a)(1). The language in Senate Bill No. 144 discourages issuance of CPCNs for water service to "large rural areas" and intends to preserve traditional rural water utility patterns. Senate Bill No. 144 (as amended pp. 2-3). The Board has interpreted §6077(a)(2) to authorize the Secretary to grant larger areas to applicants

entitled to a CPCN under §6077(a)(1). Even assuming that Tidewater's legal argument is correct and the Secretary had the authority to grant Tidewater's large area application under §6077(a)(2), the Secretary, in his discretion, chose not to issue that CPCN. The Board is unlikely to compel the Secretary to perform a discretionary act. In any event, the evidence supporting Tidewater's application for a large area is insufficient to reverse the Secretary's decision here.

Tidewater contends that the Hearing Officer, Robert R. Thompson, erred by reopening the record to admit Wilmington Suburban's Water Service Agreement for Grandview Farms II and by failing to summarize the evidence correctly. There was some confusion following the pre-hearing conference regarding DNREC's agreement to offer the testimony of the Hearing Officer. DNREC objected to his testimony under the "deliberative process privilege" exception which exempts adjudicatory officials from testifying where their conclusions are embodied in a written decision or recommendation. Courts have preserved the integrity of the administrative adjudicatory process by refusing to compel the testimony of administrative officials who have issued the underlying decisions. See United States v. Morgan, 313 U.S. 409, 422 (1941); Brooks v. Johnson, Del. Supr., 560 A.2d 1001, 1004 (1989). Here, Tidewater alleged that the Hearing Officer acted arbitrarily in reopening the record without notice. The Board compelled the testimony of the Hearing Officer to respond to allegations by Tidewater's attorney that he improperly reopened

the record, but the Board prohibited inquiry by Tidewater into the areas governed by the deliberative process privilege. The Board concludes from the Hearing Officer's testimony and the evidence submitted that the decision to reopen the record was not arbitrary or erroneous; it followed the enactment of Senate Bill No. 144, which changed CPCN law and placed a premium on signed water service agreements. We do not fault the Hearing Officer for reacting as he did following Senate Bill No. 144; this statute did not include grandfather provisions.

Tidewater argued that the Hearing Officer should have included more evidence favorable to Tidewater in his Memorandum Report to the Secretary dated February 26, 1993. This argument is also rejected. The Hearing Officer's report was a sufficient summary of the hearing and the evidence below. If Tidewater were seeking CPCNs for individual subdivisions or a smaller region, it should have specifically applied for same. Neither the Hearing Officer nor DNREC was obligated to reformulate Tidewater's large area application to grant a smaller territory to Tidewater. Also, DNREC's regionalization policy, as embodied in the 1987 Regulations Governing The Allocation of Water, may not overrule the new statute (Senate Bill No. 144). Senate Bill No. 144 does not require DNREC to take a more active role in water resource management in this area, although more leadership or management by DNREC may reduce these continuous CPCN squabbles. It may, in fact, be more efficient for one water company to service a large area such as the large area Tidewater requested, but the Board

will not order DNREC to avoid the competitive process or grant the first filed application, especially in light of the mandate in Senate Bill No. 144 and the uncertainty over Tidewater's ability to establish service to a large area quickly.

The Board does not find a reversal or remand is necessary due to the Hearing Officer's or DNREC's conduct, or their conclusions below. Also, the Board finds no reason to alter the conclusions reached in its March 22, 1993 Final Order; the principles of collateral estoppel and *res judicata* provide further support for denial of Tidewater's appeal. In short, Tidewater failed to satisfy its burden to show that the Secretary's decision was not supported by the evidence. 7 Del. C. §6008(b).

CONCLUSION

The Board determines by unanimous vote that the decision of the Secretary should be affirmed.

Thomas J. Kealy, Chairman

Clifton H. Hubbard, Jr. 10/26/93

Richard C. Sames

Ray K. Woodward 10/26/93

DATE: October ___, 1993

will not order DNREC to avoid the competitive process or grant the first filed application, especially in light of the mandate in Senate Bill No. 144 and the uncertainty over Tidewater's ability to establish service to a large area quickly.

The Board does not find a reversal or remand is necessary due to the Hearing Officer's or DNREC's conduct, or their conclusions below. Also, the Board finds no reason to alter the conclusions reached in its March 22, 1993 Final Order; the principles of collateral estoppel and *res judicata* provide further support for denial of Tidewater's appeal. In short, Tidewater failed to satisfy its burden to show that the Secretary's decision was not supported by the evidence. 7 Del. C. §6008(b).

CONCLUSION

The Board determines by unanimous vote that the decision of the Secretary should be affirmed.

Thomas J. Kealy, Chairman

Clifton H. Hubbard, Jr.

Richard C. Sames

Ray K. Woodward

DATE: October ___, 1993

will not order DNREC to avoid the competitive process or grant the first filed application, especially in light of the mandate in Senate Bill No. 144 and the uncertainty over Tidewater's ability to establish service to a large area quickly.

The Board does not find a reversal or remand is necessary due to the Hearing Officer's or DNREC's conduct, or their conclusions below. Also, the Board finds no reason to alter the conclusions reached in its March 22, 1993 Final Order; the principles of collateral estoppel and *res judicata* provide further support for denial of Tidewater's appeal. In short, Tidewater failed to satisfy its burden to show that the Secretary's decision was not supported by the evidence. 7 Del. C. §6008(b).

CONCLUSION

The Board determines by unanimous vote that the decision of the Secretary should be affirmed.

Thomas J. Kealy, Chairman

Clifton H. Hubbard, Jr.

Richard C. Sames

Ray K. Woodward

DATE: October 21, 1993