

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application
for a Tidal Wetlands permit pursuant
to Environmental Conservation Law
article 25 and part 661 of the
Official Compilation of Codes, Rules
and Regulations of the State of New
York by

RULING

DEC Application No.
1-4734-00407/00003

November 5, 2004

BEVERLY SINKIN

Summary

Beverly Sinkin (Applicant), 25 Spring Hollow Road, St. James, New York 11780, applied for a tidal wetlands permit for construction of a timber boardwalk, ramp and floats in Stony Brook Harbor at her residence in the Village of Nissequogue, Town of Smithtown, Suffolk County. The Department of Environmental Conservation (DEC or Department) Region 1 Staff denied the permit application on October 3, 2003 and the Applicant requested a hearing, which began on October 12, 2004.

The Applicant's motion that the permit be granted based upon delay in scheduling the hearing is denied. DEC Staff cross-moved that the application be denied based upon Staff's position that the Applicant's property does not abut Stony Brook Harbor and, accordingly, she does not have a legal right to build the dock. DEC Staff's cross-motion is also denied without prejudice to further consideration of it once the hearing record is complete. The hearing will continue as scheduled.

Background

On March 4, 2003, the Applicant applied for a permit to construct of a timber boardwalk measuring 86 feet by 4 feet that would be four feet above high water, with a ramp and three floats extending waterward to form a floating "T" dock. The dock would be located in Stony Brook Harbor, at the Applicant's house. According to the plan submitted with the application, the landward end of the dock would be located at the high water line.

On October 3, 2003, DEC Region 1 Staff sent the Applicant a letter denying the application. Joan B. Scherb, Esq., counsel for the Applicant, wrote to DEC Staff on October 10, 2003 requesting a hearing and also requesting a conference with the person who reviewed the application. On October 24, 2003, Mark Carrara, Region 1 Permit Administrator, wrote to Ms. Scherb

stating that DEC Staff did not believe a conference would resolve the matter and Staff would refer the hearing request to the DEC Office of Hearings. Events leading to the hearing are discussed below, in the context of the Applicant's motion. The hearing began on October 12, 2004 and continued on the following day. The hearing is scheduled to resume on November 19, 2004.

The Applicant is represented in this hearing by Ms. Scherb. DEC Staff is represented by Gail Rowan, Esq., Assistant Regional Attorney, Region 1. The parties to this hearing are the Applicant and DEC Staff, as full parties, and the Joint Coastal Management Commission of the Villages of Head-of-the-Harbor and Nissequogue (Joint Coastal Commission) as an amicus party pursuant to section 624.5 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR).

The Applicant's direct case was presented on October 12, 2004. The Applicant called as witnesses Jean Gilman, the Applicant's consultant who prepared the application, and Marshall Irving, P.E. The Applicant also testified. On October 13, 2004, DEC Staff began its direct case, calling as witnesses Christopher Arfsten, Biologist I (Marine) and Charles Hamilton, Regional Supervisor of Natural Resources. At the end of the day on October 13, the hearing was adjourned to November 19, 2004 with the expectation of continuing with the remainder of Mr. Hamilton's testimony on that date.¹

On the morning of October 12, 2004, the Applicant presented a written motion that, based upon the time that elapsed between the hearing request and the start of the hearing, DEC Staff should be precluded from opposing the permit application and the permit should be issued. DEC Staff mailed to me a reply on October 19, 2004 and personally served a copy of the reply on Ms. Scherb on the same date. In the same document as its reply, DEC Staff cross-moved that the application be denied on the basis that the Applicant's property does not abut the mean high water mark of Stony Brook Harbor and that therefore the Applicant does not have a legal right to build the proposed dock.

The Applicant replied to DEC Staff's cross motion on October 26, 2004.

¹ I do not have a copy of the transcript of the October 12 and 13 hearing sessions at present. This ruling was written based upon my notes and recollection, and on the written materials currently in the hearing record.

Applicant's motion to grant permit

The Applicant argued that the Department failed to take certain actions within the time periods specified in 6 NYCRR part 621, the uniform procedures for review of permit applications. The Applicant argued that approximately 200 days elapsed between the date the application was submitted to DEC and the date on which the application was denied, in violation of part 621, that the original date scheduled for the hearing (May 18, 2004) was more than 45 calendar days from DEC Staff's receipt of the Applicant's request for a hearing, and that the hearing was adjourned twice at DEC Staff's request.

DEC Staff replied that there is no statutory penalty for non-compliance with the time period specified in 6 NYCRR 621.7(f) for scheduling a hearing, and that the remedy of issuing a permit does not exist as a matter of law for non-compliance with this provision. DEC Staff argued that the adjournments were for good cause and that the Applicant had not objected to them in writing, implying consent. DEC Staff also argued that the Applicant had not shown any prejudice, in that she was able to use her boat even in the absence of a dock, and that the timing of the hearing was not unreasonable in the context of section 301(1) of the State Administrative Procedures Act (SAPA).

In the Applicant's reply, counsel for the Applicant asserted that DEC consulted no one and gave no reasons for failing to schedule a hearing within 45 days of the Applicant's hearing request. She asserted that the hearing was adjourned from May 18, July 13, and July 27 without her consent, and that she had told me in July, by telephone, that she did not consent to the adjournments. The reply asserted the delays prejudiced the Applicant because if DEC had complied with part 621, she would have had a decision before the spring of 2004 and would have been able to build the dock.

Part 621 of 6 NYCRR contains mandatory time periods by which DEC must make a decision on an application following its completeness or following the close of the hearing record if a hearing is held (Environmental Conservation Law (ECL) 70-0109(3);

6 NYCRR 621.9 and 624.13(b)).² If DEC fails to comply with these deadlines, an applicant may submit a letter, by certified mail return receipt requested, notifying the Department of its failure to issue a timely decision (known as a "five-day letter"). If DEC then fails to issue a decision within five working days of receipt of the letter, the application is deemed approved subject to any standard conditions (ECL 70-0109(3)(b)). ECL article 70 and 6 NYCRR parts 621 and 624 contain other deadlines within the application review process that are directory, not mandatory. Both part 621 and part 624 (permit hearing procedures) allow for modification or extension of time periods (6 NYCRR 621.15(a), 624.6(g)). The only circumstance in which the statute and regulations would require DEC to issue a permit, with standard conditions, in the event it fails to meet a deadline is failure to respond to a five-day letter.

There is no indication the Applicant submitted such a letter during the time between completeness of the application and DEC Staff's denial of the application. In any event, DEC Staff did make a decision denying the permit on October 3, 2003.

When a hearing is taking place on an application, the time period for a decision does not start until receipt by the Department of a complete record (ECL 70-0109(3)(a)(ii) and (b)). In the present case, the hearing record is not complete. Thus, there is no basis under ECL article 70, part 621 or part 624 for a permit to be issued based upon the timing of review of the present application.

The date of the hearing is not unreasonable in the context of SAPA section 301(1). With regard to the time period between the Applicant's request for a hearing on the permit (October 10, 2003) and the date on which the hearing commenced (October 12, 2004), DEC Staff took approximately three months between the Applicant's request for a hearing and Staff's referral of the matter to the DEC Office of Hearings and Mediation Services (OHMS). A portion of the remaining time, however, is attributable to trying to find hearing dates on which the

² Failure by DEC to comply with the time period between submission of an application and DEC's determination whether the application is complete also carries specified consequences (6 NYCRR 621.5(f)) but these are not involved in the present motion. DEC Staff's hearing request form stated the application was complete on March 25, 2003 and that a notice of complete application did not need to be published because it is a minor project.

Applicant, her witnesses and her attorney were available to attend the hearing. DEC Staff's requests for adjournment were for good cause. The first time counsel for the Applicant notified me of an objection to the timing of the hearing was by telephone on July 12, 2004, after I had already adjourned the hearing for the second time. In addition, the Applicant has not shown that she was prejudiced by delay in scheduling the hearing.

On October 10, 2003, the Applicant requested a hearing on the denial of the application. The request was addressed to the Regional Permit Administrator of DEC Region 1. DEC Region 1 Staff referred the request to the DEC OHMS on January 13, 2004 and OHMS received it on January 20, 2004. There is nothing in the record to indicate the Applicant inquired about getting the hearing scheduled earlier.

I was assigned to the hearing on January 27, 2004. On that date, I telephoned Assistant Regional Attorney Vernon Rail, Esq., who was representing DEC Staff in this matter at that time, and Ms. Scherb about scheduling the hearing.

On February 3, Ms. Scherb told me that April 13 and 14, 2004 were available on her client's schedule but that she was not sure if the Applicant's consultant was available on these dates. She said she had tried twice to contact him and would try again. I did not hear from Ms. Scherb again until March 17, after leaving phone messages for her on March 8 and 16. Earlier on March 17, Mr. Rail told me that the April dates were no longer good for DEC Staff. By March 17, it was no longer possible to provide the required 21 days notice for a hearing on April 13, in view of the publication schedule of the Environmental Notice Bulletin. Following further contacts with the parties, I scheduled the hearing to begin on May 18 and a notice of hearing was published.

On May 14, 2004, Mr. Rail sent a letter to Ms. Scherb and to me confirming telephone discussions about adjourning the hearing. The letter cited a health problem as the reason why Mr. Rail would not be able to proceed with the hearing as scheduled. I sent a letter to the parties on May 14 adjourning the hearing, noting that Mr. Rail had told me Ms. Scherb did not object to the adjournment. Ms. Scherb did not dispute the latter statement except to the extent that her comments by phone on July 12 applied to this adjournment. My letter also noted I had left a phone message for Ms. Scherb asking her to contact me about a new hearing date. On June 7, after the parties again checked their schedules, I sent a letter rescheduling the hearing for July 13, 2004.

On July 1, 2004, Mr. Rail requested an additional adjournment on the basis that one of DEC Staff's witnesses would be out of the state due to fire-fighting duties on July 13. I sent a letter on that date in which I postponed the hearing, asked the parties to check with their witnesses about August 16 and 17 which counsel for the parties had identified as tentative hearing dates, and noted that Ms. Scherb did not object to the postponement.

Ms. Scherb left me a telephone message on July 12, 2004, confirming August 16 and 17 as available hearing dates. The message also stated it was not accurate that she did not object to the adjournment, but that she had anticipated I would grant it. I understood this as suggesting she had refrained from stating an objection because she believed it would be futile. I spoke with Ms. Scherb by telephone on July 13, and she stated that, "for the record," she objected to what she described as a third adjournment if the hearing did not take place on August 16 and 17. I said these two dates had been tentative dates, and that my July 1 letter was accurate with regard to Ms. Scherb not having made an objection to the July 1 adjournment.

In late July, Mr. Rail went on leave and Regional Attorney Karen Murphy, Esq. stated another attorney from DEC Region 1 would need to represent DEC Staff in this matter. On July 27, Ms. Murphy, Ms. Scherb and I had a conference phone call in which I asked the parties to check their schedules for hearing dates in the weeks of October 12 and 18, 2004. On August 30, Ms. Rowan notified me that DEC Staff would be available on October 12 and 13. Ms. Rowan also wrote to Ms. Scherb on September 2, 2004 confirming October 12, 13 and 14 as available dates.

I did not receive a response from Ms. Scherb about dates in October until September 21, 2004, after leaving phone messages for her on August 31, September 8 and September 20. On September 21, Ms. Scherb notified me by telephone that October 12 through 14 were available. October 12 is the date on which the hearing began.

With regard to the Applicant's position that delay in the hearing was prejudicial to her, the only adverse effect identified was that the Applicant did not have a decision by the spring of 2004. Counsel for the Applicant stated that if DEC had issued a timely decision, the Applicant would have had a dock in place. This position assumes that the decision in this matter will be to issue the requested permit. In addition, the Applicant testified that she and her husband were able to use their boat, and did use it, without the proposed dock. While the

Applicant would prefer to have a dock, and while a possible outcome of the hearing is that a permit will be issued for this, she has not shown that she was substantially prejudiced by delays in the start of the hearing. The Applicant did not allege that the passage of time interfered with her ability to present a case and there is no indication in the record that this happened.

Ruling: The Applicant's motion, that DEC Staff be precluded from opposing the application at this time and that the permit be issued, is denied. A decision on whether to issue the permit will be made after the close of the hearing record.

DEC Staff's cross-motion to deny permit

DEC Staff's cross-motion argued that the survey of the Applicant's property, in evidence as exhibit 5, shows that the Applicant's property is landward of the mean high water mark and that consequently the Applicant does not have a legal right to build the proposed dock on the public property that abuts Stony Brook Harbor. DEC Staff moved that I dismiss the application on this basis. I am interpreting this as a motion that I dismiss the application without further hearing.

The Applicant responded that DEC Staff's notice of denial of the permit never mentioned there was any issue with respect to riparian rights, and that from the notice of denial it is clear that DEC Staff conceded the Applicant has riparian rights. The Applicant also stated, based upon the denial letter, that DEC Staff has taken the position prior to the hearing that the Applicant has riparian rights.

Paragraph 8 of the Applicant's response asserts that at the hearing the Applicant was surprised by this new alleged ground for denial of the permit and that I granted a request by the Applicant for a reasonable opportunity to produce documents including, but not limited to, the subdivision maps of the site,³ the assessment as waterfront property by the Town of Smithtown and any other documentation concerning the Applicant's riparian rights. I do not recall granting such a request, nor do I recall that such a request was made to me. My notes of the hearing do not reflect the discussion described in paragraph 8 of the response. As noted above, the transcript is not yet available. If this request was made, however, I would have granted it,

³ DEC Staff included a copy of the subdivision map as Exhibit 13 of its reply and cross-motion.

because the material to be produced would be appropriate rebuttal.

DEC Staff's letter denying the permit discussed standards for permit issuance and did not address the Applicant's riparian rights or lack of riparian rights. There is no indication that DEC Staff took a position prior to the hearing that the Applicant has riparian rights. The lack of a mention of this question in the denial letter, however, could be taken as a concession that riparian rights was not a disputed issue at that time.

Lack of riparian rights was not proposed as an issue by DEC Staff in the issues conference portion of the hearing on October 12, 2004. The Applicant's riparian rights in connection with boat access were mentioned by counsel for the Applicant in responding to DEC Staff's proposed issues.

The preliminary discussion immediately prior to the testimony included argument about the local jurisdictions in which the Applicant's property and the proposed dock are located and the significance of that for participation by the Joint Coastal Commission. During the hearing, several witnesses testified about the location of high and low water at the site.

The Applicant's own survey is the basis for DEC Staff's assertion about riparian rights. The argument about the location of the project with regard to local government boundaries may have caused all parties to focus more closely on the location of the property boundary than they had earlier. Legitimate issues that arise in the context of a hearing can be added if necessary (Matter of Hyland Facility Associates, Decision of the Commissioner, June 21, 1993, at 1-2 of the decision).

There is a substantive dispute concerning whether or not the Applicant has riparian rights to build a dock at the proposed location. Whether and to what extent this issue is within the jurisdiction of DEC has not yet been addressed by the parties, however, other than DEC Staff's position that the evidence in the hearing thus far precludes the Applicant from obtaining a permit (Reply and cross-motion, paragraphs 17 through 24). The Applicant's response to DEC Staff's cross-motion did not assert that this issue is outside the Department's jurisdiction. If the parties wish to address this in closing briefs, they may do so.

Mr. Hamilton's testimony about the location of the Applicant's property line with respect to mean high water and his conclusion that the Applicant's property is entirely upland and lacks riparian rights were stated towards the end of the second

day of the hearing. The Applicant has not yet had an opportunity to cross-examine this testimony or to present rebuttal evidence. It would be premature to decide this issue without allowing the record to be developed completely. The most efficient and fair procedure is to allow both parties to finish presenting their evidence for the record, followed by argument about how this evidence should affect the decision on the application.

Whether the permit should be denied on the basis that the Applicant lacks riparian rights to build a dock at the proposed location is an issue for adjudication, to the extent it can be determined by DEC in the Commissioner's decision on this application rather than being determined by a court.

Ruling: DEC Staff's cross-motion to dismiss the application is denied, without prejudice to further consideration of it once the record is complete. The hearing remains scheduled to continue on November 19, 2004. The parties may present evidence regarding whether the Applicant has riparian rights to build a dock at the proposed location, including rebuttal on this subject by the Applicant, and may present argument on this issue in briefs at the conclusion of the testimony.

Appeals

Pursuant to 6 NYCRR 624.6(e) and 624.8(d), rulings on issues may be appealed to the Commissioner on an expedited basis. The ruling on DEC Staff's motion adds an issue to the hearing and may be appealed in this manner. Such appeals are to be filed with the Commissioner in writing within five days of the disputed ruling, unless this time frame is modified by the ALJ (see, 624.6(e)(1); 624.6(g)). Any ALJ ruling may also be appealed to the Commissioner after the completion of all testimony as part of a party's final brief (624.8(d)(1) and (6)).

Any expedited appeals must be sent to the Commissioner at the following address: Commissioner Erin M. Crotty, NYS Department of Environmental Conservation, 625 Broadway, Albany, New York, 12233-1010. Copies of such appeals must be transmitted to all persons on the service list at the same time and in the same manner as they are sent to the Commissioner, with two copies being sent to my address.

Although there is the possibility of expedited appeals, the hearing remains scheduled to continue on November 19, 2004 (see, 624.6(e)(3) and 624.8(d)(7)).

Service list

Attached please find a service list for use in sending correspondence about this hearing. Any correspondence the parties send to the Commissioner or to me about this hearing must be copied to all persons on the service list.

The service list includes the Joint Coastal Commission, an amicus party. In preparing this ruling, I noticed that at least some of the motion and reply documents had not been copied to the Joint Coastal Commission. (Ms. Scherb may have given it a copy of her motion at the hearing.) On November 1, 2004, I asked that any such documents be copied to the Joint Coastal Commission. Because the hearing is scheduled to continue soon, on November 19, 2004, I have not delayed this ruling to see if the Joint Coastal Commission would seek to reply to the motion or the cross-motion. Due to the limited role of amicus parties in DEC permit hearings, there may be a question whether the Joint Coastal Commission would even have the right to respond to the motion or cross-motion (see, 6 NYCRR 624.5(e)(2)). If the Joint Coastal Commission seeks to reply to the motion or the cross-motion, I will consider what further steps, if any, should be taken.

Albany, New York
November 5, 2004

/s/
Susan J. DuBois
Administrative Law Judge

Encl.

TO: Joan Scherb, Esq.
Gail Rowan, Esq.
Kaylee Engellenner