
IN THE MATTER OF P.T. JIBSAIL
LIMITED PARTNERSHIP
TIDELANDS LICENSE NUMBER
1515-06-0012.1 TDI 190001

SUPREME COURT OF NEW
JERSEY

SUPREME COURT
Docket No.:

SUPERIOR COURT OF NEW
JERSEY
APPELLATE DIVISION
DOCKET NO.: A-699-22

Appellate Division Judges:
Hon. Jessica R. Mayer, J.A.D.
Hon. Lorraine Augostini, J.A.D.
Hon. Mary Gibbons Whipple, J.A.D.

Civil Action

On Appeal from a Final Agency
Decision of the New Jersey
Department of Environmental
Protection

PETITION FOR CERTIFICATION ON BEHALF OF APPELLANT-
PETITIONER JANINE MORRIS TRUST

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STATEMENT OF THE MATTER INVOLVED

Tidelands are “all lands under tidewater below high-water mark.” In re Tideland’s License 96-0114-T, 326 N.J. Super. 209, 212 (App. Div. 1999). The State of New Jersey owns all tidelands in the State’s territory and regulates, through the Tideland Resource Council (“TRC”), the issuance of grants, leases, and licenses to permit the use of, and building on, such environmentally important lands. Ibid. The Tidelands Act, N.J.S.A. 12:3-1 to 12:3-71, outlines the authority and duties of the TRC.

A fundamental duty of the TRC is to establish around or in front of all islands situated in the tidal waters of the State, exterior lines in said waters, beyond which no pier, wharf, bulkhead, erection, or permanent obstruction of any kind shall be made or maintained. See N.J.S.A. 12:3-19. Also known as a pierhead line, the pierhead line is the legal boundary beyond which no structures of any kind may be built. New Jersey v. Delaware, 552 U.S. 597, 642 (2008).

N.J.S.A. 12:3-19 clearly establishes the procedure that the TRC must follow in fixing the pierhead line as follows:

The Tidelands Resource Council, with the approval of the Commissioner of the Environmental Protection and after consultation with the Army Corps of Engineers, shall, from time to time, fix and establish, around or in front of all islands, reefs and shoals situate in the tidal waters of this State, exterior lines in said waters, beyond which no pier, wharf, bulkhead, erection or permanent obstruction of any kind shall be made or

maintained... when the council shall have so fixed and established said lines after consultation as aforesaid, it shall file a survey and map thereof in the Office of the Secretary of State, showing the lines for piers and solid filling so fixed and established.

N.J.S.A. 12:3-19 (emphasis added).

The reason for requiring a fixed and established outward line beyond which no permanent obstruction of any kind can be made or maintained is clear. Without a uniform system applying to all riparian lands around an island, the result would be an ad hoc fixing of the line for each grant, lease, or license that could impede an adjacent riparian owner's fundamental right to navigation. This situation is exactly what happened in this matter. The Pierhead line as established by survey was reflected on the Borough Tax map. [Aa361.] It is located 100 feet from the bulkhead line. The TRC disregarded this line and permitted a dock well beyond this line at from the bulkhead.

Appellant-Petitioner, Janine Morris Trust ("Appellant" or "Trust"), brings this petition for certification after the Appellate Division affirmed the final agency decision of the TRC, an arm of the New Jersey Department of Environmental Protection ("NJDEP"), permitting the modification of a tidelands license granted to Respondent, P.T. Jibsail Family Limited Partnership ("Jibsail") on May 8, 2024. [SCa59-SCa82.]¹ The initial tidelands license,

¹ "SCa" refers to the pages in Appellant's Supreme Court Appendix.

issued to Jibsail on March 8, 2018, allowed Jibsail to occupy sufficient tidelands to construct a 168-foot dock extension, resulting in an approximately 300-foot-long dog-legged dock protruding into Barnegat Bay and crossing in front of Appellant's existing approximately 150-foot-long dock. [SCa60.] The 2022 tidelands license modification allowed for a 1.7-foot error in the location of the dock extension as constructed and the boundaries of the license as initially approved. See id. Appellant argued below that the 2017 license and the 2022 modification should have been vacated in light of the clear legislative mandate prohibiting the construction of any permanent obstruction of any kind beyond the pierhead line.

Jibsail's property is located at 83 Pershing Boulevard, Lavallette, West Point Island, New Jersey ("Jibsail Property"). [Aa57-Aa153.]² Appellant owns the property at 85 Pershing Boulevard, Lavallette, West Point Island, New Jersey, which is immediately adjacent to the Jibsail Property. [Aa419-Aa421.] On May 19, 2017, the NJDEP issued a Waterfront Development ("WFD") individual permit No. 1515-06-0012.1 to Jibsail for a 167.3-foot dock extension and 2 open-type boat lifts. [Aa159-Aa163.] The dock extension was constructed in the Spring of 2018. [Aa404; Aa406.] On December 12, 2017, the TRC issued a ten-year Tidelands license to Jibsail for the dock extension. [Aa183-Aa195.]

² "Aa" refers to the pages in Appellant's Appellate Appendix.

In 2017 during the WFD permitting process, Appellant, and other neighbors, submitted public comment to the NJDEP opposing the installation of the extended dock at the Jibsail Property. [Aa422.] However, those comments were misplaced by the Department. [SCa6.] Appellant subsequently discovered the extension after it had already been approved and constructed. [SCa6].

The Jibsail extended dock is almost twice as long as other docks in the area. [Aa404; Aa405; Aa422.] The Jibsail extended dock is also angled in a manner that interferes with Appellant's use and enjoyment of Appellant's dock and results in significant safety and navigational issues. These issues are evident based on a simple review of photographs and other documentary evidence in the record. [Aa404; Aa405; Aa407; Aa443; Aa533-Aa537; Aa539; Aa545].

As noted above, Jibsail's dock was not constructed in accordance with its WFD permit and tidelands license. As such, Jibsail was required to obtain a WFD permit modification and a modified tidelands license. On March 4, 2020, the TRC held a hearing on Jibsail's modified tidelands license application. Janine Morris is one of the trustees of the Appellant. [SCa5.] Ms. Morris testified to the increased navigational and safety hazards that now exist because of Jibsail's extended dock. [SCa7.] John Morris testified that his ability to approach Appellant's dock is now severely compromised and forces him to take unsafe measures in order to reach and dock on Appellant's dock. [SCa14.] Other

members of the public also noted safety concerns and impediments to the public caused by Jibsail's extended dock. [SCa18-SCa20.]

After the hearing, the TRC reserved decision and requested written briefs on the issues raised. [SCa20.] In addition, the TRC requested that the New Jersey Office of Attorney General provide an opinion on the issues raised during the hearing. [SCa20.] On April 20, 2020, Appellant filed its post-hearing brief and exhibits. [Aa297-Aa299.] On April 23, 2020, Jibsail filed its post-hearing brief. [Aa300-Aa302.] On May 1, 2020, Appellant filed its supplemental post-hearing brief. [Aa303-Aa308.] The exhibits that were introduced by Appellant, which can be found at Aa338-Aa545, visually demonstrate the perils of Jibsail's extended dock.

Following approximately two and a half years of consistent follow-ups by Appellant, and a subsequent mandamus action filed in the Superior Court of New Jersey, the TRC scheduled the second hearing for the Jibsail application on September 14, 2022. On September 14, 2022, the TRC voted to approve Jibsail's application. [SCa56-SCa58.] A resolution of approval was signed on October 6, 2022 (the "Resolution"). [Aa551-Aa555.]

The Resolution contains numerous errors and findings not supported by the record. Of particular note, the Resolution states that "[t]he Council has determined that the established pierhead line is the outshore extent of an

individual riparian owner's riparian rights to erect a dock or pier, or to claim preemptive rights related to a pending application before the Council." [Aa552.] However, the Resolution is silent on whether Jibsail's tidelands license is within the established pierhead line. It should also be noted that the TRC relies entirely on the WFD permit issued to Jibsail for a finding that navigation to nearby properties is not hindered. Ibid. The deferring of this finding by the TRC is in direct conflict with the purpose of the TRC review, which is to ensure that the issuance of the tidelands instrument is in the public interest and does not prevent another's access to navigable waters. Bailey v. Driscoll, 19 N.J. 363, 374 (1955); N.J.S.A. 12:3-12.1.

What cannot be disputed in this matter is that the pierhead line has been established as required under New Jersey statute. [Aa361; Aa539; Aa545.] As approved, the Jibsail Dock is well beyond the pierhead line. [Aa539; Aa545.] This is a clear violation of the plain language of the statute, which clearly and unambiguously only permits the construction of permanent structures of any kind within the pierhead line. N.J.S.A. 12:3-19. As the TRC never had any legal authority to grant any rights beyond the pierhead line, and in fact is specifically prohibited from doing so, the entire approval is *ultra vires* in the primary sense and *void ab initio*. For these reasons, the 2017 tidelands license and 2022 tidelands license modification must be vacated.

QUESTION PRESENTED

1. DOES THE TRC HAVE THE LEGISLATIVE AUTHORITY TO ESTABLISH PIERHEAD LINES THROUGH INDIVIDUAL CONVEYANCES?

ERRORS COMPLAINED OF AND COMMENTS WITH RESPECT TO THE APPELLATE DIVISION'S OPINION

Certification should be granted because the issues herein present questions of general public importance and should be settled by the Supreme Court. See R. 2:12-4.

I. THE TRC DOES NOT HAVE THE LEGISLATIVE AUTHORITY TO ESTABLISH PIERHEAD LINES THROUGH INDIVIDUAL CONVEYANCES.

The Appellate Division held that the TRC can establish the exterior lines outside which no development can occur through individual conveyances. [SCa81.] The Court erroneously relied upon Schultz v. Wilson for this proposition, in which the Court stated:

We do not consider the Bailey [II] case as requiring the Council to make an independent survey to establish the pierhead and bulkhead line prior to the execution of a riparian grant. No reason appears why the line cannot be established in the grant itself. It would be unreasonable to assume that in fixing [the riparian owner's] exterior line the Council did not have in mind that in future grants the same exterior course would be followed along the creek, so as to establish a practical uniformity and assure littoral owners reasonable access to navigable waters.

[SCa81 (alterations in original) (citing Shultz v. Wilson, 44 N.J. Super. 591, 607 (App. Div. 1957))].

In Schultz, the appellant contended that a riparian grant issued to respondent was invalid because the exterior pierhead and bulkhead lines had not been established prior to the issuance of the grant. Schultz, 44 N.J. Super. at 605-06. The Court determined that while the exterior lines were not previously established, the riparian deed expressly fixed the exterior line “in accordance with the express statutory authority, [N.J.S.A. 12:3-17], and the established practice of the [TRC] in fixing exterior lines in riparian deeds and accompany maps.” Id. at 606.

N.J.S.A. 12:3-17 directed “‘the board *** at the request of shore owners’ to extend its surveys over the tidewaters of the state showing what lines have been established for ‘the exterior lines for solid filling and pier lines.’” (alterations in original) Bailey, 19 N.J. at 372 (citing N.J.S.A. 12:3-17). Therefore, at the time of the decision of Schultz, there was statutory authority to which the TRC could reasonably interpret permitting the establishment of exterior lines through individual conveyances. However, N.J.S.A. 12:3-17 was repealed in 1979. A similar statutory provision allowing fixing the pierhead line through individual conveyances was never enacted in its place. The logical conclusion drawn from this Legislative action is that the Legislature wanted to

ensure that the pierhead was set on a more global and uniform basis in accordance, as to islands, with N.J.S.A. 12:3-19.

Schultz also relied upon Bailey v. Council of Div. of Planning and Development, to show that the Supreme Court had also acknowledged that “‘normally’ the line ‘would be established prior to a grant.’ This indicates that the [Supreme Court] was aware that such was not always the practice and that the line might be fixed in the grant itself.” Schultz, 44 N.J. Super. at 607 (citing Bailey v. Council of Div. of Planning and Development, 22 N.J. 366, 372 (1956)). However, these cases were all decided prior to the repeal of N.J.S.A. 12:3-17 in 1979. Therefore, the reliance on Schultz and its interpretation and application of N.J.S.A. 12:3-17 is respectfully in error.

To the extent that the Appellate Division was relying upon N.J.S.A. 12:3-19, the statute states that:

The Tidelands Resource Council, with the approval of the Commissioner of Environmental Protection and after consultation with the Army Corps of Engineers, shall, from time to time, fix and establish, around or in front of all islands, reefs and shoals situate in the tidal waters of this State, exterior lines in said waters...

[N.J.S.A. 12:3-19 (emphasis added).]

Furthermore, the Legislature clearly intended this line to be fixed in a uniform manner by the filing of a statewide survey and map delineating the pierhead line, as the statute continues to read:

...and when the council shall have so fixed and established said lines after consultation as aforesaid, it shall file a survey and map thereof in the Office of the Secretary of State, showing the lines for piers and solid filling so fixed and established.

[Ibid. (emphasis added).]³

Regardless of the past practices of the TRC in establishing the pierhead line pursuant to N.J.S.A. 12:3-17, New Jersey is now faced with a chaotic situation where the ad hoc application of the line has resulted in a clear lack of uniformity and a threat to navigation and safety to those that utilize navigable waters, such as the channel to Barnegat Bay in this matter. Respectfully, the TRC must follow the law and cannot act beyond its statutory authority. The TRC needs to consult with the Army Corps of Engineers and obtain approval from the Commissioner of the Environmental Protection. The plain language of N.J.S.A. 12:3-19 cannot be interpreted to permit amendment of the exterior lines through individual conveyances.

If the exterior lines could be amended on an ad hoc basis through individual conveyances, then there would be no point to the establishment of exterior lines and would render entire sections of the statute “inoperative, superfluous, void, or insignificant.” Sanchez v. Fitness Factory Edgewater,

³ The only map in the record showing the pierhead line is the one which Appellant submitted into evidence. [Aa361.] No other maps reflecting a change in the pierhead line have been introduced by the parties.

LLC, 242 N.J. 252, 261 (2020). For example, N.J.S.A. 12:3-1 states in relevant part that the TRC would fix the exterior lines beyond which no permanent obstruction should be permitted, and establish a plan for the improvement, use, renting, or leasing of said lands. If the TRC could simply amend the lines through individual conveyances, this would make it irrelevant and insignificant to have done this initial survey and established a plan for conveyances. By way of further example, N.J.S.A. 12:3-3 prohibits the filling of materials beyond the established bulkhead lines and prohibits the erection or maintenance of any pier or structure beyond the pierhead line in certain areas. N.J.S.A. 12:3-14 has a similar prohibition of any encroachment beyond the bulkhead lines or pierhead lines.

If the TRC could simply amend the lines through individual conveyances, then it makes these sections superfluous and negates the very purpose of establishing the bulkhead or pierhead line. An owner already has to obtain permission from the TRC to do any project within tidally flowed waters. It does not make sense that this prohibition was meant to only apply to individuals since any action without TRC approval would already be a violation. There is no purpose to the exterior lines if it can simply be amended on an ad hoc basis through individual conveyances.

Lastly, N.J.S.A. 12:3-20 states that “the [TRC], together with the Commissioner of Environmental Protection, may sell or let to any applicant therefor any of the lands under water and below mean high-water mark, embraced within the lines fixed and established pursuant to [N.J.S.A 12:3-19].” (emphasis added). The TRC’s interpretation would make the limitation “embraced within the lines fixed and established” completely superfluous if the TRC could simply amend the lines ad hoc through individual conveyances. The interpretation of a statute should give effect to all of the statutory provisions so that it “does not render any language inoperative, superfluous, void, or insignificant.” Sanchez, 242 N.J. at 261. While the above cited statutory provisions may not apply to the issuance of licenses for island properties, the sections illustrate the inconsistency of the Appellate Division’s holding in this matter.

Acts which are utterly beyond the jurisdiction of a governmental entity are *ultra vires* in the primary sense and *void ab initio*. Summer Cottagers’ Assoc. v. Cape May, 19 N.J. 493, 504 (1955); Heyert v. Taddese, 431 N.J. Super. 388, 429 (App. Div. 2013); see also City Council of City of Orange Tp. v. Edwards, 455 N.J. Super. 261, 274 (App. Div. 2018) (holding that a void act results from where a public officer has no authority to act at all). For these reasons, Appellant respectfully submits that the Appellate Division erred in relying upon Schultz

and its interpretation of the now repealed N.J.S.A. 12:3-17 in determining that the TRC had statutory authority to amend the exterior lines through individual conveyances. As a result, the TRC original tidelands license grant to Jibsail, and the subsequent modification must be vacated. This is an issue that impacts all riparian landowners in New Jersey and must be settled by this Court.

REASONS WHY CERTIFICATION SHOULD BE ALLOWED

Absent certification, the state of case law is wholly incongruent with statutory law and the TRC would be acting beyond its statutory authority. The TRC has formidable power to issue grants, leases, and license to State owned tidelands. The TRC's role is to determine whether applications for the grant, lease, or license of riparian lands are in the public interest. N.J.S.A. 12:3-12.1. Beginning in 1851, New Jersey began passing a series of legislation that gave legislative sanction to the historical local custom that an upland owner had exercisable rights to the of the adjacent tidewaters. Bailey, 19 N.J. at 369. The purpose of riparian instruments and the establishment of "exterior lines" were to provide the owner with access to navigable waters. Id. at 373. In the context of confirmatory action, the TRC is specifically "directed to consider whether the grant, taken in conjunction with all other grants in the immediate area, provides 'reasonable access to riparian owners to deep water beyond bulkhead and pierhead lines.'" Id. at 374. As such, it is clear that the legislature intended to

prohibit structures beyond the pierhead lines so as to ensure that all riparian owners have reasonable access to the deepwater channel beyond bulkhead and pierhead lines.

Uniformity in establishing the pierhead lines through the State is critical for the TRC to properly exercise its powers. Appellant's case is a hallmark example to show the need for uniformity. The record reflects a clear showing of negative impacts to navigation and safety. During the TRC hearings, Appellant testified that because of the Jibsail extended dock, it is difficult and hazardous to navigate and use the Appellant's own dock. [SCa7.] Prior to the Jibsail Dock extension, Appellant had a "straight shot" to access the deepwater channel. [SCa7]; [Aa401-Aa403]. Since construction of the dock extension, boats must navigate to the west to get around Jibsail's extended dock, which causes significant issues during low tide. [SCa7.] On rainy days, it is difficult to get in and out because it is now necessary to come to the dock at an angle while fighting the current. [SCa7.] John Morris also testified as to the difficulties of navigating because of the Jibsail extended dock. If there is a west wind, Mr. Morris's ability to come in from the north or east is now severely compromised, requiring him to raise his trim and come in at a speed faster than would be safe for docking. [SCa15.] A west wind pushes the boats towards the Jibsail extended dock which creates a hazardous condition for navigation and approach. [SCa15.]

Other members of the public also noted safety concerns. One neighbor testified that jet boats are often running the channel at unsafe speeds and that the longer dock will be a safety hazard. [SCa18.] Another neighbor noted that small boaters such as fishers, are not in the channel and would hug the coast to get home in fog. [SCa19.] With the Jibsail extended dock, a small boat may not realize and go under the dock and cause a major accident. [SCa19.] A third neighbor testified that because of the Jibsail extended dock, his kids when kayaking now have to go into the boat channel in order to get around this dock, which creates a dangerous situation for them and a hazard for boats. [SCa19-SCa20.]

Moreover, not only will this extended dock create a navigational and life safety hazard, the impact of the approval of Jibsail's extended dock is that it will ultimately prevent Appellant's property from having any access to navigable waters. [Aa545]. If the remedy is to extend all docks in the area to the same length as the Jibsail dock, this will ultimately create a conflict where the docks will not be able to fit. Ibid. This is in direct conflict with the purpose of the TRC review, which is to ensure that the issuance of the tidelands instrument is in the public interest and does not prevent another's access to navigable waters. Bailey, 19 N.J. at 374; N.J.S.A. 12:3-12.1. Ultimately, this situation could be avoided

with a regional uniform setting of the pierhead line as required by N.J.S.A. 12:3-19.

The instant matter is a microcosm of the perils that will be faced by all waterfront property owners if the Appellate Division's decision remains. Moreover, certification of this matter is of significant general public importance because the NJDEP, in its brief and during oral argument, admitted that its normal practice is to set pierhead lines through individual conveyances, but could not cite to any statutory authority for this practice. Respectfully, this means that the NJDEP has been acting beyond its statutory authority since 1979, when N.J.S.A. 12:3-17 was repealed. For these reasons, Appellant respectfully submits that this petition sets forth a question of general public importance and should be settled by the Supreme Court. See R. 2:12-4.

CONCLUSION

For the reasons stated above, the Janine Morris Trust respectfully requests the Court grant its petition for certification.

Respectfully submitted,

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Attorneys for Appellant-Petitioner

Dated: June 21, 2024

/s/ Michael G. Sinkevich
Michael G. Sinkevich, Jr., Esq.

CERTIFICATION PURSUANT TO R. 2:12-7(a)

Pursuant to R. 2:12-7(a), I hereby certify that this Petition for Certification presents a substantial question and is filed in good faith and not for the purposes of delay.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

LIEBERMAN BLECHER & SINKEVICH, P.C.
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Dated: June 21, 2024

/s/ Michael G. Sinkevich
Michael G. Sinkevich, Jr., Esq.