

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

September 27, 2005

BEVERLY SINKIN

The above application is for a permit to construct a dock extending out from the shore of Stony Brook Harbor at the residence of Beverly Sinkin (the Applicant). The site is located in the Village of Nissequogue, Suffolk County. A hearing on the proposed project began on October 12, 2004 and continued on October 13, 2004. The full parties to the hearing are the Applicant and the staff of the Department of Environmental Conservation (DEC Staff). The Joint Coastal Management Commission of the Villages of Head-of-the-Harbor and Nissequogue (Joint Coastal Commission) was granted amicus party status.

The Applicant presented her direct case on the first day of the hearing and DEC Staff presented part of its direct case on the second day. When the hearing adjourned, cross examination of DEC Staff's second witness had not yet occurred. The hearing was adjourned to November 19, 2004. At the end of the second day of the hearing, DEC Staff witness Charles Hamilton testified that the Applicant's property is a non-riparian parcel because its property line that is closest to Stony Brook Harbor is located landward of the high water line.

On October 19, 2004, DEC Staff 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. DEC Staff made this motion as a cross-motion, in the context of an earlier motion by the Applicant that the permit be granted based upon delay in scheduling the hearing. Both motions were the subject of a ruling dated November 5, 2004. That ruling denied the Applicant's motion. It also denied DEC Staff's motion, without prejudice to further consideration of it once the hearing record is complete. The ruling allowed for appeals to the Commissioner but also stated that the hearing remained scheduled to continue on November 19, 2004. The parties did not appeal the ruling.

On November 16, 2004, I adjourned the hearing without date following a conference phone call with Gail Rowan, Esq., DEC Assistant Regional Attorney, and Joan Scherb, Esq., who at that time was representing the Applicant in this matter. As of November 16, 2004, the parties were planning to meet for settlement discussions, including review of proof from the Applicant that her property is a riparian lot. A meeting occurred on November 19, 2004 but did not result in settlement of the case. The hearing remained adjourned without date while the Applicant sought documents concerning the lot boundaries and the mean high water line. Ms. Rowan and Ms. Scherb notified me on November 19, 2004 that it was uncertain when the documents would be available.

On January 21, 2005, the Applicant notified DEC Staff that she had discontinued the services of Ms. Scherb. Following additional correspondence about how the parties wished to proceed, the Applicant submitted copies of deeds and a survey of her lot with a transmittal letter dated April 6, 2005. DEC Staff responded on May 3, 2005, transmitting an April 19, 2005 letter from Alan C. Bauder, of the New York State Office of General Services (OGS) that stated, among other things, "It appears that the lands owned by Sinkin were subdivided without ownership passing to the shore."

On April 29, 2005, a conference phone call took place among Ms. Sinkin, Ms. Rowan and me. Ms. Sinkin stated that she intended to have an attorney prepare a response on her behalf concerning interpretation of the deeds for her lot with regard to whether the lot extends to the shore and whether she has riparian rights. This correspondence was due on May 27, 2005. Miriam E. Villani, Esq. contacted me on May 24, 2005 and requested an extension of this deadline. On June 6, 2005, Ms. Villani confirmed that she had been retained by the Applicant to represent her in this matter. Following additional extensions of the deadline, Ms. Villani submitted a letter dated August 19, 2005 concerning the deeds for the Applicant's property and a discussion of riparian rights. DEC Staff responded on August 29, 2005.

Current status of this issue

The November 5, 2004 ruling stated that there is a substantive dispute concerning whether or not the Applicant has riparian rights to build a dock at the proposed location. The ruling noted that whether and to what extent this issue is within the jurisdiction of DEC had not yet been addressed by the

parties, other than DEC Staff's position that the evidence in the hearing thus far precludes the Applicant from obtaining a permit. The Applicant had not asserted that this issue is outside the DEC's jurisdiction. The ruling stated that the parties may address this jurisdictional question in their closing briefs, if they wish to do so (Ruling, at 8). At the time of the November 5, 2004 ruling, the hearing was scheduled to continue on November 19, 2004 and the ruling allowed for the parties to present evidence regarding whether the Applicant has riparian rights to build a dock at the proposed location. The ruling stated, "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, at 9).

The Applicant's August 19, 2005 submission states that a March 20, 1940 deed for the property transferred interest to land to the low water mark of Stony Brook Harbor and to land under waters of Stony Brook Harbor. The August 19 letter notes that subsequent deeds leave out this language, an omission the letter attributes to "either abbreviation or a scrivener's error," but do not surrender any rights or interests. The letter concludes by asking that I grant the Applicant's motion that the permit be granted.

DEC Staff's August 29, 2005 letter argues that the Applicant has the burden of rebutting DEC Staff's position regarding riparian rights but has not met this burden due to deficiencies in the information presented about the deeds, including the lack of a current survey that is based on the Sinkins' deed and that notes the present high water mark. DEC Staff argues that any discussion of waterfront property owners' rights to apply for a permit to build a dock should be postponed until I decide the issue of whether the Applicant's property abuts Stony Brook Harbor.

DEC Staff's August 29, 2005 letter states, "It is the State of New York's position that the underwater lands and formerly underwater lands in Stony Brook Harbor to the last known location of mean high water are owned by the State" and refers to two 1987 letters from OGS to the Secretary of State of the State of New York in support of this. In contrast to this statement, Mr. Bauder's letter that was enclosed with DEC Staff's May 3, 2005 letter states, "[DEC Staff's] map showing the high water mark is the demarcation between the state land and the Village lands.

The private ownership of the subdivision is landward of the Village property."

Discussion

At the time of the November 5, 2004 ruling, it appeared possible that the issue of the Applicant's lot boundary and riparian rights might be able to be clarified in the hearing that was then scheduled to continue on November 19, 2004, with the parties subsequently having the opportunity to include arguments about this issue in their closing briefs. The ruling qualified the identification of this issue by saying that it "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."

Based upon the correspondence submitted for the record following the November 5, 2004 ruling, the procedure outlined in my November 5, 2004 ruling no longer appears practical. The information submitted by DEC Staff and the Applicant includes a series of deeds for the Applicant's property and statements about how the deeds should be interpreted. The information does not support a simple conclusion regarding the Applicant's property boundary or riparian rights.

The Applicant's August 19, 2005 correspondence acknowledges that language regarding land under the waters of Stony Brook Harbor was left out of deeds subsequent to 1940 "due to either abbreviation or a scrivener's error," but also asserts that other language in the later deeds indicates that no rights were surrendered or otherwise lost. Interpretation of the title history, and possibly correction of the deed, would need to be decided by a court rather than by the Commissioner in an administrative hearing.

The November 5, 2004 ruling's reference to "the extent [this issue] can be determined by DEC" was based upon the possibility that the Commissioner could arrive at a conclusion for the limited purpose of deciding whether to issue, condition or grant a permit. DEC permits commonly include a notification that the permit does not convey to the permittee any right to trespass upon the lands or interfere with the riparian rights of others in order to perform the subject work, and that the permit does not authorize impairment of any rights, title or interest in real property held by others. DEC permits also commonly include a general condition making the permittee responsible for obtaining any other permits, approvals, lands, easements and rights-of-way

that may be required for the subject work. In the present case, these provisions do not resolve the problem related to the Applicant's property boundary for the reasons discussed in the following paragraphs.

Based upon the documents and arguments submitted by the Applicant and DEC Staff, the current deed for the Applicant's property contains an omission or error. Further, it is unclear what entity might own the land between the waterward property line and the mean high water line if the Applicant does not own it. The letter from Mr. Bauder suggests that this land is owned by the Village of Nissequogue, while DEC Staff's August 29, 2005 letter suggests it is owned by the State of New York. In the absence of clarification of the Applicant's land title, in the proper forum, one cannot know whether the Applicant would need permission of a governmental agency and what governmental agency that would be.¹ If such permission is required, additional questions would be whether the permission would be granted and the nature of that permission.

In addition to affecting the viability of the project, these unknowns could affect the range of alternatives available to the Applicant, which is a subject relevant to the standards for granting a tidal wetlands permit (6 NYCRR 661.9). The Applicant herself suggested she may intend to modify her proposal, as briefly stated in a February 12, 2005 letter from the Applicant to Ms. Rowan that was attached with Ms. Rowan's letter of February 25, 2005. The February 12 letter stated, in part, "... we have decided not to pursue the large dock proposed." Ms. Villani's letter of August 19, 2005, however, asks that the permit be granted, with no mention of modifying the project for which the Applicant requested a permit.

The permit application requirements in 6 NYCRR section 661.12 include the following:

"The application shall include...a statement identifying the owner of the subject property and, where applicable, written permission of said owner for the applicant to seek permission for, and to carry out, the proposed activity..." (661.12(a)(1), in part); and

¹ Based upon the information in the record at present, one cannot rule out the additional possibility that correction of the deed might involve a private (non-governmental) entity.

"The application shall be accompanied by a list of the names of the owners of record of lands adjacent to the tidal wetland or adjacent area upon which the regulated activity is to be undertaken and the names of known claimants of water rights, of whom the applicant has notice, which relate to any land within, or within 300 feet of the boundary of, the property on which the proposed regulated activity is located" (661.12(a)(2)).

Clarification of the Applicant's land ownership and rights is relevant to the above required information as well.

The most recent request or motion by DEC Staff is its August 29, 2005 position that, "Any discussion of waterfront property owners rights to apply for a permit to build a dock should be postponed until you [the Administrative Law Judge] decide the issue of whether Ms. Sinkin's property abuts the Stony Brook Harbor." The most recent request or motion by the Applicant is her August 19, 2005 request that I "grant [A]pplicant's motion for the permit to be granted." For the reasons discussed above, neither of these requests or motions is granted. Instead, the hearing is adjourned to allow the extent of the Applicant's land ownership to be resolved in an appropriate forum having jurisdiction to render a binding determination.

The uniform procedures for review of applications for certain permits, including tidal wetlands permits, contain a provision allowing for the Department to "request in writing any additional information which is reasonably necessary to make any findings or determinations required by law. Such a request shall be explicit, and shall indicate the reasonable date by which the [D]epartment is to receive the information. Failure to provide such information by the date specified in the request may be grounds for denial of the application." (6 NYCRR 621.15(b)). In the present case, a correct deed is necessary. Depending on what happens concerning the deed, a corrected survey of the Applicant's lot that includes the mean high and low water lines may also be necessary.

I do not know how the Applicant would intend to proceed with regard to correcting the deed, nor how long this process is likely to take. In order to set a reasonable date for this information, I will schedule a conference phone call with Ms. Villani and Ms. Rowan. I also plan to inquire about whether the Applicant intends to pursue the present application.

Ruling: Both the Applicant's and DEC Staff's requests concerning the procedure to be followed are denied, and the hearing will proceed as outlined immediately above.

Appeals

Any party that wishes to appeal this ruling prior to completion of the testimony would first need to seek leave of the Commissioner to file an expedited appeal (see, 6 NYCRR 624.6(e) and 624.8(d)).

/s/

Albany, New York
September 27, 2005

Susan J. DuBois
Administrative Law Judge

TO: Miriam Villani, Esq.
Gail Rowan, Esq.
Kaylee Engellenner