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JOHN AND JANE GIBBONS,)	<u>ADMINISTRATIVE ACTION</u>
)	FINAL DECISION
Petitioners,)	
)	
v.)	
)	
NEW JERSEY DEPARTMENT OF)	OAL DKT. NO.: ELU 11840-19
ENVIRONMENTAL PROTECTION,)	
LAND USE REGULATION)	AGENCY DKT. NO.: 0103-10-0015.1
)	WFD 170001
Respondent.)	

This Order addresses the challenge by John and Jane Gibbons (“Petitioners”) to the New Jersey Department of Environmental Protection’s (“NJDEP”) November 28, 2017, denial of a Waterfront Development Individual Permit (“Permit”) to legalize and/or build waterfront pier and docking structures at their property under the Waterfront Development Act, N.J.S.A. 12:5-3, and its associated regulations, the Coastal Zone Management (CZM) Rules, N.J.A.C. 7:7. Petitioners requested a hearing to contest this decision, and the case was transferred to the Office of Administrative Law (“OAL”) on August 23, 2019. On August 13, 2020, NJDEP moved for summary decision, and Petitioners filed a cross-motion for summary decision on September 23, 2020.

On September 8, 2021, Administrative Law Judge Jeffrey S. Masin (“ALJ Masin”), retired and serving on recall, issued an initial decision granting NJDEP’s motion for summary decision and denying Petitioners’ cross motion for summary decision (“Initial Decision”). The Initial Decision found that the Petitioners’ proposed project violated certain sections of the CZM Rules, specifically the Shellfish Habitat rule, N.J.A.C. 7:7-9.2, and the Recreational Docks and Piers rule,

N.J.A.C. 7:7-12.5. ALJ Masin further concluded that NJDEP did not err in declining to use its discretion to allow a 12.9' overlength dock under N.J.A.C. 7:7-9.2(d)ii which allows NJDEP to authorize an overlength dock where "appropriate in order to ensure that the requirements" of the CZM rules are met.

After a review of the record, and for the reasons set forth below, I ADOPT the Initial Decision, as modified herein.

FACTUAL AND PROCEDURAL BACKGROUND

I ADOPT the ALJ's finding of facts as set forth in the record and discussed as follows.

Petitioners' property is a bulkheaded lot on the Wading Thoroughfare, located at 516 West Shore Drive, Block 7103, Lot 9, in Brigantine, New Jersey ("Property"). When Petitioners purchased the property in 2003, the property contained an existing dock structure that was built under a previously issued NJDEP permit, dated January 11, 1994. This original T-shaped dock structure consisted of a 5' wide by 80' long fixed pier perpendicular to the property, with an 11' wide x 27' long pier at the end and two timber mooring pilings. This dock covered 697 square feet of shellfish habitat, and its footprint matched an earlier dock that was constructed prior to 1978. The 1994 permitted dock was damaged in 2012 by Superstorm Sandy. Petitioners' adjoining neighbors on either side also have docks that were also approved by NJDEP.

In accordance with the "Zane amendment" to the Waterfront Development Act, N.J.S.A. 12:5-3(b)(1), as implemented in the CZM Rules at N.J.A.C. 7:7-2.4(d)6 and 7, a dock that existed prior to the effective date of this amendment may be rebuilt in the same footprint as the prior structure without the need for a NJDEP permit.¹ However, rather than reconstruct within the existing footprint consistent with Zane, and without seeking NJDEP approval, sometime between

¹ The "Zane amendment" was signed into law on December 3, 1981, by Governor Brendan Byrne, but had a statutory effective date of January 1, 1981.



2012 and 2015, Petitioners constructed a new expanded docking structure. Petitioners acknowledge the new structure exceeded the length of the prior dock by 12.9'. The expansion included a floating dock with a ramp at the end of the fixed pier, as well other new structures such as a boat lift and flag shaped dock.² This new docking and pier structure covered an additional 254.56 square feet of shellfish habitat, beyond the originally affected 697 square feet, for a total of 951.56 square feet of condemned shellfish habitat. Additionally, the new docking structure impermissibly crossed the "straight line drawn between the outside corner of the outermost end of decking of the two nearest adjacent existing legal docks or piers" that marks the outer boundary permissible under the CMZ Rules at N.J.A.C. 7:7-9.2(d)ii. In 2017, several years after building the dock and pier structure, Plaintiffs applied to NJDEP to legalize the new expanded docking structure without providing any justification for the unauthorized expansion.

On August 18, 2017, Petitioners applied to the NJDEP for a Waterfront Development Individual Permit (application number #0103-10-0015.1 WFD 170001) to legalize the removal of the prior dock, and to authorize the already built, but not permitted, new dock structure described above. Specifically, the 2017 application sought to legalize the following unpermitted activities: 1) removal of the existing T-shaped fixed pier, 2) construction of the new 8' x 16' floating dock with 3' x 16' ramp, 3) construction of the new 5' x 81' fixed pier, 4) construction of a new 7.6' by 24.81' flag shaped fixed pier perpendicular to the 5' x 81' fixed pier and 5) construction of a new 13' x 14' boat lift.³ At issue here is the floating dock - constructed outshore of the end of the 5' x 81' fixed pier and connected to the fixed pier by the 3' x 16' ramp - which extends an additional 12.9' past the ending point of the prior dock. Because Petitioners chose to expand the existing

² Certification of John Gibbons in Support of NJDEP Motion for Summary Decision (Gibbons Cert.), ¶ [para 10-11].

³ Certification of Dana Galbreath in Support of NJDEP Motion for Summary Decision (Galbreath Cert. and attached photographic exhibits), ¶ [4].



structure, the Zane amendment is not applicable, and the new expanded structure is subject to all applicable requirements of the CZM Rules, including a limitation on the length of recreational docks in shellfish habitat at N.J.A.C. 7:7-9.2. Under that section, a recreational dock “shall not be located beyond, and a dock or pier shall not extend beyond, a straight line drawn between the outside corner of the outermost end of decking of the two nearest adjacent legal docks or piers...” N.J.A.C. 7:7-9.2(d)3iii. The additional length added through the addition of the floating dock extends beyond an invisible line between the docks at the adjoining properties that limits the length of the dock at Petitioner’s property. There is no dispute that the area in which the proposed project is located is designated shellfish habitat under N.J.A.C. 7:7-9.2(a)2.

NJDEP reviewed Petitioners’ application and found that the project did not meet the applicable regulatory requirements, primarily: 1) the Recreational Docks and Piers Rule, N.J.A.C. 7:7-12.5(c), which provides “construction of recreational docks and piers within areas designated by the Department as shellfish habitat shall comply with the standards specified under the shellfish habitat rule”; and 2) the Shellfish Habitat Rule, N.J.A.C. 7:7-9.2, specifically N.J.A.C. 7:7-9.2(d)3, which sets out the requirements for a “noncommercial dock, pier, or boat mooring associated with a single family dwelling” intended to be built in designated shellfish habitat. N.J.A.C. 7:7-9.2(d)3ii, iii. NJDEP also found that the docking structure had the potential to moor five boats, while only two moorings are allowed under N.J.A.C. 7:7-9.2(d)3iii.

N.J.A.C. 7:7-9.2(d)3 of the Shellfish Habitat Rule requires, in relevant part, that “[u]nless the Department determines that a different length dock or pier is appropriate in order to ensure that the requirements of this chapter are met, a boat mooring shall not be located beyond, and a dock or pier shall not extend beyond, a straight line drawn between the outside corner of the outermost end of decking of the two nearest adjacent existing legal docks or piers.” N.J.A.C. 7:7-9.2(d)3ii.



Petitioners acknowledge that the property from the water outward is shellfish habitat under N.J.A.C. 7:7-9.2(a)2 because it is mapped as supporting, or previously supporting, hard clam production (high value) on the Department's Distribution of Shellfish Resources maps (Little Egg Harbor to Longport), dated 1963, and is classified as “Conditionally approved: January” for shellfish harvest. Additionally, Petitioners acknowledge the proposed structures crossed an imaginary line between the permitted docks on the neighboring properties. In applying the Shellfish Habitat Rule, the NJDEP found that the proposed structures exceed the maximum allowable length as determined by N.J.A.C. 7:7-9.2(d)3ii and were therefore not permissible.

Further, NJDEP found that Petitioners had not demonstrated that the expanded dock was “appropriate in order to ensure that the requirements” of the rules are met. N.J.A.C. 7:7-9.2(d)3ii. Rather than addressing how the expanded dock is appropriate to ensure the requirements of the CZM Rules are met, and while not included in their permit application, Petitioners later alleged in their motion for summary decision that the additional length was necessary to utilize a sailboat because sand deposited by Superstorm Sandy made the prior docking area insufficiently deep for mooring.⁴ More specifically, they argue that their new expanded dock was built to extend further out than their original dock in order to reach deeper water to load/unload passengers from their boat. The sailboat in question, a Catalina 22, however, has a retractable keel to allow for mooring in shallow water. While Petitioners’ practice was to leave the keel down while passengers disembark at the floating dock, requiring at least 5’ of water, Petitioners provide no demonstration sufficient to justify the allowance of a different length dock as “appropriate in order to ensure that the requirements” of the CZM Rules are met under N.J.A.C. 7:7-9.2(d)3ii. Notwithstanding, NJDEP investigated this issue using depth information obtained from the National Oceanic and

⁴ Gibbons Cert., ¶ [2].



Atmospheric Administration (“NOAA”), and Sheet 4 of the August 3, 2017 survey prepared by Petitioners’ consultant, Robert J. Catalano, and found the existing water depth sufficient to permit the Petitioners to dock utilizing their preferred method (keel down) at low tide, even without the 12.9’ overlength floating dock and ramp extension. NJDEP therefore concluded that Petitioners could both unload passengers with their keel down, and moor their sailboat with the keel up, without requiring an overlength dock.⁵

NJDEP also concluded that the proposed project would include five potential mooring areas: the boat lift (1 mooring), floating dock (2 moorings), and flag dock (2 moorings). Petitioners assert that they only ever utilize the two moorings, and that potential boat mooring locations should not matter as they are not utilized, or appropriate to consider.⁶ However, under N.J.A.C. 7:7-9.2(d)3iii, a “dock, pier, or boat mooring shall have no more than two designated slips.” This limitation on designated slips minimizes pollution areas in shellfish habitat, balanced with water dependent uses of landowners.

On November 28, 2017, NJDEP denied Petitioners permit application to legalize the new expanded dock as failing to comply with the Shellfish Habitat Rule, N.J.A.C. 7:7-9.2, a prerequisite for satisfaction of the Recreational Docks and Piers rule, N.J.A.C. 7:7-12.5. Petitioners subsequently requested a hearing on the denial on January 2, 2018. Thereafter, both parties moved for summary decision. Petitioners argued that: 1) the overlength dock is necessary because the water closer to shore is not deep enough to safely accommodate their sailboat; 2) they only intend to have two designated moorings; and 3) the Shellfish Habitat Rule is arbitrary and unfair. In response and in support of its motion for summary decision, NJDEP argued: 1) based on the clear evidence from the permitting record, Petitioner’s project did not meet the rules clearly stated in

⁵ Reply Certification of Dana Galbreath in Support of Summary Decision (Galbreath Reply Cert.) ¶ [7-15].

⁶ Gibbons Cert. ¶ [2].



the denial, and thus could not be approved, and 2) the OAL is not the proper forum to challenge NJDEP rules.

INITIAL DECISION

In the Initial Decision, ALJ Masin granted NJDEP's motion for summary decision and denied Petitioners' cross-motion. ALJ Masin first found that "undisputed evidence establishes that the Gibbons constructed a dock that is 12.9' longer than the length established by an imaginary line drawn from the outside corners of the outermost ends of these adjacent docks as permitted under N.J.A.C. 7:7-9.2(d)3ii." He then considered whether NJDEP should have exercised its discretion to allow a longer dock to ensure that the requirements of N.J.A.C. 7:7-9.2(d)3ii are met.

However, in considering whether NJDEP properly exercised its discretion by not allowing the overlength structure, ALJ Masin improperly declined to apply a deferential standard reasoning that "[o]nly after the Executive Branch agency has issued its final administrative decision does the principle of deference due to a co-equal Branch's exercise of its discretionary authority apply." Still, despite applying an improper standard, the Initial Decision upheld the NJDEP's denial of Petitioners' permit.

The Initial Decision concluded that Petitioners had not sufficiently demonstrated that they required an overlength dock to reach water deep enough to accommodate their sailboat. ALJ Masin found that the NJDEP provided detailed calculations using verifiable data from NOAA as well as the survey done by Petitioners' own consultant to demonstrate that the water closer to shore was sufficiently deep even at low tide for Petitioners' sailboat. As such, the Initial Decision found that the overlength dock was in violation of the applicable CZM Rules and properly disallowed, finding no genuine dispute of material fact.



ALJ Masin further noted that OAL is not the proper forum to challenge the arbitrariness of a regulation. Finally, ALJ Masin found that the regulatory restriction on the number of designated moorings does not restrict the number of potential moorings. Accordingly, he concluded that it would be improper for NJDEP to deny a permit based on an assumption that a permit holder who had designated only two mooring sites would later violate his permit by using other mooring locations. Because the permit application was properly denied on other grounds, however, this finding did not alter the Initial Decision.

EXCEPTIONS

Petitioners filed exceptions to the Initial Decision on September 20, 2021. They reiterated that the overlength dock is necessary due to insufficient water depth closer to shore and, without providing evidence to dispute NJDEP's finding, asserted that NJDEP's depth findings are invalid because they were taken more than five years ago. Petitioners also argue that they only seek to have two designated boat slips, in compliance with the applicable rule. Lastly, Petitioners argue that NJDEP should exercise its discretion to allow Petitioners' overlength dock because the dock could come into compliance retroactively if a neighbor were permitted to extend his or her dock (shifting the imaginary line further offshore). Petitioners also argue that they could seek to dredge the sediment under their dock to deepen it, which would be more detrimental to the shellfish habitat than permitting Petitioners' dock project.

In response, NJDEP argues that Petitioners have not submitted any data or evidence to dispute the depth findings provided by Galbreath that the water surrounding Petitioners' dock is deep enough to dock their sailboat without an overlength dock. NJDEP also argues that the Initial Decision rendered the issue of the number of moorings issue moot, because the ALJ relied on other grounds to grant NJDEP's motion for summary decision. Finally, NJDEP argues that any



argument based on the hypothetical actions of uninvolved parties or speculative future permit applications is not an appropriate consideration in determining compliance with the applicable regulations.

NJDEP filed its own exceptions on September 21, 2021 arguing that while ALJ Masin reached the correct conclusion, he should have applied a deferential standard in his review of the permit denial as it represents a final agency action.

DISCUSSION

Before reaching the merits of this matter, the proper standard of review should be addressed. While ALJ Masin's Initial Decision reached sound conclusions based on well-supported findings of fact, the Initial Decision did not apply the appropriate deferential standard to the denial as a final agency action reached as a result of the NJDEP's technical expertise. It has been long recognized that the Courts "give great deference to an agency's interpretation and implementation of its rules enforcing the statutes for which it is responsible." ZRB, LLC v. NJ Dep't of Env'tl. Prot., 403 N.J. Super. 531, 549 (App.Div.2008) (quoting In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 488 (2004)). "That deference stems from the recognition that agencies have specialized expertise and superior knowledge in the areas of law delegated by the Legislature." Lourdes Med. Ctr. v. Bd. of Rev., 394 N.J. Super. 446, 458 (App. Div. 2007), rev'd. on other grounds, 197 N.J. 339 (2009). In applying this deference, there is no distinction between a decision reached by one of NJDEP's Divisions (in this case, the Division of Land Resource Protection) or by the Commissioner herself, as all decisions reached by NJDEP Divisions are a function of statutory or regulatory authority delegated by the Commissioner. This matter involves the interpretation and application of the Department's regulations—whether NJDEP should have used its discretion and allowed a longer dock—a matter that falls squarely within NJDEP's



technical expertise. Accordingly, the subject agency decision must be afforded the requisite deference. See In re Taylor, 158 N.J. 644, 658 (1999), Durr Wholesale Florist, 2010 N.J. AGEN LEXIS 885. Despite applying a less stringent standard, the Initial Decision here correctly upheld NJDEP's denial of Petitioners' permit application. The remainder of the Initial Decision is therefore adopted, as explained below.

There is no dispute that Petitioner's docking structure crosses an invisible line between adjacent docks, as restricted by N.J.A.C. 7:7-9.2(d)ii. This rule allows a narrow exception to the invisible line requirement, allowing deviation by the Department where it "...is appropriate in order to ensure that the requirements of this chapter are met..." Petitioners failed to demonstrate that their circumstances warrant a discretionary exception from the Shellfish Habitat Rule's dock length restriction as they have not shown that deviation would further the requirements of the CZM Rules. The CZM Rules take a holistic approach to harmonizing the protection of New Jersey's valuable natural resources, such as shellfish habitat, balanced with the rights of private property owners' water dependent activities. N.J.A.C. 7:7-9(m).

The record shows that Petitioners have not presented any reason, let alone a sufficient reason, that their dock need be overlength by any amount, let alone 12.9'. As such, there was no reason for NJDEP to considering using discretion in allowing the overlength structure in the permitting decision. Petitioners now, in the hearing process, contend that their new docking structure was built to extend further out than their original dock in order to reach deeper water for their sailboat due to sediment deposits from Superstorm Sandy. They reiterate that, without the extra length, they would be unable to keep the sailboat's keel down while they disembark passengers (a practice that requires 5' of water). Despite these assertions, however, Petitioners still present no depth findings to support their contention that the water landward of the "straight



line” limit under the Shellfish Habitat Rule is too shallow to accommodate their boat. See N.J.A.C. 7:7-9.2(d)3ii. In fact, ALJ Masin found that Petitioners offered only John Gibbon’s “bald assertion” that the current depth is inadequate. Thus, the depth findings and calculations presented by NJDEP are the only depth measurements on record.

As recognized by ALJ Masin in the Initial Decision, Galbreath’s certification on behalf of NJDEP provided detailed data regarding post Superstorm Sandy water depth at the docking structures utilizing information from the NOAA regarding mean low water (MLW) and mean high water (MHW). Galbreath’s analysis, utilizing data for the Wading Thorofare surrounding the Petitioners’ dock and pier, and Petitioners’ own survey of the project site, concluded that adjacent to the inland edge of the floating dock, there is a water depth of 6.08’ at MLW, and 9.95’ at MHW. On the inland side of the dock, while shallower, the water depth at MLW was determined to be 4.08’ and 7.95’ at MHW. All of these depths, reflecting conditions post Superstorm Sandy, are located within the imaginary line drawn between the two closest adjacent docks and are thus depths that are located in areas other than the floating dock. Even without the 12.9’ extension, boats could be docked at low tide at a water depth of 6.08’ on one side, and 4.08’ on the other. The keel of the Petitioners’ sailboat in the down position has a draft of 5’, which means that even without an overlength dock, Petitioners would have access to water deep enough to keep their sailboat keel in its “down” position while they unload passengers. In addition, on the inland side of the flag-shaped dock, the water depth at low tide is approximately 4.08’, which would accommodate the Petitioners’ sailboat after passengers have disembarked, when the keel is in its “up” position. These water depths reflect conditions after Superstorm Sandy when Petitioners claim the area became shallower. Moreover, these depths are all located on the landward side of the imaginary line drawn between the two closest adjacent docks—meaning they are located at areas that would



be available without the overlength dock extension. Based on these findings, there is no reason an overlength dock would be necessary.

Petitioners still do not present any conflicting data or depth measurements to show that the Galbreath calculations are incorrect or unreliable. The Initial Decision was predicated on the “undisputed” evidence before ALJ Masin, and there is no reason to find any differently in this Final Decision. Though Petitioners argue that the depth findings are outdated, they present no conflicting data to show that the depth findings are incorrect. Indeed, Petitioners do not explain why data obtained “five years ago” would not appropriately reflect the effect of Superstorm Sandy, which occurred in 2012. Petitioners do not clarify what they perceive is misleading or incorrect in the data presented, and their exception is therefore unpersuasive.

Further, the OAL is not the correct forum to challenge an agency regulation, and the Initial Decision properly declined to consider the alleged arbitrariness of the rule itself. That jurisdiction lies with the Appellate Division through a separate, established process. Rivkin v. Department of Environmental Protection, 96 N.J.A.R.2d (EPE) 353 (OAL lacked jurisdiction over property owner’s constitutional challenge to denial of waterfront development permit for on grounds that proposed construction would conflict with shellfish habitat regulation), accord R. 2:2-3(a)(2).

Additionally, ALJ Masin correctly declined to consider the Petitioners’ argument that a neighbor could potentially, at some time in the future, apply to extend his or her dock and, therefore, move the “straight line” limit established by N.J.A.C. 7:7-9.2(d)3ii. Neither the OAL nor the NJDEP can base a permitting decision on hypothetical future applications, especially by uninvolved parties. Moreover, application of the CZM Rules would, as intended, necessarily restrict future waterward expansions as it has in the present matter. For the same reason, it would be inappropriate to consider Petitioners’ hypothetical future application to dredge under N.J.S.A.



12:5-3.1 as support for the permit application currently before the NJDEP. Neither the OAL nor NJDEP would be in any position to know whether those applications would be granted, and both properly declined to give this argument any weight. For those reasons, Petitioners' remaining exceptions are unpersuasive.

Finally, there is no reason to disturb the Initial Decision's finding that NJDEP could not deny Petitioners' application based on the number of "designated slips" allowed under N.J.A.C. N.J.A.C. 7:7-9.2(d)3iii. Petitioners asserted that they only ever utilized two moorings and argued that potential boat mooring location should not matter as they are not utilized or appropriate to consider under the permit application. Here, as there remains a sufficient basis to uphold the denial for failure to satisfy the preceding requirements of the Shellfish Habitat Rule N.J.A.C. 7:7-9.2, the other factors discussed above require satisfaction before consideration of the mooring issue. As such, there is no need to further consider this issue as the other legal prerequisites have not been met.

CONCLUSION

For the foregoing reasons, I ADOPT AS MODIFIED the ALJ's findings as contained in the September 8, 2021, Initial Decision. IT IS SO ORDERED.

Dated: January 21, 2022


Shawn M. LaTourette, Commissioner
New Jersey Department of Environmental Protection



JOHN & JANE GIBBONS
v.

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