

**BEFORE THE BOARD OF ADJUSTMENT OF
THE TOWN OF FENWICK ISLAND**

IN RE:

**APPEAL OF DECISION OF
BUILDING OFFICIAL
BY KINGDOM TRUST CO FBO
DWIGHT HURST IRA**

DECISION

The Board of Adjustment of the Town of Fenwick Island (the “Board of Adjustment”) held a hearing on Wednesday, June 29, 2022, at 10:00 at the Town of Fenwick Island Town Hall, 800 Coastal Highway, Fenwick Island, DE 19944, to hear an appeal of the decision of the Building Official by Applicant Kingdom Trust CO FBO Dwight Hurst IRA (the “Applicant”). Present for the Board of Adjustment hearing were Chairman Marlene Quinn, and members Lizbeth Lear, Paul Wilson, and Edward Bishop, and Nicholas G. Kondraschow, Esq., counsel for the Board of Adjustment. Also present were Patricia Schuchman, Town Manager; Erin Ellinger, Building Official; Raelene Menominee, Town Administrator; and Luke Mette, Esq., the Town Solicitor. Dwight Hurst of the Applicant and Jonathan Staehle of Sussex Marine Construction Inc. (the “Contractor”) appeared on behalf of the Applicant at the hearing. The public hearing was attended by members of the public who were interested in the appeal.

FINDINGS OF FACT

The Applicant is the owner of residential property located at 501 Glenn Avenue, Fenwick Island, DE 19944, within the corporate limits of the Town of Fenwick Island, Sussex County, Delaware (the “Town”). The property is also identified as Sussex County Tax Map and Parcel No. 1-34 23.16 157.00 Lot 248 (the “Property”). The Property is located on the westerly side of Coastal Highway (State Route 1). To the east of the Property is a lagoon and/or canal 60 feet or less in width. The Property is improved by a residence and bulkhead.

On or about August 17, 2021, the Applicant and Contractor submitted a Request for Authorization Form for the State of Delaware Statewide Activity Approval (“SAA”) for Construction in Tidal Artificial Lagoon Systems to the State of Delaware Department of Natural Resources and Environmental Control (“DNREC”). In “Structure Type,” the Applicant listed “Bulkhead 40’x1’[Repair],” “Dock 22’x9’→ 0’ (Triangle) [New],” and “Davit (on Bulkhead) [New].” On or about February 24, 2022, the Applicant received an SAA from DNREC. On February 25, 2022, the Applicant filed an Application for Building Permit with the Town to “Repair and Replace 40’ Bulkhead” (the “Application”). The Application did not refer to a dock. On February 25, 2022, the Building Official issued preliminary clearance for “Repair & Replace 40’ Bulkhead.” On February 28, 2022, the Applicant received a building permit from Sussex County with Scope of Work “Repair & Replace 40’ Bulkhead” and “Bulkhead 40 X 1

Dock 22 X 9 Triangle.” On March 1, 2022, the Town issued a building permit for “Repair & Replace 40’ Bulkhead.”

On or about March 8, 2022, the Town’s Public Works Department notified the Town that the Applicant was building a dock in violation of Chapter 160-8B(1) of the Town of Fenwick Island Code (the “Town Code”). Under Chapter 160-8B(1), docks are not permitted in lagoons or canals 60 feet or less in width. At the time, the dock was partially built. On March 8, 2022, the Town Manager issued a Stop Work Order to stop all work on the dock (the “Stop Work Order”) to the Contractor on site and thereafter to the Applicant. After receiving the Stop Work Order, the Applicant continued working on the dock and completed it on or about May 27, 2022.

On March 31, 2022, Mr. Hurst sent a letter to the Town stating that “[t]his letter shall serve as my official appeal to the Stop Work Order issued on the dock being installed at 501 Glenn Ave. on March 8, 2022.” Prior to the hearing, 10 neighbors of 501 Glenn Avenue submitted a letter to the Town in opposition to the dock. No member of the public spoke in favor of the dock at the hearing.

APPEAL OF DECISION OF THE BUILDING OFFICIAL

Chapter 160-8B(1) of the Code states:

- B. Regulations for structures such as but not limited to docks, piers, wharves, boat ramps, steps, boat houses, gazebos, piling and navigational aids in lagoons and canals.
 - (1) In order to provide clear, safe and unobstructed operation of watercraft in lagoons or canals 60 feet or less in width within the corporate limits of Fenwick Island, Delaware, no structure such as but not limited to docks, piers, wharves, boat ramps, steps, boat houses, gazebos, piling and navigational aids shall be constructed which project beyond the bulkhead line of such lagoon or canal. Davits shall be permitted, provided that they shall not project over the waterways more than 12 feet from the bulkhead and, when not in use, they shall be retracted to a line at least four feet parallel to the bulkhead. This installation shall require a building permit.

Chapter 160-8B(4)(a) of the Code states:

- (4) When application is made for a building permit for the construction of structures such as but not limited to bulkheads, docks, piers, wharves, boat ramps, steps, boat houses, gazebos, piling and navigational aids, the procedure shall be as follows:
 - (a) Prior to submitting an application to the State of Delaware, Department of Natural Resources and Environmental Control and the United States Army Corps of Engineers, the data required by Chapter 61, Building

Construction, § 61-3, and copies of all material and data required for application for a permit from the State of Delaware, Department of Natural Resources and Environmental Control and the United States Army Corps of Engineers shall be submitted to the Town of Fenwick Island for preliminary review and clearance as to compliance with Town ordinances. The submission of applications to the State of Delaware, Department of Natural Resources and Environmental Control and the United States Army Corps of Engineers shall be accompanied by a letter from the Town of Fenwick Island stating that the project has preliminary clearance from the Town of Fenwick Island and complies with its regulations. Such preliminary clearance shall not be construed as permission to commence any work on the project.

The following exhibits were submitted to the Board of Adjustment:

- Exhibit 1 – Legal notice of hearing
- Exhibit 2 – Names and addresses of neighbors of 501 Glenn Avenue
- Exhibit 3 – Chapter 160-8B
- Exhibit 4 – Letter to the Board of Adjustment regarding 501 Glenn Avenue from Patricia Schuchman, Town Manager, dated June 1, 2022
- Exhibit 5 – Letter to Patricia Schuchman, Town Manager, regarding appeal to the Stop Work Order from Dwight Hurst, dated March 31, 2022
- Exhibit 6 – Preliminary Clearance from the Office of the Building Official, dated February 25, 2022
- Exhibit 7 – Application and Building Permit
- Exhibit 8 – Request for Authorization form for the State of Delaware Statewide Activity Approval for Construction in Tidal Artificial Lagoon Systems and Statewide Activity Approval
- Exhibit 9 – Sussex County Building Permit, dated February 28, 2022
- Exhibit 10 – Picture
- Exhibit 11 – Picture, dated March 8, 2022
- Exhibit 12 – Picture, dated May 30, 2022
- Exhibit 13 – Picture, dated May 30, 2022
- Exhibit 14 – Letter from 10 neighbors of 501 Glenn Avenue in opposition to the dock

Erin Ellinger, Building Official, stated that the Town did not issue a building permit to the Applicant to build a dock. She stated that the lagoon or canal where the dock is located is less than 60 feet wide and that a dock is not permitted at that location by the Town Code. She further stated that the preliminary clearance and the building permit was to repair and replace 40' bulkhead and that neither referred to a dock. Ms. Ellinger finally stated that the dock at the Property violates the Town Code.

Patricia Schuchman, Town Manager, stated that the lagoon or canal where the dock is located is less than 60 feet wide. She stated that the Town did not issue a building permit to the Applicant to build a dock. She stated that the Town does not have the authority to issue a

building permit in violation of the Town Code. She stated that the Town Code is publicly available online at the Town's website and elsewhere and at the Town. Ms. Schuchman further stated that the Town issued a Stop Work Order to the Applicant for violation of the Town Code and for the lack of a building permit for a dock, and that after issuing the Stop Work Order to the Applicant, the Applicant continued to work on and completed the dock.

According to Mr. Hurst, the alleged failure of the Town to include the dock in the preliminary clearance and building permit was the Town's mistake. Mr. Hurst acknowledged that the lagoon or canal where the dock is located is less than 60 feet wide. Mr. Hurst acknowledged that the Applicant and Contractor had submitted a Request for Authorization Form for SAA to DNREC on August 17, 2021, prior to submitting to the Town for preliminary clearance. Mr. Hurst acknowledged that the SAA stated: "The issuance of this permit does not constitute approval for any activities that may be required by any other local, state or federal government agency." Mr. Hurst argued that the materials submitted to DNREC were also submitted to the Town and that the Applicant had received a building permit from Sussex County with Scope of Work "Repair & Replace 40' Bulkhead" and "Bulkhead 40 X 1 Dock 22 X 9 Triangle." Mr. Hurst also acknowledged receiving the Stop Work Order on March 8, 2022. Mr. Hurst stated that he did not read the Town Code until after receiving the Stop Work Order. Mr. Hurst acknowledged continuing to work on and completing the dock after receiving the Stop Work Order. Mr. Hurst also acknowledged using the dock after receiving the Stop Work Order, including to dock his boat.

Mr. Staehle also acknowledged that the Applicant and Contractor had submitted a Request for Authorization Form for SAA to DNREC on August 17, 2021, prior to submitting to the Town for preliminary clearance. With respect to Town Code's requirement to submit to the Town for preliminary clearance first, Mr. Staehle stated that the Town is the only town that requires that and that he had never done that before.

Greg Nowak, a neighbor of 501 Glenn Avenue read the letter from 10 neighbors to the Town in opposition to the dock and stated that the dock was a violation of the Town Code and a safety hazard. No members of the public spoke in favor of the dock.

According to the Town, the Building Official and/or Town Manager does not have the authority to issue a building permit for a dock, the Town did not issue a building permit for a dock and the dock violates Chapter 160-8B(1) of the Town Code. The Town also argued that the Applicant and Contractor did not follow the procedure set forth in Chapter 160B(4)(a), which requires that the Applicant submit to the Town for preliminary clearance first and then submit the Town's preliminary clearance to DNREC. The Town argued that if the Applicant had followed the procedure in the Town Code, it might not be in the position it is in.