STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Environmental Conservation Law article 25 and part 661 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York by

RULING

D&D Bowne St. Realty Corp.
Bernardino Esposito, personally and as corporate officer (vice-president) of D&D Bowne St. Realty Corp.
DMP Contracting Corp., and
Daniel Pirraglia, personally and as corporate officer (president) of DMP Contracting Corp. and as corporate officer (president) of D&D Bowne St. Realty Corp.,

DEC File No. R2-20060504-335

November 10, 2009

Respondents.

This matter was commenced by DEC Staff serving a notice of hearing and complaint dated September 13, 2006. The complaint alleged that the Respondents had violated Environmental Conservation Law (ECL) section 25-0401 and section 661.8 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) by excavating, regrading, and placing fill including construction and demolition debris in the adjacent area of a regulated tidal wetland (first through third causes of action). The complaint also alleged that the Respondents had violated ECL section 25-0401 and 6 NYCRR 661.8 by servicing and/or storing commercial equipment and machinery, including but not limited to a crane, a steel truss, a combustion engine and beams, above and in the water in the tidal wetland (fourth cause of action), and by storing two trailers and other equipment as part of non-water-dependent, commercial uses in the adjacent area of the tidal wetland (fifth cause of action).

The site of the alleged violations is a waterfront parcel at 435 Hunter Avenue, Bronx, New York 10464 (the Site), which is also identified as Bronx County Tax Block 5634 Lot 33. This lot is located on the western shore of City Island and is owned by Respondent D&D Bowne St. Realty Corp. The lot’s longer dimension runs approximately east-west. The western (seaward) end of the lot extends into the water. The tidal wetland

boundary at the site is shown on the DEC tidal wetlands map panel No. 600-522. (Official notice is taken of this map panel.) From north to south, the tidal wetlands boundary follows the north, west and south edges of a square bulkheaded area that projects into the water in the northwest part of the lot, and then follows a curve into a cove that is in the southwest part of the lot. A diagram of this side of the site is attached as Appendix A with the paper copies of this ruling.

Respondent D&D Bowne St. Realty Corp. purchased the Site in 2004 and intends to develop a seafood restaurant on the Site.

This matter initially came before the DEC Office of Hearings and Mediation Services (OHMS) as a motion to compel disclosure, made by DEC Staff on January 22, 2008. The matter was assigned to Administrative Law Judge (ALJ) Susan J. DuBois, the undersigned. DEC Staff is represented in this matter by Udo M. Drescher, Esq., Assistant Regional Attorney, DEC Region 2, Long Island City, New York. All of the Respondents are represented in this matter by Daniel Riesel, Esq., of Sive, Paget & Riesel, P.C., New York City.

The January, 2008 discovery dispute was resolved between the parties without the need for a ruling on DEC Staff's motion. The parties then engaged in settlement negotiations. On April 29, 2009, DEC Staff notified me that the parties were unable to reach a settlement. Following a conference call with the parties, I set a schedule for additional discovery and scheduled the hearing to begin on September 22, 2009, as discussed in my letters of May 8 and 21, 2009. DEC Staff submitted a statement of readiness for hearing on August 9, 2009.

On September 10, 2009, the Respondents moved to dismiss the complaint on the basis that any activity that might otherwise be regarded as a regulated activity under the Tidal Wetlands Law did not take place in a wetland or an adjacent area, within the meaning of those terms under the Tidal Wetlands Law. The motion included a memorandum of law, an affirmation of Mr. Riesel, and an affidavit of Edward Weinstein, Architect.

Both parties agreed that the outcome of the motion might obviate the need for a hearing. On September 16, 2009, I adjourned the hearing and set a schedule for replies.

DEC Staff replied on September 25, 2009, submitting a memorandum of law and an affidavit of George Stadnik, Marine Resources Specialist, DEC Region 2. On October 6, 2009, with

leave of the ALJ, the Respondents submitted a reply memorandum of law and a reply affidavit of Mr. Weinstein.

Arguments of the parties

The Respondents asserted that application of the DEC regulations to the uncontestable facts about bulkheading at the Site warrant dismissal of the complaint due to lack of DEC jurisdiction over the alleged activities. The Respondents argued that the bulkhead around the square area in the northwestern part of the Site is approximately 166.5 feet long (the total of three of the sides of the square, that are each 55.5 feet long), that a bulkhead greater than 100 feet in length exists on the shoreline of the Harlem Yacht Club immediately south of the site, and that the non-bulkheaded area between these two bulkheads is approximately 55 feet long.

In the City of New York, the adjacent area of a tidal wetland is land within 150 feet of the most landward boundary of the tidal wetland (6 NYCRR 661.4[b][1][i]), although other portions of subdivision 661.4(b) describe circumstances under which certain structures, imaginary lines, or elevation contours cause the adjacent area boundary to be at a different location. The Respondents argued that, pursuant to 6 NYCRR 661.4(b)(1)(ii), the adjacent area is cut off by pre-1977 bulkheads such that DEC's jurisdiction ends at the bulkhead on the site and on the Harlem Yacht Club property. The Respondents argued that, pursuant to paragraph 661.4(b)(2), the adjacent area in the gap between the two bulkheads is cut off by an imaginary line drawn between the ends of the bulkheads (running from the southeastern end of the Respondents' bulkhead to the yacht club's bulkhead). The Respondents cited the decision conference report in Matter of Mark Lazarovic (Aug. 19, 1982) in support of this position.

The tidal wetland itself extends into the cove east of this imaginary line. Despite this uncontested fact, the Respondents argued that section 661.4(b) provides that "[a]djacent area shall not include any area lying landward of an imaginary line drawn between the seaward edges of two existing...substantial fabricated structures which constitute the landward limit of the adjacent area, as provided in subparagraph (ii) of this subdivision..."[1] and that no exception to the adjacent area cutoff is provided by paragraph 661.4(b)(2).

[1] Respondents' memorandum of law, at 13-14. This quote is from 6 NYCRR 661.4(b)(2).

The Respondents also argued that the complaint should be dismissed because the Respondents' land use is an industrial use that pre-dated the Tidal Wetlands Act and the complained-of activities are of an industrial nature (storing industrial equipment). The Respondents concluded that all industrial activities at the site are exempt from the regulatory provisions cited in the complaint. The Respondents cited 6 NYCRR 661.10(a) as the basis for this argument ("No provision of this Part shall be deemed to prohibit or require the removal of any land use and development, including any structure, lawfully in existence on August 20, 1977.") The Respondents argued that "land use" is an expansive term, encompassing any industrial use, and that the only requirement for this exemption to apply is that industrial land use must have been lawfully in existence on August 20, 1977.

The Respondents also argued that the area that is tidal wetland is limited to the area depicted as such on the tidal wetland map and that the "evolving characteristics" of areas beyond the mapped delineation in the cove do not cause additional portions of the Site to be regulated tidal wetlands.

DEC Staff disagreed with the Respondents' assertion that the facts supporting the Respondents' motion are not in dispute, but agreed that the question presented in the motion to dismiss concerns the extent of DEC's tidal wetlands jurisdiction over the parcel. DEC Staff's memorandum and affidavit agreed with the Respondents' papers on many, but not all, factual questions relevant to the motion.

DEC Staff argued that the structure on the Site is a solid fill pier, consisting of a bulkhead on the west and two bulkhead returns to its north and south, and that it protrudes perpendicular to the shore rather than being "generally parallel to the most landward tidal wetland boundary" as contemplated in 6 NYCRR 661.4(b)(1)(ii). DEC Staff argued that, even if each of the three edges of the structure were considered a "seaward edge," each such seaward edge would still have to be at least 100 feet long in order to be considered in the context of this provision. DEC Staff also argued that it is at least doubtful whether the bulkhead is functional, in view of the existence of one or more sinkholes on the landward side of the bulkhead, one of which was depicted in a photograph in Mr. Stadnik's affidavit.

DEC Staff also argued that 6 NYCRR 661.4(b)(2) (concerning the imaginary line across the gap between bulkheads) does not apply because this provision applies to identifying the landward boundary of adjacent area, not tidal wetland, and in the present case tidal wetland exists landward of the imaginary line. DEC Staff cited the Commissioner's Order in Matter of Michael Tubridy (Oct. 12, 2000, DEC File No. R2-0428-99-03) in support of its position. Mr. Stadnik's affidavit also stated that the bulkhead at the Harlem Yacht Club is less than 100 feet in length, based upon the tidal wetlands map and plans in the yacht club's file for a permit application.

DEC Staff disputed the Respondents' interpretation of 6 NYCRR 661.10(a), and cited subdivision 661.4(p) as providing narrower definitions of "land use and development" and "use" than those used by the Respondents. DEC Staff's memorandum of law also disputed the sufficiency of the Respondents' proof concerning use of the site as a boatyard or shipyard in 1977, on the basis that the Respondents' consultant relied on maps rather than on personal knowledge. DEC Staff did not submit proof showing a different use in 1977.

In their reply memorandum, the Respondents described the provision about the imaginary line as being written in absolute terms and providing no exception for situations in which a wetland is within the gap crossed by the imaginary line. The Respondents also argued their interpretation is consistent with the policy underlying 6 NYCRR 661.4(b)(2), which they described as the lack of a reason to regulate uplands where a substantial interruption exists between the wetland and the upland due to a structure such as a bulkhead or a street, even if a gap of less than 100 feet exists between the structures. Mr. Weinstein's reply affidavit stated that the yacht club's bulkhead is greater than 100 feet long, based upon measurements using Google Earth.

The Respondents argued that the Tubridy order should be revisited or reconsidered in light of the Respondents' arguments in the present matter. The Respondents disputed DEC Staff's interpretation of 6 NYCRR 661.10(a) on the basis that this interpretation would render that section merely a restatement of the provisions of section 661.5 (Use guidelines).

Discussion

Pursuant to 6 NYCRR 622.11(b)(3), the party making a motion bears the burden of proof on that motion. The Respondents' motion to dismiss is a motion seeking a summary order. In a DEC

administrative enforcement hearing, motions such as the present one are evaluated in a manner analogous to motions for summary judgment under the Civil Practice Law and Rules (CPLR) (Matter of Cobleskill Stone Products, Inc., Order of the Commissioner, May 26, 2009, at 2, and Hearing Report, at 5-7; Matter of Rocco Manniello, et al., Ruling of the ALJ, July 3, 2009, at 9). As summarized in the Manniello ruling:

> "[the moving party] 'must make a prima facie showing of an entitlement to judgment as a matter of law sufficient to demonstrate the absence of any material issue of fact." Flack v. NL Indus., 228 A.D.2d 888, 890 (3d Dept. 1996); see Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557,562 (1980). The burden then shifts to [the non-moving party] 'to demonstrate, through evidence in admissible form, the existence of material questions of fact requiring a trial.' State v. Williamson, 8 A.D.3d 925, 928 (3d Dept. 2004), citing Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003); Zuckerman, supra, at 562. That evidence is viewed in the light most favorable to the non-moving party. Williamson, supra, at 927-28: citing Trionfero v. Vanderhorn, 6 A.D.3d 903, 903 (3d Dept. 2004)." (Manniello ruling, at 9).

In the present case, as discussed below, the Respondents have not made the required case concerning either their argument about the gap between the bulkheads or their argument about land uses existing as of August 20, 1977. This is so due in part to the existence of at least one disputed fact material to the first argument. In addition, even if no factual dispute existed between the Respondents and DEC Staff, the Respondents' interpretation of how the tidal wetlands adjacent area should be identified at this site is not supported by the definition of adjacent area in 6 NYCRR 661.4(b). The Respondents' interpretation of 6 NYCRR 661.10(a) as allowing very broadly-defined land uses to occur outside of DEC's jurisdiction is not supported by 6 NYCRR part 661 as a whole, particularly section 661.5, and is not consistent with ECL sections 25-0302 and 25-0401.

Adjacent area boundary

With regard to the gap between the bulkheads, both of the structures that would limit the adjacent area must be at least 100 feet in length, measured generally parallel to the most landward boundary of the tidal wetland. Leaving aside the

parties' assertions and arguments about how the bulkhead(s) should be defined and measured on the Respondents' site, a factual dispute exists about whether the bulkhead at the Harlem Yacht Club is more or less than 100 feet in length.

In addition, the Respondents' interpretation of 6 NYCRR 661.4(b)(2) as an absolute limitation on the existence of adjacent area landward of an imaginary line between the two bulkheads is not supported by subdivision 661.4(b) read in its entirety, or by past DEC administrative decisions. Although paragraph 661.4(b)(2) does not contain an explicit exception for situations in which tidal wetlands exist landward of the imaginary line, paragraph 661.4(b)(3) does address such situations in a general manner and leads to a conclusion that adjacent area exists on the site landward of the tidal wetlands boundary in the "cove" in the southwestern portion of the site.

Paragraph 661.4(b)(3) provides:

> "Where land lies within the boundaries of an adjacent area described by subparagraph (i) or subparagraph (iii) of this subdivision but appears to be excluded from an adjacent area by subparagraph (ii) of this subdivision or paragraph (2) of this subdivision, such land shall be deemed to be part of an adjacent area (see figure 6). Provided, however, that in such instances of overlap between the various provisions of this subdivision the regional permit administrator may in his [sic] discretion determine that said land is not an adjacent area for the purposes of this Part if factors are present which in his [sic] opinion justify treating such land as non-adjacent area in light of the provisions in subparagraph (ii) or paragraph (2) of this subdivision."

Figure 6, included in this subdivision of the regulations, shows a situation similar to what exists at the site, in which a bulkhead is parallel to the wetland boundary (although, in the figure, separated from it by some adjacent area rather than being at the boundary as on the site) but wetland also exists with a boundary perpendicular to, and "behind," the bulkhead's alignment at the point where the bulkhead contacts this latter area of wetland. In such situations, the area "behind" the bulkhead but within the requisite distance from the wetland (300 feet in the figure, 150 feet in New York City) is adjacent area notwithstanding the presence of the bulkhead.

The regional permit administrator has discretion not to treat such an area as adjacent area, but in the present case there is no indication that the regional permit administrator has done so. On the contrary, DEC Staff's arguments strongly suggest that the regional permit administrator has not made such a determination in this case.

The Lazarovic case cited by the Respondents differs materially from the situation in the present case, although in a manner that might not be apparent from reviewing the Lazarovic decision conference report as it appears on Westlaw. The full report in that matter, which is on file in the DEC Office of Hearings and Mediation Services, and of which official notice is taken, includes a drawing of the Lazarovic site. That drawing, a copy of which is attached as Appendix B with the paper copies of the present ruling, shows that the tidal wetlands boundary was seaward of the imaginary line between structures, unlike the wetland boundary in the present case that is landward of the imaginary line.

The situation in the present case more closely resembles that in the Tubridy order cited by DEC Staff, in which tidal wetland existed landward of what the respondent in that case proposed as the line between structures that would limit the adjacent area. The hearing report in the Tubridy case, with which the Commissioner concurred, stated, "6 NYCRR 661.4(b)(2) is applicable to identifying the landward boundary of the adjacent area of a tidal wetland, not the boundary of a tidal wetland. In the present situation, the tidal wetland itself exists landward of the imaginary line cited by the Respondent" (Tubridy hearing report, at 5; emphasis in original). The report also rejected Mr. Tubridy's argument because one of the two structures he proposed as limiting the boundary was a house, although individual buildings are specifically excluded as structures to be used in locating the boundary of a tidal wetland adjacent area. Contrary to the Respondents' suggestion that a "hotly disputed" factual question about the existence of functioning bulkheads affected the outcome of the Tubridy case, the hearing report in that matter states that the question whether the bulkhead is functional need not be reached because paragraph 661.4(b)(2) was not applicable for the other two reasons discussed (Respondents' memorandum of law, at 8; Tubridy hearing report, at 6).

The Respondents' reply papers contested a factual statement in Mr. Stadnik's affidavit concerning adjacent area on the Site that would be based on the 150 foot distance from the wetland

boundary that is located north of the square bulkheaded area (Weinstein reply affidavit, paragraph 7; Stadnik affidavit, paragraph 15). Mr. Weinstein, however, did not assert that the riprap north of the square bulkheaded area was lawfully in existence as of August 20, 1977. The adjacent area based upon this portion of the wetland boundary would include a substantial amount of the Site, including a portion of the area landward of the tidal wetland boundary in the cove.

The Respondents' argument that the policy underlying subdivision 661.4(b)(2) supports the Respondents' interpretation is unavailing in light of the factual dispute about the yacht club bulkhead, the effect of subdivision 661.4(b)(3), the adjacent area boundary based upon the tidal wetland boundary north of the site, and the Tubridy order.

In addition, the Respondents' policy argument relies in part of their characterization of the gap in the bulkhead as a "man made part of an industrial operation with rails extending its length from the upland down to the low water mark," constituting an incline (or marine railway) for launching and retrieving boats (Respondents' reply memorandum, at 7). The reply memorandum cites Mr. Weinstein's September 10, 2009 affidavit that states, "This 'incline' still exists on the site today and is still capable of being used for its original intended purpose." (September 10, 2009 affidavit, paragraph 7). No indication of an existing marine railway appears on the photographs of this area in Mr. Stadnik's affidavit, with the possible exception of two lines that might or might not be pieces of rail, nor on Mr. Weinstein's drawing that is pasted into page 7 of Mr. Stadnik's affidavit. Mr. Weinstein's October 5, 2009 reply affidavit describes this area as "the former marine railway" and states that this unbulkheaded area could still be used for launching vessels (reply affidavit, paragraphs 6 and 7).

The Respondents' position that paragraph 661.4(b)(2) provides an absolute limitation on the existence of adjacent area landward of the line between two bulkheads, streets or similar structures lawfully existing in 1977 could also produce results that are contrary to the Tidal Wetlands Act's policy of protecting tidal wetlands (ECL 25-0102). The Respondents' interpretation would eliminate otherwise-existing permit requirements for regulated activities in the adjacent areas of tidal creeks or lagoons that connect with larger tidal wetland areas through gaps in such structures where the gaps are less than 100 feet wide.

Land uses existing in 1977

The Respondents' second argument is based on on section 661.10, which states, in part, "No provision of [part 661] shall be deemed to prohibit or require the removal of any land use and development, including any structure, lawfully in existence on August 20, 1977."

A legal question exists concerning whether the land use existing at the site in 1977 is the same as the activities that DEC Staff alleged the Respondents engaged in at the site on and before September 1, 2006.

With respect to the factual assertions about the land uses, Mr. Weinstein's affidavit stated that maps obtained from the Sanborn Library, LLC show that the site has been used as a boatyard and shipyard from at least 1935 through the 1980s. Mr. Weinstein's affidavit also made assertions concerning the marine railway or incline, as discussed above. The complaint does not allege that the Respondents were operating a boatyard, but instead alleges that they filled, excavated and graded the site, serviced and/or stored commercial equipment and machinery including but not limited to a crane, a steel truss, a combustion engine and beams, and undertook commercial and/or industrial use activities including but not limited to maintenance and storage of equipment and trailers. The Respondents' memorandum of law, at 5, states that the site is leased to an entity in the piling business, and that miscellaneous industrial equipment is stored on the site.

The Respondents make the legal argument that the term "land use" is to be construed expansively, and that the complained-of activities are of an industrial nature and are "a continuation of the 'land use' of the Site at the time of its acquisition" (Respondents' memorandum of law, at 16). The Respondents assert that the term "land use" is generic, and that because industrial land use in conformance with local zoning existed on the site as of August 20, 1977, any industrial land use on the site that conforms with that zoning is exempt from the regulatory requirements of ECL article 25. The Respondents also argue that DEC Staff's interpretation would render 6 NYCRR 661.10(a) as merely restating the provisions of section 661.5, impermissibly rendering section 661.10(a) surplusage (Respondents' reply memorandum of law, at 10-11).

Subdivision 661.4(p) of 6 NYCRR states, "*Land use and development* or *use* shall mean any construction or other activity which materially changes the use or appearance of land or a structure or the intensity of use of land or a structure, including but not limited to any regulated activity." Section 661.5 contains a table of uses, which it also refers to as types of uses, that are far more specific than the generic interpretation of "land use" proposed by the Respondent. For example, the uses listed in 661.5(b)(16) and 661.5(b)(17), both of which involve installation of a floating dock or docks, are distinguished from each other on the basis of square footage of the dock or docks. As used in part 661, "use" can have a much more specific meaning than the broad meaning proposed by the Respondents.

The Respondents' broad interpretation of the term land uses, and their argument for the exemption of broadly-interpreted 1977 land uses from tidal wetlands regulation, are also contradicted by the requirements applicable to substantial reconstruction (661.5[b][24]) or expansion (661.5[b][25]) of existing functional structures in adjacent areas. Both such activities require a permit.

Section 661.5 and subdivision 661.10(a) contain a similar concept but also contain distinct concepts. The Respondents' assertion that DEC Staff's arguments "would simply write out section 661.10(a)" (Respondents' reply memorandum of law, at 10) is without merit.

The Respondents' memorandum of law states, "Under 6 NYCRR §§ 661.5(b)(1), 661.10, Respondents are entitled to continue the Site's long-standing industrial usage, including making repairs, restoration, or even rebuilding on the Site 'provided, no such repair, restoration or rebuilding shall increase any existing non-compliance.' (*Id.*)" (Respondents' memorandum of law, at 3, see also 17). The phrase quoted by the Respondents in this statement is from 6 NYCRR 661.10(b) and actually pertains to variances rather than permits. Subdivision 661.10(b) states: "The development restrictions in section 661.6 of this Part shall not be deemed to require a variance for the repair, restoration, or rebuilding, in whole or in part, of any structure or facility lawfully in existence, although such repair, restoration or rebuilding activities may be subject to the permit requirements of this Part; provided, no such repair, restoration, or rebuilding shall increase any existing non-compliance with the provisions of that section."

For the reasons discussed above, the Respondents' motion to dismiss is denied. The parties' additional arguments, including arguments about dictionary definitions of "parallel," "edge" and other words, and about the significance of wetland vegetation landward of the tidal wetlands line shown on the tidal wetlands map, need not be reached in order to decide the motion.

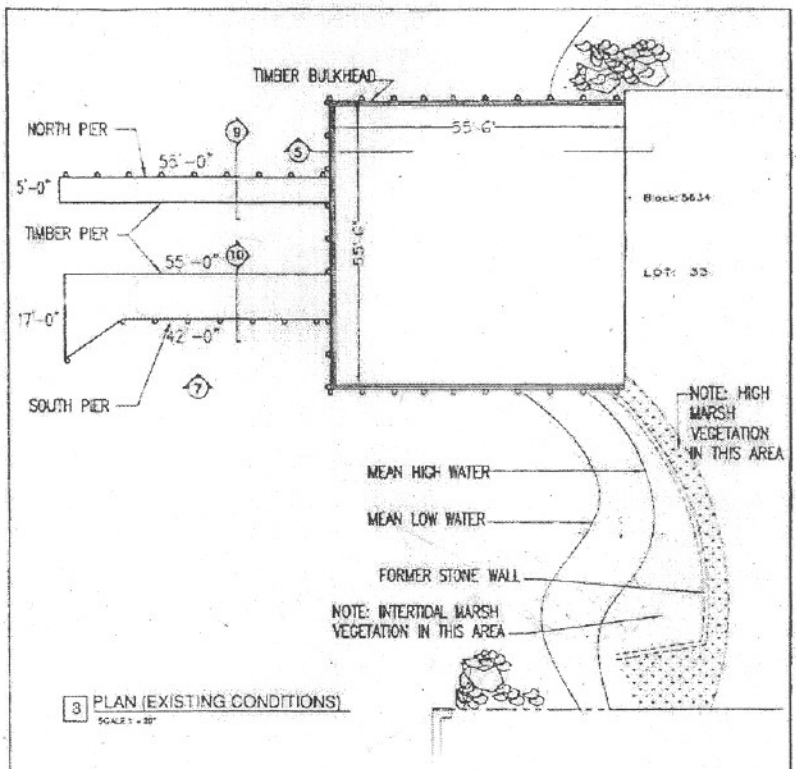
Further proceedings

A conference phone call among the parties and the ALJ is scheduled for November 12, 2009.

____/s/_____
Albany, New York
November 10, 2009

Susan J. DuBois
Administrative Law Judge

TO: Daniel Riesel, Esq.
Udo M. Drescher, Esq.



Adjacent Property Owners:
1. 459 REALTY CORP. (5634/13, 19)
2. HARLEM YACHT CLUB (5634/47)
3. CITY OF NEW YORK
4. G.DEVAU (5634/90)

Agent:
Edward M. Weinstein /Architecture & Planning,P.C.
14 Spring Street
Hastings-on-Hudson, NY 10706
Tel: (914) 478-0800
Fax: (914) 478-7287

Sheet 3 of 7

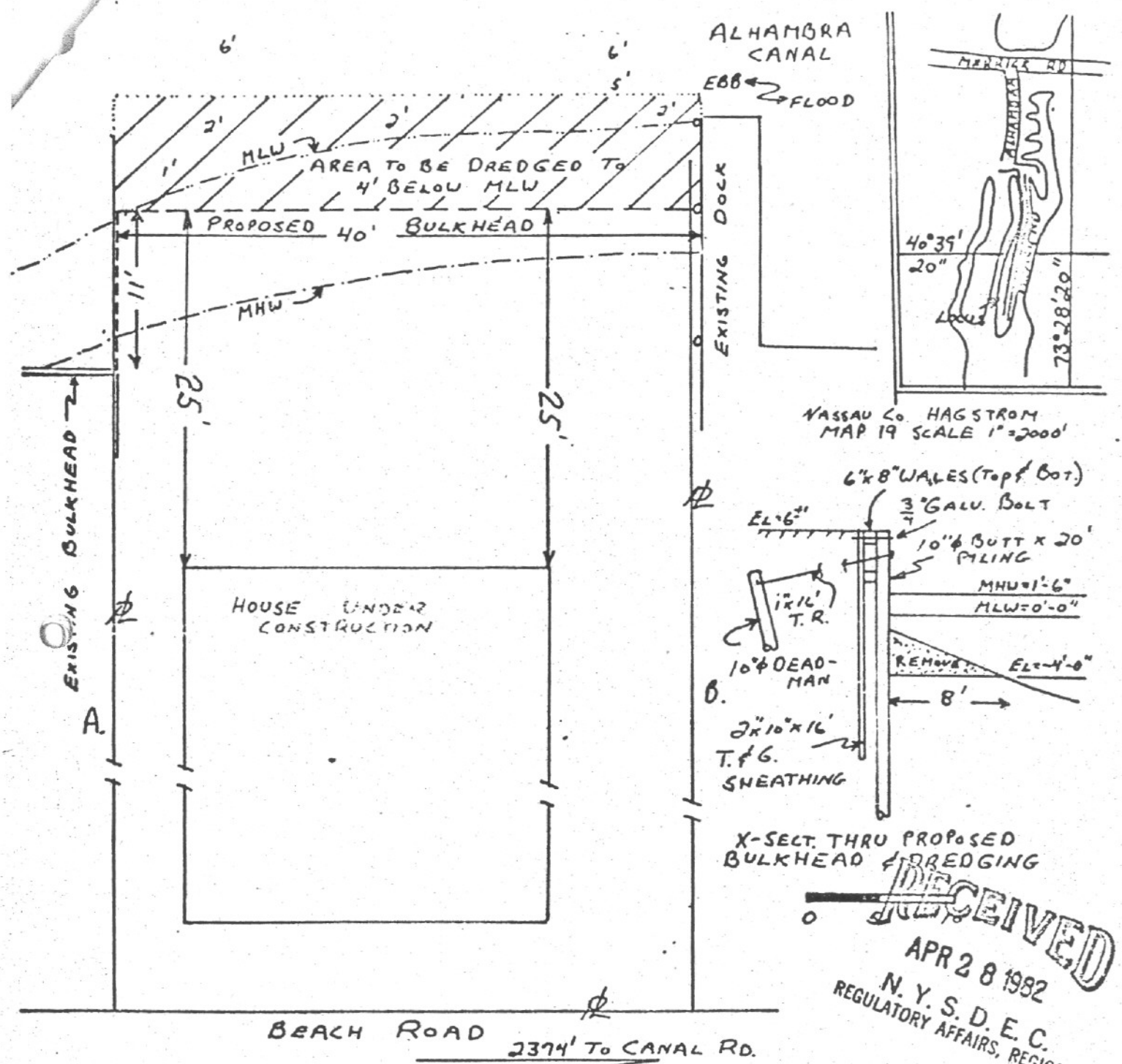
Replace existing timber bulkhead with new steel bulkhead and replace two timber piers in kind in place.

Project Location:
435 Hunter Avenue
Bronx, NY 10464

Application By: D&D Bowne Street Realty Corp.
c/o Esposito
459 City Island Avenue
Bronx, N.Y. 10464

REVISED June 10, 2005
December 20, 2004

Appendix A of hearing report
D&D Bowne St. Realty Corp., et al.
DEC File No. R2-20060504-335
(from p. 7 of 9/25/09 Stadnik affidavit)



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Notes
DATUM: MLW
PURPOSE: EROSION CONTROL
ADJACENT OWNERS:
A. WALTER KAST

PROPOSED BULKHEAD & MAINT. DREDGING
for MARK LAZAROVIC
at MASSAPEQUA, NASSAU CO., N.Y.
on ALHAMBRA CANAL
by ENCONSULTANTS, INC.
64 N. MAIN ST.
SOUTHAMPTON, N.Y. 11968
SHEET 1 of 1 4/25/82

Appendix B of hearing report
D&D Bowne St. Realty Corp., et al.
DEC File No. R2-20060504-335
(from 8/19/82 report on Lazarovic application)