

DECISION AND FINDINGS
OF THE SECRETARY OF COMMERCE
IN THE
CONSISTENCY APPEAL OF
JOHN K. DELYSER
FROM AN
OBJECTION BY NEW YORK STATE DEPARTMENT OF STATE
February 26, 1988

SYNOPSIS OF DECISION

John K. DeLyser (Appellant) owns waterfront property on LeRoy Island in Sodus Bay, Lake Ontario, Huron, New York. In February, 1986, the Appellant applied for and received from the Army Corps of Engineers (Corps) a permit to construct a dock and boathouse on piles in Sodus Bay. The permit contained several conditions, including a prohibition on construction of boathouses with living quarters. Construction began in April and continued into the summer. In July, the Corps became aware that the Appellant was constructing living quarters in the boathouse. Consequently, the Corps ordered Mr. DeLyser to stop all construction. The Corps then allowed the Appellant to submit an application for an after-the-fact permit, which would authorize inclusion of the residential unit in the dock and boathouse project approved earlier.

On August 18, 1986, Mr. DeLyser submitted to the Corps a consistency certification for the proposed activity for the State of New York's (State or New York) review under section 307(c)(3)(A) of the Coastal Zone Management Act of 1972, as amended (CZMA), 16 U.S.C. § 1456(c)(3)(A). On December 8, 1986, the State objected to Mr. DeLyser's consistency certification for his project on the ground that the inclusion of the residence in the project violates the State Coastal Management Program's policy of giving priority in the coastal zone to water dependent uses. As an alternative, the State suggested that Mr. DeLyser construct the residence on the upland portion of his property. Under CZMA section 307(c)(3)(A) and 15 C.F.R. section 930.131 (1987), the State's consistency objection precludes Federal agencies from issuing any permit or license necessary for the Appellant's proposed activity to proceed, unless the Secretary of Commerce finds that the objected-to activity may be Federally approved because it is consistent with the objectives of the CZMA (Ground I) or is otherwise necessary in the interest of national security (Ground II). If the requirements of either Ground I or Ground II are met, the Secretary must sustain the appeal.

On January 8, 1987, in accordance with CZMA section 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H (1987), the Appellant, pleading Ground I, filed with the Secretary of Commerce a notice of appeal from the State's objection to Mr. DeLyser's consistency certification for the residential portion of his project. The Secretary, upon consideration of the information submitted by Mr. DeLyser, the State, Federal agencies and members of the public, as well as other information in the administrative

record of the appeal, made the following findings pursuant to 15 C.F.R. section 930.121 (1987):

Ground I

The residential component of Mr. DeLyser's project does not further the objectives or purposes of the CZMA.
(Pp. 4-8)

Conclusion

The Secretary will not override the State of New York's objection to Mr. DeLyser's consistency certification.
(P. 8)

DECISION

I. Factual Background

John K. DeLyser (Appellant) owns waterfront property on LeRoy Island in Sodus Bay, Lake Ontario, Huron; New York. In February, 1986, the Appellant applied for and received from the Army Corps of Engineers (Corps) a permit¹ to construct a 36' x 80' dock and boathouse on piles in Sodus Bay. The permit authorized "only [the construction of the dock and boathouse structures] ... indicated on the ... drawings [attached to the application]." State of New York's (State or New York) Response to Appeal at Exhibit C, p. 1. The permit also contained several conditions, including a prohibition on "the construction of boathouses which include living quarters or sanitary facilities" Id. at 3.

Construction began in April and continued into the summer. In July, the Corps became aware that the Appellant was constructing living quarters in the boathouse. Consequently, the Corps ordered Mr. DeLyser to "cease work on all activities relative to the boathouse until a final determination can be made as to whether it can be authorized by a Department of the Army permit." State's Response to Appeal at Exhibit E. The Corps, pursuant to its regulations, allowed the Appellant to submit an application for an after-the-fact permit, which would authorize inclusion of the residential unit in the dock and boathouse project approved earlier. Letter from Col. Daniel R. Clark, U.S. Army Corps of Engineers to Sydney Minnerly, Attorney-Adviser, National Oceanic and Atmospheric Administration (NOAA), May 29, 1987. In July, Mr. DeLyser submitted to the Corps a revised application, which included drawings and a description of the living quarters. According to the drawings attached to the application, the living quarters consist of a 25' x 32' two-story house on the island end of the dock and boathouse. State's Response to Appeal at Exhibit F, p. 3.

On August 18, 1986, Mr. DeLyser submitted to the Corps a consistency certification for the proposed activity for the State's review under section 307(c)(3)(A) of the Coastal Zone Management Act of 1972, as amended (CZMA), 16 U.S.C. § 1456

¹ The Corps permit is required by § 10 of the River and Harbor Act of 1899, 33 U.S.C. § 403; and § 404 of the Clean Water Act, 33 U.S.C. § 1344.

(c)(3)(A).² The certification states that "[t]he proposed activity complies with New York State's approved Coastal Management Program, or with the applicable approved local waterfront revitalization program, and will be conducted in a manner consistent with such program." State's Response to Appeal at Exhibit H.

On December 8, 1986, New York objected to the Appellant's consistency certification for his proposed project on the ground that inclusion of the residence in the project violates the State Coastal Management Program's (CMP) policy of "[f]acilitat[ing] the siting of water dependent uses and facilities on or adjacent to coastal waters." *Id.* at Exhibit I. The State explained further that "the construction of a residence removes a waterfront space that is suitable for water dependent activities and replaces it with a permanent structure that is clearly not water dependent." *Id.* As an alternative, the State suggested that Mr. DeLyser construct the residence on the upland portion of his property. In addition to explaining the basis of its objection, the State also notified Mr. DeLyser of his right to appeal the State's decision to this Department as provided under CZMA section 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H (1987).

Under CZMA section 307(c)(3)(A) and 15 C.F.R. section 930.131 (1987), the State's consistency objection precludes Federal agencies from issuing any permit or license necessary for Mr. DeLyser's proposed activity to proceed unless I determine that the activity may be Federally approved notwithstanding the objection because the activity is consistent with the objectives or purposes of the CZMA, or is necessary in the interest of national security.

II. Appeal to the Secretary of Commerce

On January 8, 1987, in accordance with CZMA section 307(c)(3)(A) and 15 C.F.R. Part 930, Subpart H (1987), counsel for the Appellant filed with this Department a notice of appeal from

² The State did not review the first permit application because the original project fell within the scope of a general Corps permit to which the State had granted blanket consistency concurrence for all projects within the permit's scope. The residential component of the after-the-fact permit application exceeded the scope of the general permit, and, therefore, triggered an individual consistency review. State's Response to Appeal at 5-6.

New York's objection to the Appellant's consistency certification for the proposed project. The parties to the appeal are Mr. DeLyser and the New York Department of State. I have retained the authority to decide this appeal under Department Organization Order 25-5A, section 3.01(w).

Public notices of receipt of the appeal were published in the Federal Register, 52 Fed. Reg. 9,682-83 (1987). When the Appellant perfected the appeal by filing supporting data and information pursuant to 15 C.F.R. section 930.125 (1987), public comments on the issues germane to my decision in the appeal were solicited by way of notices in the Federal Register, 52 Fed. Reg. 15,743-44 (1987)(request for comments); 52 Fed. Reg. 18,593 (1987)(correction to request for comments); and the Wayne County Star (Apr. 30, May 7, May 14, 1987). On May 12, 1987, the State filed a response to the appeal. On May 14, 1987, the Department solicited the views of five Federal agencies³ regarding the four regulatory criteria which the project must meet for me to find it "consistent with the objectives or purposes" of the CZMA. The criteria appear at 15 C.F.R. section 930.121 (1987), and are discussed below.⁴ All agencies responded. In addition, twenty-nine persons wrote in support of Mr. DeLyser's project, and three state and local agencies voiced their opposition to it.

During the course of the appeal, the Appellant and the State filed additional materials, including a request for a public hearing filed by the Appellant on January 8, 1987. The Department denied this request on April 6, 1987, because it believed that public and Federal agency views received during the prescribed comment periods would provide sufficient information upon which I could decide the appeal. All comments and information received by the Department during the course of the appeal have been included in the administrative record.⁵

³ The Army Corps of Engineers, the Coast Guard, the Department of the Interior, the Environmental Protection Agency and the National Marine Fisheries Service.

⁴ See infra p. 4.

⁵ It should be noted that, whereas all materials have been incorporated into the record, they are considered only as they are relevant to the statutory grounds for deciding consistency appeals.

I find that this appeal is ripe for consideration and that the parties have complied with Commerce's regulations governing the conduct of this appeal, 15 C.F.R. Part 930, Subparts D, H (1987).

III. Grounds for Sustaining an Appeal

Section 307(c)(3)(A) of the CZMA provides that Federal licenses or permits required for the Appellant's proposed activity may not be granted until either the State concurs in the consistency of such activity with its Federally-approved coastal zone management program, or I find that the activities are (1) consistent with the objectives of the CZMA or (2) otherwise necessary in the interest of national security. See also 15 C.F.R. § 930.130(a)(1987). The Appellant has pled only the first ground.

To make a finding on this ground, I must determine that the activity satisfies all four of the elements specified in 15 C.F.R. section 930.121 (1987). These requirements are:

1. The activity furthers one or more of the competing national objectives or purposes contained in sections 302 and 303 of the Act. 15 C.F.R. § 930.121(a)(1987).
2. When performed separately or when its cumulative effects are considered, it will not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh its contribution to the national interest. 15 C.F.R. § 930.121(b)(1987).
3. The activity will not violate any of the requirements of the Clean Air Act, as amended, or the Federal Water Pollution Control Act, as amended. 15 C.F.R. § 930.121(c)(1987).
4. There is no reasonable alternative available (e.g., location[,] design, etc.) which would permit the activity to be conducted in a manner consistent with the [state's coastal zone] management program. 15 C.F.R. § 930.121(c) (1987).

IV. Element 1 -- Furthering the Objectives or Purposes of the CZMA

The CZMA identifies a number of objectives and purposes which may be stated generally as follows:

1. To preserve, protect and where possible to restore or enhance the resources of the coastal zone. § 302(a), (b), (c), (d), (e), (f), (g), (i); § 303(1);
2. To develop the resources of the coastal zone. § 302(a)(b), (i); § 303(1); and
3. To encourage and assist the states to exercise their full authority over the lands and waters in the coastal zone, giving consideration to the need to protect as well as to develop coastal resources, in recognition by the Congress that state action is essential to more effective protection and use of the resources of the coastal zone. § 302(h), (i); § 303(2).

More specifically, in the context of this appeal, the CZMA encourages "priority consideration ... to coastal-dependent uses ... and the location, to the maximum extent practicable, of new commercial and industrial developments in or adjacent to areas where such development already exists." § 303(2)(C). Relying on this goal and the Act's policy of assisting "in the redevelopment of deteriorating waterfronts and ports," § 303(2)(E), Mr. DeLyser argues that his house "provides revitalization of under-utilized waterfronts, and it also facilitates water dependant [sic] uses." Appellant's Opening Brief at 1. In arriving at this conclusion, the Appellant relies on an engineering report attached as an exhibit to his brief. Neither the Appellant nor the engineering report, however, offer substantive legal analysis to support their conclusory statements.

New York disputes the Appellant's claims regarding both policies:

With regard to revitalization of underutilized waterfronts, [the] Appellant misses the point. Revitalization requires some sort of development which has fallen into a state of decay or nonuse. This is not an issue in this appeal as the coastal waters upon which Appellant's property fronts have until now been undeveloped.

With regard to facilitating water dependent uses, Appellant's project does not further the objectives or purposes of Section 302 and 303 of the CZMA since a residence, while development, is not the type of development Congress seeks to achieve as a national objective

State's Response to Appeal at 10-11.

In addition to the parties' arguments, the record contains relevant views of three of the five commenting Federal agencies.⁶ All three agencies agree with the State's assertion that the Appellant's project does not further the CZMA's objectives or purposes.

The National Marine Fisheries Services (NMFS) states:

Section 303 of the Coastal Zone Management Act states that priority consideration should be given to coastal dependent use and transportation. Section 302 emphasizes a conservation/preservation approach to coastal habitats over developments that are not water dependent. This project does not appear to be in the interest of furthering national objectives.

Memorandum from William E. Evans, Assistant Administrator for Fisheries, NOAA, to Sydney Minnerly, Attorney-Adviser, NOAA, July 14, 1987. According to the Environmental Protection Agency (EPA), "Section 303 declares Congressional policy to preserve, protect, develop and restore the coastal zone, and to encourage and assist the states in their coastal zone management programs. We do not believe this project furthers any of these national objectives or purposes." Letter from Jennifer Joy Wilson, Assistant Administrator for External Affairs, EPA, to Anthony J. Calio, Administrator, NOAA, July 6, 1987. Similarly, the Department of the Interior (DOI) notes that "the [DOI Fish and Wildlife] Service agrees with the New York Department of State that Mr. DeLyser's project is not consistent with the objectives and purposes of the Coastal Zone Management Act." Letter from James C. Gritman, Acting Director, DOI Fish and Wildlife Service, to Sydney Minnerly, Attorney-Adviser, NOAA, June 24, 1987.

Based upon an analysis of the Act and its history, I agree with the State's and agencies' position. Previous CZMA appeal decisions have stated that "[b]ecause Congress has broadly defined the national interest in coastal zone management to include both protection and development of coastal resources, this element will 'normally' be found to be satisfied on appeal." See, e.g., Findings and Decision in the Matter of

⁶ See supra note 3.

the Appeal by Exxon Company, U.S.A. (Feb. 18, 1984), citing 42 Fed. Reg. 43,594 (1977)(preamble to proposed rule regarding Federal consistency with approved coastal management programs). This case, however, is distinguishable because the residential component of the Appellant's project does not advance any of the CZMA's goals.

New York correctly states that, for the purposes of the CZMA, revitalization of under-used waterfronts relates only to those which have been developed previously and then decayed. The language of the statute, "redevelopment of deteriorating urban waterfronts and ports" § 303(2)(E)(emphasis added), supports this point.

Further, the legislative history on this point confirms the conclusion that this policy applies only to pre-existing development. In 1980, while considering a proposed amendment to the CZMA, the House Committee on Merchant Marine and Fisheries discussed the need for legislation to reaffirm the original Act and clarify national coastal management policies. Regarding decaying waterfronts, it stated:

At the same time there is a concomitant recognition that a carefully selected portion of our coast must be devoted to commerce and industry. The lifeline of our foreign trade, and a substantial portion of our interstate trade, is the system of ports, docking facilities, and navigational channels located in the coastal zone. Indeed, most of our major urban areas developed on, or in close proximity to, a water mode of transportation. Unfortunately, the deterioration [sic] of many of our cities includes the underutilization of urban waterfronts and port areas, thus leading to the slow destruction of one of the key characteristics and cultural features of urban living.

H. R. Rep. No. 96-1012, 96th Cong., 2d Sess. 32, reprinted in 1980 U.S. Code Cong. & Admin. News 4380-81 (emphasis added). The national policies enacted by the amendment discussed above include current section 303(2)(E) quoted above. Based upon the foregoing history, it is indisputable that under-used waterfronts do not include those that were undeveloped previously. I find that Mr. DeLyser's project does not further the Act's policy of redeveloping deteriorating waterfronts.

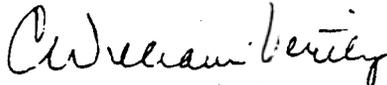
New York's position regarding coastal-dependent uses is also correct. The Act declares that it is a national policy to accord "priority consideration ... to coastal-dependent uses." Legislative history states that "[t]his policy underscores the importance of priority consideration to coastal dependent or water dependent uses in the coastal zone and the need where development already exists in order to protect coastal resources." H. R. Rep. No. 96-1012, 96th Cong., 2d Sess. 40, reprinted in 1980 U.S. Code Cong. & Admin. News 4362, 4388.

Mr. DeLyser's conclusory statement notwithstanding, the residential component of his project is, by no stretch of the imagination, coastal-dependent. Based upon the plain meaning of the statute and the legislative history cited above, I find that the Appellant's house does not further the Act's objectives or purposes in terms of giving priority to coastal dependent uses.

Not only does the residential component of the project not further the two statutory objectives cited by the Appellant, it does not further any other of the Act's objectives or purposes. Nowhere in the CZMA or its history does there appear an express or implied goal of encouraging residential construction in the coastal zone. This silence certainly does not mean that such construction is prohibited; rather, it means that such activity is not isolated as a pursuit to be fostered by the legislation. Given this silence, it cannot be said that residential construction contributes affirmatively to the Act's goals. Therefore, I find that the residential component of Mr. DeLyser's project does not further the objectives or purposes of the CZMA.

Conclusion

Because the Appellant must satisfy all four elements of the regulation in order for me to sustain his appeal, failure to satisfy any one element precludes my finding that the Appellant's project is "consistent with the objectives or purposes of the [CZMA]." Having found that the Appellant has failed to satisfy the first element of the regulation, it is unnecessary to examine the other three elements. Therefore, I will not override the State's objection to Mr. DeLyser's consistency certification.


Secretary of Commerce