



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. ELU 11840-19

AGENCY DKT. NO. 0103-10-0015.1

WFD 170001

**JOHN AND JANE GIBBONS,**

Petitioners,

v.

**NEW JERSEY DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,  
LAND USE REGULATION,**

Respondent.

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**John Scott Abbott**, Esq., for petitioners (Law Office of John Scott Abbot,  
attorneys)

**Bruce Velzy**, Deputy Attorney General, for respondent Andrew J. Bruck, Acting  
Attorney General of New Jersey, attorney)

Record Closed: July 28, 2021

Decided: September 8, 2021

BEFORE **JEFF S. MASIN**, ALJ (Ret., on recall):

John and Jane Gibbons applied to the Department of Environmental Protection (DEP) for a Waterfront Development Individual Permit, Application number #0103-10-

0015.1 WFD170001, seeking authority for a project at their property located in Brigantine City, New Jersey. Such approval is necessitated by the terms of the Waterfront Development Act, N.J.S.A. 12:5-3. By letter dated November 28, 2017, the DEP's Division of Land Use Regulation advised that the application would not be approved. The Gibbons requested a hearing to contest this decision, and the case was transferred to the Office of Administrative Law on August 23, 2019. On August 13, 2020, the DEP moved for summary decision, as permitted by N.J.A.C. 1:1-12.5. The Gibbons responded on September 23, 2020, with a cross-motion for summary decision and opposition to the DEP's motion. The DEP replied to the cross-motion and in further support of its own motion on November 18, 2020. The contested case had been assigned to Honorable John S. Kennedy. Judge Kennedy was appointed to the Superior Court prior to his issuing a decision on the cross-motions and they were transferred to this judge, retired and serving on recall, on July 28, 2021.

As the Gibbons' proposed project is described in the letter denying the application, they intended to either build or to legalize already built structures on the water located next to their bulkheaded lot, at 516 West Shore Drive, Block 7103, Lot 9, in Brigantine, where they have a single-family dwelling. The application proposed the removal of the current "T"-shaped fixed pier, the legalization of the existing 8' by 16' floating dock and 3' by 16' ramp, and construction of a 5' by 81' fixed pier, a 7.6' by 24.81' flag-shaped fixed pier, and a 13' by 14' boat lift. The proposed structures are shown on Sheet 4 of the Land Title Survey provided as part of the permit application, revised August 28, 2017, by Robert J. Catalano, P.L.S. The letter advised that the application was denied because the proposed project violated requirements of the Coastal Zone Management Rules, N.J.A.C. 7:7-1.1 et seq., more 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. The Division found that the water area out shore of the project site is defined as shellfish habitat under N.J.A.C. 7:7-9.2(a)2 and the water area was classified as "Conditionally approved: January" for shellfish harvest. The proposed structures exceed the maximum length as determined by N.J.A.C. 7:7-9.2(d)3ii. The applicants had not demonstrated a need to exceed the maximum length. Additionally, N.J.A.C. 7:7-9.2(d)3iii permitted a maximum of two mooring areas in

shellfish habitat. From the information supplied with the application, the Division determined that the proposed project had five potential mooring areas: boat lift (1), floating dock (2), flag dock (2). Thus, the application failed to demonstrate compliance with these regulations. As for the Recreational Docks and Piers regulation, this provided that the construction of recreational docks and piers within areas designated as shellfish habitat had to comply with the standards specified under the Shellfish Habitat rule, N.J.A.C. 7:7-9.2. Since the Division had determined that the proposed project did not comply with the Shellfish Habitat rule, it could not meet the Recreational Docks and Piers rule. As a result of these problems, the entire project could not be approved.

N.J.A.C. 7:7-9.2 provides

a) Shellfish habitat is defined as an estuarine bay or river bottom which currently supports or has a history of production for hard clams (*Mercenaria mercenaria*), soft clams (*Mya arenaria*), eastern oysters (*Crassostrea virginica*), bay scallops (*Argopecten irradians*), or blue mussels (*Mytilus edulis*), or otherwise listed below in this section. A shellfish habitat area is defined as an area which meets one or more of the following criteria:

1. The area has a current shellfish density equal to or greater than 0 .20 shellfish per square foot;
2. The area has a history of natural shellfish production according to data available to the New Jersey Bureau of Shellfisheries, or is depicted as having high or moderate commercial value in the Distribution of Shellfish Resources in Relation to the New Jersey Intracoastal Waterway (U.S. Department of the Interior, 1963) and/or "Inventory of New Jersey's Estuarine Shellfish Resources" (Division of Fish, Game and Wildlife, Bureau of Shellfisheries, 1983-present);
3. The area is designated by the State of New Jersey as a shellfish culture area as authorized by N.J.S.A. 50:1 et seq. Shellfish culture areas include estuarine areas presently leased by the State for shellfish aquaculture activities or hard clam relay, transplant and transfer as well as those areas suitable for future shellfish aquaculture development; or
4. The area is designated as productive at N.J.A.C. 7:25-24, Leasing of Atlantic and Delaware Bay Bottom for Aquaculture . . .

(d) Construction of a dock, pier, or boat moorings in shellfish habitat is prohibited, except for the following: . . .

3. A single noncommercial dock, pier, or boat mooring associated with a single family dwelling provided the proposed dock, pier, or boat mooring meets the requirements at (d)3i through v below. If a lot has frontage on both a natural waterway and a man-made lagoon, the dock, pier, or boat mooring shall be located within the lagoon, unless locating the dock, pier, or boat mooring on the lagoon would not otherwise comply with the recreational docks and piers rule at N.J.A.C. 7:7-12.5 or any other provisions of this chapter . . .

ii. Unless 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 (for a diagram illustrating how the maximum length of a single noncommercial dock or pier or location of a boat mooring is determined in accordance with this paragraph, see chapter Appendix E): . . .

iii. The dock, pier, or boat mooring shall have no more than two designated slips. Boats shall not be moored at any area other than the two boat slips designated in the Department permit and/or the plan approved under that permit;

N.J.A.C. 7:7-12.5 reads

a. Recreational and fishing docks and piers are structures supported on pilings driven into the bottom substrate, or floating on the water surface or cantilevered over the water, which are used for recreational fishing or for the mooring of boats or jet skis used for recreation or fishing, except for commercial fishing, and house boats.

c) The 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, N.J.A.C. 7:7-9.2.

Motions for summary decision are permitted by N.J.A.C. 1:1-12.5. The standards for determining such a motion follow those for the motion for summary judgment applicable in the Judicial Branch. The New Jersey Supreme Court defined the standard for determining motions for summary decision in Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). In this case, the Court elaborated upon the standards first established in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954). Under the Brill standard, a motion for summary decision may only

be granted where there are no “genuine disputes” of “material fact.” The determination as to whether disputes of material fact exist is made after a “discriminating search” of the record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of “genuine” disputes of material fact. The substantive law governing a dispute determines which facts are material. Only disputes regarding “those facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Dunjee v. Northeast Foods, Inc., 940 F.Supp. 682, 685 (D.N.J. 1996), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (Anderson).

In Judson, at 75, the Supreme Court stated that the material facts allegedly in dispute upon which the party opposing the motion relies to defeat the motion must be something more than “facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious, . . . ” (citations omitted). Brill focuses upon the analytical procedure for determining whether a purported dispute of material fact is “genuine” or is simply of an “insubstantial nature.” Brill, at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary decision motions. “The essence of the inquiry in each is the same: ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law.’” Id. at 536, quoting Anderson, at 477 U.S. 251-52, 106. In searching the proffered evidence to determine the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the “burden of persuasion” which would apply at trial on the merits, whether that is the preponderance of the evidence or the clear and convincing evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed material facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. However, where the proofs in the record are such that

“reasonable minds could differ” as to the material facts, then the motion must be denied and a full evidentiary hearing held.

The DEP moves for summary decision based upon what it asserts is the clear evidence from the application itself that it does not meet the rules cited in the denial and therefore the project cannot be approved. It proposes several facts that it offers as unopposed. It is undisputed that

- 1) The Gibbons’ built the 8’ by 16’ floating dock and the 3’ by 16’ ramp between 2012 and 2015 without the approval of the DEP.
- 2) These structures and the proposed structures are located in the Wading Throughfare, waterward of the bulkhead on the applicants’ property.
- 3) The waters are shellfish habitat.
- 4) On each side of the Gibbons’ property there are existing docks, which are on adjacent properties and which were approved by the DEP.
- 5) Petitioners proposed 8’ by 16’ dock structure that is furthest waterward, extends 12.9’ beyond an imaginary line drawn from the outside edges of the adjacent docks.
- 6) Petitioners have four areas where a boat could be moored: the landward side of the flag-shaped 7.6’ by 24.81’ dock (also referred to as the “crabbing and fishing dock”), both sides of the end of the 8’ by 16’ dock, and the boat lift.

Additionally, DEP notes that the proposed structures were actually built in the Wading Thorofare after the DEP denied the permit application. Specifically, the structures built after the denial are the 8’ by 16’ floating dock, the 3’ by 16’ ramp, a 7.6’ by 24.81 flag-shaped fixed pier, and a 13’ by 14’ boat lift.

In support of these facts, the DEP offers the Certification of Dana Galbreath, a case manager in the Division of Land Resource Protection (formerly known as the Division of Land Use Regulation), who is the assigned case manager for the Gibbons’ permit application. Her Certification is accompanied by Exhibits A through E. Included in

these exhibits are a series of photographs of the property, the structures, and the Land Title Survey sheets prepared by Robert J. Catalano. Exhibit D is an aerial photograph that shows the Gibbon's dock with a line drawn by Galbreath from the waterward end of the adjacent docks which shows that the Gibbons' dock extends waterward beyond that imaginary line.

Counsel for the DEP argues that as the petitioners proposed a dock that they concede is 13 feet longer than allowed under N.J.A.C. 7:7-9.2(d)3ii and have no sustainable reason for this extra length, the denial of the application is clearly required and, as there are no material facts regarding this violation of the rule, summary decision is appropriate. The Waterfront Development Act, N.J.S.A. provides that no development or improvement in any waterfront upon any navigable water of New Jersey "shall be commenced or executed without the approval of the Department of Environmental Protection." N.J.S.A. 12:5-3. Under N.J.A.C. 7:7-9.2(d)3ii,

Unless 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

Counsel points out that the application offered no reason for the need for the excess length and when offered the chance to submit a justification for this, the petitioners' consultant did not do so. Given this, the rejection of the permit was appropriate.

As for the reasons for rejecting the application under N.J.A.C. 7:7-9.2(d)3, "the "two designated slips", provision, counsel notes that a mooring is defined at N.J.A.C. 7:7-1.5 as "the structure and/or water area adjacent to the structure where boats and/or jet skis are secured by cables, anchors, or lines. Examples of moorings that are structures include docks, jet ski drive-on docks, bulkheads, boat lifts, pilings, and buoys."

The petitioners' application listed the boat lift and floating dock as the designated slips. However, counsel notes that a picture submitted with the application shows the petitioners' sailboat docked on the landward side of the "crabbing and fishing" dock. Also, there would exist the ability to moor watercraft at both ends or sides of the floating dock. Thus, there exists the ability to moor watercraft at more than the two designated slips locations. Up to four boats could be moored. And while in their answers to interrogatories the Gibbons claimed that they only seek two moorings, counsel contends that in the face of the pictures showing multiple mooring sites the answer does not create a genuine issue of material fact as to the violation of N.J.A.C. 7:7-9.2(d)iii.

Finally, DEP notes that since the application clearly fails to satisfy the requirements of the Shellfish Habitat rule, it cannot satisfy N.J.A.C. 7:7-12.5(c), which makes conformity with the Shellfish Habitat rule a requirement for approval under the Recreational Docks and Piers rule.

In summary, the DEP contends that as there are no genuine disputes of material fact concerning the failure of the application to meet the requirements of the cited Coastal Zone Management rules, denial of the permit was proper and summary decision must be granted.

In their motion for summary decision and response to the DEP's cross-motion, the Gibbons argue that DEP failed to exercise its discretion under N.J.A.C. 7:7-9(d)iii, which would have permitted the extra 12.9' length of the extension of their dock.

Further, the DEP's finding concerning five designated boat slips is incorrect, as the application only proposed two designated slips. The applicants do not deny that a strict application of N.J.A.C. 7:7-9(d)iii results in the appropriate conclusion that the dock extension does extend beyond the theoretical line running from the outer ends of the adjacent docks. But the DEP has discretion to allow for a longer dock under the opening portion of the regulation, which reads, "Unless the Department determines that a different length dock or pier is appropriate in order to insure that the requirements of this chapter



are met. . . ” Given this authority, DEP’s failure to consider and permit the excess length was a failure to exercise reasonable discretion and should not be permitted to stand.

The petitioners offer as a reason for the extra length the explanation that as a result of Superstorm Sandy the depth of the water in the area where the Gibbons dock their sailboat was changed so that there is insufficient depth to accommodate the sailboat. According to Mr. Gibbons’ Certification, they purchased their home in 2003 and had no problem with their dockage until 2012, when Superstorm Sandy destroyed their dock. When the dock was replaced it was built 12 feet further out than the previous dock. According to Gibbons, Amon Dock Construction went further out “because of the amount of sand that has washed into our cove and made our water shallow.” Gibbons describes their sailboat as a Catalina 22 with a retractable keel. Describing how he operates the boat when docking, he explains that he comes “up to the dock with my sail up, I must leave the keel down so as to disembark any passengers. Once I lower the sail I can raise the keel and I move the boat from the floating dock to the adjoining boat slip which is closer to the bulkhead,” and then he moors the boat with separate lines on mooring piles and dock piles. He notes that he did not think the DEP would have a problem with the extra length because it “provides him with enough water at low tide so I can bring my boat in next to the floating dock and then raise the keel. Otherwise, I cannot do so at low to mid tide, the keel hits the bottom.”

As for the floating dock, were he to moor the sailboat at that location, the boat “would be destroyed.” There are no mooring pilings and there is “substantial wave action” on the “open body of water” the dock fronts on. Gibbons also notes that the “L” dock was substituted for the previous “T” dock so that a boat hoist could be utilized to lift their grandchildren’s’ motorboat out of the water both for the benefit that he claims the DEP favors so as to keep painted bottoms out of the water and because “a small motor boat cannot safely tie up at our dock especially if there is a wind storm coming in the right direction.”

In part, the petitioners' argument is based upon what they characterize as the arbitrariness of the rule regarding the length allowed for the dock as limited by the length of the docks on either side of his property. Gibbons notes that many docks in the cove extend beyond the length of his dock, but the rule limits his length by the happenstance of the length of his immediate neighbors' docks. Thus, if he had adjoining neighbors in the cove who had longer docks he could also have a longer dock. Mr. Gibbons also acknowledges that he could dredge the area, but notes that this would "disrupt shellfish habitat." Finally, he offers that he has no intention to have five moorings. "We have two boats."

The Gibbons also offer a Certification from Junetta Dix, an environmental consultant affiliated with ACT Engineers, Inc., who prepared a report dated February 12, 2020, regarding this matter. She notes that the petitioners do not intend to have more than two moorings and that "tying a vessel to the floating dock without mooring piles, or better yet, a boat lift, would in this area of the open bay subject any vessel to severe damage and most likely loss during any kind of wind event." She also offers that the reconfiguration of the dock "actually reduced the total area covered by 12.3 sq. Feet" which is less than was previously covered by the former dock which DEP had authorized. She agrees that the imaginary line does bisect the Gibbons' dock.

In reply to the Gibbons, counsel for DEP notes that while the petitioners may dislike the rule regarding the length of their dock and the need to limit it based on the length of the adjacent docks, the OAL is not a forum in which a challenge to the rule is cognizable. Also, while Mr. Gibbons and his consultant posit that while he may have the ability to dredge to create more water depth, such activity would, as Gibbons wrote, disrupt shellfish habitat, no application for approval of dredging has been made and therefore it is speculative to consider whether that step would or would not be approved. As for the contention that the DEP acted in an arbitrary manner regarding the issue of the length of the dock and failed to properly consider its discretion to waive the rule, counsel argues that the petitioners do not set out any facts showing the need for the overlength dock. Counsel offers Certifications from Dana Galbreath and DEP counsel Mr. Velzy. These

provide tidal information and details concerning the Catalina sailboat. Mr. Velzy points to the Land Title Survey by Mr. Catalano, sheet 6 of 6, which details the Catalina 22 sailboat owned by the petitioners. It has a Swing Keel Board, which in the down position has a draft of five feet. Dana Galbreath offers that the water under the floating dock is sufficient to permit the Gibbons to dock boats at low tide even without the 12.9' extension. Based upon information from the National Oceanic and Atmospheric Administration (NOAA), regarding mean low water (MLW), which is the average of low water heights observed over a period of time known as the National Tidal Datum Epoch, reflecting low tide over a period of time, the MLW for the Wading Thorofare surrounding the Gibbons dock and pier is  $-1.12$  feet or  $1.12$  feet below sea level. Mean high water (MHW) is the average of all the high water levels observed over the period of time known as the National Tidal Datum, the high tides over that period of time. The MHW for the same area is  $2.75$  feet above sea level.<sup>1</sup> The difference between these is  $3.87$  feet. Galbreath calculated the water depth based on sheet 4 of 6 of the Catalano survey and determined that at an elevation of  $-7.2$  feet below sea level ( $0.0'$ ) for the bottom of Wading Thorofare adjacent to the inland edge of the floating dock as shown on the survey, the water depth is  $6.08$  feet at MLW ( $-7.2$  minus  $-1.12$ ) and  $9.95$  feet at MHW ( $-7.2$  plus  $2.75$ ). On the inland side of the flag-shaped dock, the water depth at MLW is  $4.08$  feet ( $-5.2'$  minus  $-1.12$ ) and  $7.95$  feet ( $-5.2'$  plus  $2.75'$ ). These water depths, which reflect conditions after Superstorm Sandy, are all located on the landward side of the imaginary line drawn between the two closest adjacent docks and are thus depths located at areas that would exist without the dock extension requested by the Gibbons. MLW, or low tide water depth, occurs only twice every 24 hours. Given this data, Galbreath offers that even without the  $12.9'$  extension, the petitioners can dock boats at low tide at a water depth of  $6.08$  feet at the inland edge of the floating dock and  $4.08$  at the flag-shaped dock and the boat lift.

Further, Galbreath calculates that square footage of the new dock which the Gibbons actually built with the square footage of the docks at their property that existed before 1994, docks that could have been rebuilt pursuant to the Zane Amendment, N.J.S.A. 12:5-3(b)(1) and N.J.A.C. 7:7-2.4(d)6 and 7. According to Galbreath, the square

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<sup>1</sup> Galbreath cites these figures from <http://tidesandcurrents.noaa.gov./datumoptions.html>.

footage of the two piers approved by DEP in 1994 covered 697 square feet of shellfish habitat, whereas the square footage of the docks and piers proposed in 2017 and then actually built without authorization covers 951.56 square feet of shellfish habitat. If the dock were of the length authorized by N.J.A.C. 7L7-9.2(d)3ii, it would have covered 103.2 less square feet than what was actually constructed.

I **FIND** that the 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. Thus their dock as constructed, without DEP authorization, violates the restriction on length contained at N.J.A.C. 7:7-9.2(d)3ii. However, as the wording of that regulation states and the petitioners emphasize, the DEP does have the authority to permit a longer dock than the regulation would otherwise allow if the "Department determines that a different length dock or pier is appropriate in order to insure that the requirements of this Chapter are met." Such authority is discretionary. In exercising discretionary authority, an agency must act reasonably. An unreasonable, arbitrary or capricious exercise of discretion, either to allow or disallow something that the agency may permit within its discretion, cannot stand.

As counsel for the DEP notes, a party challenging an agency's decision regarding the exercise of discretionary authority faces a high hurdle. As the Supreme Court noted in State v. Bender, 80 N.J. 84, 90 (1979), cited as authority by the DEP, where the Court reviewed discretionary determinations by prosecutors denying defendants admission into county pretrial intervention programs, the party seeking to overturn the agency action must "clearly and convincingly establish" that the [agency's] action "was based on a patent and gross abuse of [its] discretion." But it must be remembered that Bender, and other appellate cases that may rule similarly, are matters where the agency, be it a county prosecutor exercising the Executive Branch's authority regarding criminal matters, or an Executive Branch administrative agency acting within the scope of its authority as established by statute and regulation, has issued a final administrative determination. The appellate courts are then reviewing the action of a co-equal branch of the government

and, as the Bender court noted, citing State v. Leonardis, 73 N.J. 360 (1977) (Leonardis II), “great deference should be given to a prosecutor’s determination not to consent to diversion” 73 N.J. at 381. Here, the DEP Commissioner has not yet acted on the Gibbons’ application, and a subordinate division of the DEP has decided that it should not allow the discretionary action. That determination is now being reviewed within the confines of the administrative hearing process as enacted by the Administrative Procedure Act, N.J.S.A. 52:14 B-1 et seq. and 52:14F-1 et seq. The Commissioner certainly may choose to defer to the Division’s determination, but there is no mandate directing and no court ruling requiring that the Commissioner do so. An ALJ sitting in the place of the Commissioner during a hearing under the Administrative Procedure Act, N.J.S.A. 52:14-1 et seq. and N.J.S.A. 52:14F-1 et seq. similarly need not defer to the Division’s decision. The judge and then the Commissioner must evaluate the evidence as it is and decide what the proper action is under the agency’s legal authority. Certainly, the opinion of the Division as expressed in its letter denying the permit and through its witnesses and other evidence on motions and/or at hearing must be afforded its proper weight, but deference is not commanded. Only 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. Thus, the burden on the party seeking to have the agency exercise its discretion in its final determination is simply to present sufficient evidence and argument to convince the agency head that given all the relevant considerations, that authority should be exercised in that party’s favor. The burden then is to prove by the greater weight of the credible evidence that the agency should, in the circumstances of the case, allow that which it has the discretionary authority to permit. Of course, that said, it is also true that where the regulations establish a general rule in regard to a given situation, an exemption from that rule’s general standard is not to be lightly permitted. While DEP counsel’s citation of Matter of Vineland Chem. Co., 243 N.J. Super. 285, 303 (App. Div. 1990) is to a case involving an issue that did not involve an exercise of agency discretion, but instead an exemption from the legislation, nevertheless it does suggest that as with environmental regulations involving public health legislation, so too with matters involving environmental protections that seek to protect the waters of the State and commercial interests related to the life forms therein,

the burden of persuasion for one seeking the exercise of discretion relieving one from the general rule is heavy. Thus, while deference is not owed here by the judge or Commissioner, the party must surely present a strong case as to why the general rule should not be applied. As such, without reference to deference, it may not be too much to say that the proof in favor of the exception must be significantly more than a mere preponderance.

Based upon the evidence presented by the parties in support or opposition to the cross-motions for summary decision, I **FIND** that the DEP has supported its motion with detailed data demonstrating that the depth of the water landward of the extended 12.9' is sufficient to permit mooring of the sailboat. The petitioners' motion is supported only by a bald assertion by Mr. Gibbons that at low- to mid-tide the keel hits the bottom. He offers no other details, no specific instances and more importantly, neither he nor his consultant offer any scientific data to oppose Galbreath's detailed calculations. Given the lack of any such substantive opposition, as the evidence stands, even giving the petitioners the benefit of all reasonable inferences arising from the evidence, I **CONCLUDE** that no reasonable finder of fact could determine that there exists a genuine issue of material fact concerning the need for the dock to be longer than that permitted by the regulation. This is the more so in view of the significant burden the petitioners have to demonstrate a need to diverge from the general rule established by the regulation. An application to deviate from the general rule cannot be supported by merely declaratory and conclusive statements in the face of directly relevant and detailed scientific evidence that stands unopposed by any contrary data. As such, I **CONCLUDE** that the DEP correctly determined that the additional length should be disallowed and a permit for the dock as constructed in violation of the regulation should not issue. As there is no genuine dispute of material fact that needs to be determined to resolve whether the agency's discretion should be exercised to permit this deviation, summary decision is **GRANTED** to the DEP on this issue.

It must also be said that the references to the alleged arbitrariness of the regulation and the alternative of dredging are not relevant considerations here. If the regulation itself

may be arbitrary, that is a legal conclusion that is not to be determined in this forum. Challenges to agency regulations are not the province of either the OAL or the agency itself. The process for such challenges is established and calls for jurisdiction in the Appellate Division, assuming the timeliness of the challenge. As for the dredging possibility, no application for such permission has been offered and certainly to the extent that the petitioners and their consultant offer some general opinions as to the prospect of detrimental impact of dredging on the shellfish habitat, there is no basis for considering any of this in this case as it now stands.

Although the above determination resolves the matter, it should be noted that the regulation concerning the number of boat slips allowable, N.J.A.C. 7:7-9.2(d)iii, specifies that “the dock, pier, or boat mooring shall have no more than two designated slips.” Nowhere does this regulation seek to limit the number of boats an applicant may have, so long as the applicant who receives a permit abides by the use of only the two designated moorings. Counsel for the DEP notes that a picture accompanying the application shows a sailboat docked at another site from the boat lift and floating dock which are the two locations designated in the application. He also refers to the grandchildren’s boats. While the previously noted photo and the aerial photos show “four potential moorings”, it would not be proper to assume that were the permit granted with a designation of two specific mooring sites that the permit holders would then violate their permit by using such other locations. This is so in spite of their previous constructions done without first obtaining required permits. Thus, no violation of the regulation can be found. However, given that the application fails on other grounds, denial is appropriate.

Finally, I **CONCLUDE** that given the failure of the applicants to satisfy the requirements of the Shellfish Habitat regulation, the permit is necessarily denied under N.J.A.C. 7:7-12.5(c), which makes satisfaction of N.J.A.C. 7:7-9.2 a legal prerequisite for approval under 1.2(c).

**ORDER**

For the reasons noted, the petitioners' motion for summary decision is **DENIED**. The DEP's motion for summary decision is **GRANTED** and the permit application is **DENIED**.

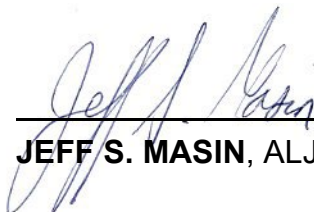
I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, PO Box 402, Trenton, New Jersey 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 8, 2021

DATE



**JEFF S. MASIN**, ALJ (Ret., on recall)

Date Received at Agency:

Date Mailed to Parties:

mph



## **EXHIBITS**

### **For petitioners:**

Certification of John Scott Abbott, Esq , with attachments as follows:

Exhibit A-Original Statement of Compliance prepared by Robert J. Catalano

Exhibit B-Certification of John Gibbons

Exhibit C-Certification of Junetta Dix

Exhibit D-Copy of N.J.S.A.12:5-3.1

### **For respondent:**

R-1 Certification of Bruce Velzy, DAG, with attachments as follows:

Exhibit A-Petitioners' Request for Adjudicatory Hearing

Exhibit B-Letter dated February 12, 2020 to John Scott Abbott, Esq. from  
Junetta N. Dix

Exhibit C-Six photographs

Exhibit D-Petitioners' Answers to Respondent's Interrogatories, dated  
February 14, 2020

Exhibit E-N.J.A.C. 7:7, Appendix E

R-2 Certification of Dana Galbreath with attachments as follows:

Exhibit A-Statement of Compliance on Rules and Policies Applicable for  
Waterfront Development Application Re: Applicant John and Jane  
Gibbons

Exhibit B-Denial of Waterfront Development Individual Permit Application  
#0103-10-0015.1 WFD170001

Exhibit C-Three aerial photographs

Exhibit D-Three aerial photographs

Exhibit E-One aerial photograph

R-3 Reply Certification of Bruce Velzy, DAG, with attachments as follows:

Exhibit F-Petitioner's Answer to Respondent's Interrogatories and material  
related to sailboat

R-4 Reply Certification of Dana Galbreath with attachment

Exhibit F-Land Title Survey prepared by Robert J. Catalano