June 21, 2022

(Via Email: lcaravano@beachhaven-nj.gov)

Beach Haven Land Use Planning Board
300 Engleside Avenue
Beach Haven, NJ 08008
Attn: Lauren Caravano, Board Secretary

Re: Patrick and Margaret Damiani, Polly’s Dock
Application: 2022-11
Block 141, Lot(s) 3 & 3.01
112 N. West Avenue
Our File No.: 15798-4396

Dear Ms. Caravano,

As a follow-up to the above referenced Patrick and Margaret Damiani hearing of Monday, June 6, 2022, carried until Tuesday, July 5, 2022, please accept the following memorandum of law. This document is submitted by applicant as to the discussed coastal water jurisdiction issues at hand.

**New Jersey Public Waterways**

The law mandates that decisions regarding the use of public waterways are within the jurisdiction of the Department of Environmental Protection (DEP) and the U.S. Army Corps of Engineers (USACE). N.J.A.C. 7:7. The doctrine of preemption provides “that a municipality cannot act contrary to the state.” Tumino v. Long Beach Tp., 319 N.J. Super. 514, 516, 725 A.2d 1173, 1174 (Super. Ct. App. Div. 1999). Thus, local government land use boards are preempted from land use regulation of public waterways.

**Coastal Area Facility Review Act (CAFRA)**

The DEP’s Division of Land Use Regulation regulates the use and development of coastal resources through the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-
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   The Coastal Zone Management Rules, “are enforceable policies of the New Jersey Coastal Management Program as approved under the Federal Coastal Zone Management Act (16 U.S.C. §§ 1451 et seq.).” N.J.A.C. 7:7-1.1. One of the Coastal Zone Management Program’s goals is to preserve “[m]eaningful public access to and use of tidal waterways and their shores.” Id.


   Case At Hand- DEP/ USACE

   Both the DEP and USACE have approved and granted permission to our client to expand its marina area in accordance with the approved NJDEP Application. There have not been any restrictions placed upon Polly’s Docks by the NJDEP or the USACE.

   Objector, Burris, argues that our client’s use of their North dock area would interfere with his business. Respectfully, the use of public water cannot be conditioned by objector. The Public Trust doctrine embodies the concept that coastal waters are for the common use of the public and are owned by the state. As our Supreme Court has recognized, “Property is held by the state, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental and cannot be alienated….” Ill. C. R. Co. v. Illinois, 146 U.S. 387, 433, 13 S. Ct. 110, 110 (1892). Public trust easements have been held to “include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state…” Marks v. Whitney, 6 Cal. 3d 251, 256, 98 Cal. Rptr. 790, 793, 491 P.2d 374, 377 (1971).
Public/Transient Waterway Access

Additionally, N.J.A.C. section 7:7-16.9 makes clear that the public has a right under the act to utilize public waterways, including via recreational boating. The section provides “[p]ublic access to the waterfront is the ability of the public to pass physically and visually to, from, and along tidal waterways and their shores and to use such shores, waterfronts and waters for activities such as… boating.”

Moreover, in 1999, the New Jersey Superior Court Appellate Division held in Tumino v. Longbeach Tp, supra, that “regulations governing coastal zone management promulgated by the New Jersey Department of Environmental Protection (DEP) pursuant to the Waterfront Development Act, N.J.S.A. 12:5-1 to -11, preempted a local ordinance governing the placement and length of a dock.” Tumino, 319 N.J. Super. at 516. In that case, similar to ours, surrounding property owners objected to the expansion of the dock and the local planning board denied the plaintiffs application for modifications to the dock. The court stated that the planning board decision was preempted by the DEP’s decision to allow the expansion, reasoning that “[w]hile the policies were intended to avoid arbitrary, unrestrained decision making by the DEP, limited flexibility was intentionally built into the rules to incorporate ‘professional judgment by DEP officials’ in the decision-making process.” Tumino, 319 N.J. Super. at 524. Additionally, the Tumino court pointed out that an analysis of the legislative history behind the Rules on Coastal Zone Management reveals an “unmistakable legislative intention to regulate virtually every aspect of use of coastal resources and development.” Tumino, 319 N.J. Super. at 527.

Given the pre-emptive authority of the NJDEP and USACE to permit and dictate the use of the public waterway in question and their express approval of our client’s plan, the Beach Haven Board is respectively preempted from maintaining conditions upon applicant’s dock areas.

Thank you for your attention to this matter.

Very truly yours,

/s/ Kenneth A. Porro, Esq.

KENNETH A. PORRO
For the Firm

KAP:ml
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