

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1863

September Term, 2014

THOMAS E. KELSO, et al.

v.

ANTHONY SMIERTKA, et ux.

Wright,
Hotten,
Reed,

JJ.

Opinion by Hotten, J.

Filed: October 21, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellants, Thomas E. Kelso (“Mr. Kelso”) and Lorenda L. Birch (“Ms. Birch”), appealed a decision of the Worcester County Shoreline Commission (“the Commission”) approving appellees, Anthony and Barbara Smiertka’s (“Mr. Smiertka and Ms. Smiertka”) application to install a pier extension to their waterfront property. The Circuit Court for Worcester County affirmed the Commission’s decision. This appeal followed.

Appellants present two questions for our review:

- [1.] Did the [Commission] err by refusing to consider and apply Maryland law regarding riparian rights to determine whether [a]ppellees could construct the pier extension at the proposed location and whether it would interfere with the riparian rights of [a]ppellant, [Ms. Birch], and other nearby waterfront owners?
- [2.] Are the [Commission’s] findings that [a]ppellees’ proposed pier extension would have no adverse impact on navigability in the area, would not adversely impact properties in the surrounding neighborhood, would not adversely impact the value of nearby properties and would be of commercial benefit to Worcester County supported by substantial evidence in the record?

For the reasons that follow, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL HISTORY

Appellees, owners of a single family residence located on 13106 Riggin Ridge Road, Ocean City, Maryland filed an application to install a 186-foot by 4 foot wide pier extension to an existing pier in order to access navigable water. The proposed changes were submitted for permits and approval to the Maryland Department of the Environment (“MDE”) and the Army Corps of Engineers and subsequently granted. A special exception to permit the requested use was also granted by the Worcester County Board of Zoning Appeals.

Appellants, who are nearby property owners, did not challenge any of the permits or the special exception issued by the Board of Zoning Appeals, but opposed appellees' application for the pier extension that was before the Commission. On July 11, 2013 and August 15, 2013, the Commission held public hearings and considered evidence and testimony from several witnesses.

Five witnesses, including Mr. Smiertka, testified on behalf of appellees. Appellees' witnesses included Chris McCabe ("Mr. McCabe"), an independent environmental consultant; Frank G. Lynch, Jr. ("Mr. Lynch"), a licensed surveyor; Jason B. Mumford ("Mr. Mumford"), a licensed Coast Guard captain, commercial fisherman, and waterfowl guide; and Pam Greer Buckley ("Ms. Buckley"), a certified general real estate appraiser. Three witnesses, including Mr. Kelso and Ms. Birch testified on behalf of appellants. The third witness was Joy Snyder ("Ms. Snyder"), a real estate broker. Testimony and a proffer of three drawings by Charles Woodward ("Mr. Woodward"), a licensed surveyor, was also admitted into evidence on behalf of appellants.

On September 5, 2013 the Commission issued a decision approving appellees' application for the pier extension. The Commission's decision incorporated by reference a letter from Jennifer K. Burke ("Ms. Burke"), Zoning Administrator for the Worcester County Department of Development, Review and Permitting. As part of its decision, the Commission rendered specific findings of fact regarding each of six considerations pursuant to the Worcester County Code, § 2-102(f) of the Natural Resources Article ("NR"), and thereafter approved appellees' application.

Appellants subsequently appealed the Commission's decision to the Circuit Court for Worcester County.¹ On July 31, 2014, the court conducted a hearing and took judicial notice of the case file from the proceedings before the Commission.

On September 29, 2014, the circuit court issued a decision affirming the Commission. Appellants noted a timely appeal to this Court. Additional facts shall be provided, *infra*, to the extent they prove relevant in addressing the issues presented.

STANDARD OF REVIEW

“When reviewing the decision of an administrative agency, . . . we review the agency's decision directly, not the decision of the circuit court. A reviewing court will affirm the decision of the [agency] when it is supported by substantial evidence appearing in the record and it is not erroneous as a matter of law. Because an agency's decision is presumed *prima facie* correct, we review the evidence in the light most favorable to the agency. Indeed, ‘it is the agency's province to resolve conflicting evidence and where inconsistent inferences can be drawn from the same evidence it is for the agency to draw the inferences.’ When we review an agency decision that is a mixed question of law and fact, we apply ‘the substantial evidence test, that is, the same standard of review [we] would apply to an agency factual finding.’” *Thomas v. State Ret. and Pension Sys. of Md.*, 184

¹ The circuit court observed that although appellants argued in their memorandum that the Commission did not base its decision on substantial evidence regarding each of the six factors outlined in the Worcester County Code, § NR 2-102(f), at oral argument before the court, appellants stated that the Commission only failed to base its decision on substantial evidence regarding factors two, five, and six.

Md. App. 240, 248 (2009) (internal citations omitted) (omission and alterations in original).

DISCUSSION

I. Standards for Granting a Shoreline Construction Application

The Commission was created to “regulat[e] and determin[e] ‘bulkhead lines, shorelines and fill lines along the shorelines of Worcester County.’” *Board of Public Works v. Larmar Corp.*, 262 Md. 24, 30 (1971). Established under the Worcester County Code, NR § 2-102, the Commission has authority to approve or deny applications for major or minor construction on a shoreline. Worcester County Code, NR § 2-102(e)(1)-(2). “Except in the case of routine maintenance and repair,” a permit to do any major or minor construction on a shoreline must first be issued. Worcester County Code, NR § 2-102(c). To obtain a permit, “[a]n applicant . . . shall make application to the Issuing Department . . . [t]he Issuing Department shall determine whether or not the work applied for constitutes a major construction or a minor construction.”² Worcester County Code, NR § 2-102(d).

In approving or denying an application to the Commission for construction along the shoreline, the Commission must make specific findings of fact regarding the following six factors:

² “If [the work applied for] constitutes a major construction, the Issuing Department shall proceed forthwith with the advertisement of a public hearing” *Id.*

(1) environmental impact; (2) navigational impact; (3) recreational potential; (4) commercial benefit to Worcester County; (5) the impact of the proposed construction upon the surrounding neighborhood and upon property values therein; [and] (6) such other matters as the [Commission] may consider appropriate and germane to the issue.

Worcester County Code, NR § 2-102(f). These factors collectively outline the scope of the Commission's authority.

The Commission also has authority to “grant or deny the application based upon the evidence presented [at a hearing] and upon those matters within the Commission's expertise.” Worcester County Code, NR § 2-102(g). In granting any application, the Commission “may place such stipulations, conditions and requirements upon the permit as the Commission may deem necessary and appropriate to effectuate the legislative intent of this section.” Worcester County Code, NR § 2-102(h).

II. Substantial Evidence Supporting the Commission's Decision

In the instant appeal, appellants aver that the Commission erred by refusing to consider the riparian rights³ of appellants and neighboring owners, and in failing to base its decision upon substantial evidence concerning factors two, four, five, and six.⁴

In addressing appellants' contentions, we remain “cognizant of the limited role that the courts must play in reviewing the decision of a local land-use [commission].” *Assateague Coastal Trust, Inc. v. Schwalbach*, 223 Md. App. 631, 643 (2015). *See*

³ An explanation of riparian rights and its governing authority is provided *infra*.

⁴ As such, the Court's discussion will be limited to these factors, which will be addressed in turn.

Cremins v. County Commissioners of Washington County, 164 Md. App. 426 (2005) (holding that the agency’s interpretations and applications of the statutory or regulatory provisions that it administers should be afforded considerable weight and the expertise of the agency in its own field should be respected); *Assateague Coastal*, 223 Md. App. at 651 (emphasizing that determinations regarding the standard for a critical area variance fell within the relative expertise of the administrative agency); *Belvoir Farms Homeowners Ass’n, Inc. v. North*, 355 Md. 259, 271 (1999) (reaffirming that various factors under zoning regulations had to be considered by the agency because such determinations were appropriate for administrative, not judicial, review).

Thus, the Court’s first task is to determine whether the issue decided by the agency is at least “fairly debatable” based on all of the evidence. *Assateague Coastal*, 223 Md. App. at 643. As we explained in *Assateague Coastal*:

Our role in reviewing the final decision of an administrative agency, such as the [Commission], is limited to determining if there is substantial evidence in the record as a whole to support the agency’s findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law. In doing so, a reviewing court decides whether the [Commission’s] determination was supported by such evidence as a reasonable mind might accept as adequate to support a conclusion. . . . The court may not substitute its judgment on the question whether the inference drawn is the right one or whether a different inference would be better supported. The test is reasonableness, not rightness.[] Moreover, a reviewing court must review the agency’s decision in the light most favorable to it; . . . the agency’s decision is prima facie correct and presumed valid.

Id. at 644 (citing *Critical Area Comm’n for Chesapeake & Atl. Coastal Bays v. Moreland, LLC.*, 418 Md. 111, 122–23 (2011) (citations and quotation marks omitted). Accordingly,

for the reasons that follow, we conclude that substantial evidence supported the Commission’s findings and conclusions regarding each disputed factor.

A. Factor Two: Navigational Impact

The Commission considers the navigational impact along the shoreline in factor two. Appellants aver that appellees’ pier extension would encroach upon the riparian rights of at least three neighboring properties and adversely affect the ability of those property owners to access the navigable channel in Sinepuxent Bay. We disagree.

The record demonstrates that the Commission heard from witnesses Mr. Lynch, Mr. Mumford, and Mr. Smiertka, whose combined testimonies discredit appellants’ arguments. Mr. Lynch drafted plans of the pier extension and testified that the space between appellees’ pier extension and Mr. Kelso’s existing pier is a distance of 88 feet. Mr. Mumford, who was very familiar with the area at issue, testified that regarding the 88 feet between the pier extension and the Kelso pier, “[a]ny type of boat [] will be able to get into that depth of water[.]”

Mr. Smiertka’s testimony corroborated with the testimonies of Mr. Lynch and Mr. Mumford’s. Mr. Smiertka testified that properties in the area generally do not need more than 90 feet for effective navigation and that the pier extension measuring at 88 feet would not have an adverse effect on the navigation in the area.

After considering the testimony of the witnesses and the drafted plans by Mr. Lynch, the Commission concluded that the pier extension would not adversely impact navigability. Noting the conclusions of the Board of Zoning Appeals, the Commission stated:

The Board is not convinced by [appellants'] argument navigation would be impacted. Specifically, the Board was convinced that 88' is a sufficient distance for persons to navigate a vessel, and that the pier extension will have no negative impact on the overall navigability of the area.

The Commission ostensibly found the evidence provided by appellees' witnesses more credible. In light of the record and drawing all reasonable inferences in favor of the Commission, we conclude that substantial evidence supported its decision that the pier extension would not have an adverse impact on navigability.

Though not binding on Maryland courts, we examine, in part, the New York case of *Stutchin v. Town of Huntington*, 71 F.Supp.2d 76 (E.D.N.Y. 1999) to support our conclusion. In *Stutchin*, the court concluded that there was a rational basis for a local zoning ordinance restricting the length of piers⁵ on Lloyd Harbor, *inter alia*, to prevent obstruction to navigation and protect the aesthetics based on substantial evidence in the record. *Id.* at 103. In crediting a departmental study of the impact of piers and witness testimony it deemed dispositive of the issue, the court held that the restriction was reasonable in view of the narrow, shallow nature of the waterway. *Id.*

We acknowledge the factual differences between *Stutchin* and the case at bar. However, we highlight *Stutchin* to demonstrate the deference afforded to an administrative body's decision, such as the Commission, when its decision is supported by substantial evidence in the record, specifically, regarding a pier extension and the impact on

⁵ The *Stutchin* opinion used the term "dock." To maintain consistency, the terms "dock" and "pier" will be used synonymously.

navigability.⁶ *See generally Hilton ex rel. Pages Homeowners' Ass'n v. Dep't of Natural Res.*, 293 Wis.2d 1, 20-21 (2006) (holding that substantial evidence in the record supported the Department of Natural Resources' decision that petitioners' pier created impaired navigability).

B. Factor Four: Commercial Benefit

Appellants contend the Commission's finding that the pier extension would provide short-term commercial benefit to Worcester County is speculative and unsupported by the record. We also disagree.

Although the Commission provided a brief explanation in support of its conclusion,⁷ we note that Mr. McCabe's testimony regarding this factor is probative. Mr. McCabe served as a natural resources Administrator for Worcester County for six years. Mr. McCabe also obtained the permits for appellees' pier extension and worked for Worcester County at the time the Kelso pier was permitted. In addition, Mr. McCabe was Co-Chair

⁶ Plaintiffs, Burt and Cheryl Stutchin applied for a permit to construct a 115-foot pier on their property. *Id.* at 78. The Stutchins obtained that required permits from the New York State Department of Environmental Conservation and the Army Corps of Engineers, but the permits required compliance with all applicable local regulations. *Id.* Because of the 75-foot pier length limit imposed on Lloyd Harbor by the local zoning ordinance, the Stutchins' application for the local permit was denied. *Id.* at 79.

⁷ The Commission stated:

The Commission finds that there is limited long term commercial benefit based upon the pier extension; however, there would be a short term commercial benefit based upon the act of constructing the pier, and the employment that would bring to the county.

of the regulatory agency tasked with licensing and registering all marine contractors that do business in the State of Maryland.

Mr. McCabe's testimony during the July 11, 2013 hearing before the Commission, proceeded as follows:

[APPELLEES' COUNSEL]: I was just going to say, so you're familiar with marine contractors and what these kind of projects would be, how much they cost and that sort of thing?

[MR. MCCABE]: Yes.

[APPELLEES' COUNSEL]: Okay. And if this was approved, it would be a nice project and that would be a commercial benefit for the county?

[MR. MCCABE]: Oh, yes.

Drawing all reasonable inferences in favor of the Commission, and taking the record as a whole, we conclude that substantial evidence supported the Commission's decision that the pier extension will promote commercial benefit to Worcester County.

C. Factor Five: Impact upon the Surrounding Neighborhood and Property Values

The Commission noted that appellants' evidence under factor five focuses on two main arguments: one, "that the pier extension would foreclose any ability the neighboring property owners had to build piers of their own" and two, "that the presence of a pier at the requested length would not be aesthetically pleasing[,] and thus, would be detrimental to property values."

We disagree and conclude that the Commission's decision was supported by substantial evidence in the record. For example, we focus on the testimonies of Ms. Buckley and Mr. Smiertka. Ms. Buckley had been an appraiser for almost thirty years and

was qualified to appraise the value of both residential and commercial property, including numerous waterfront properties in the neighborhood at issue. Additionally, Ms. Buckley had been a member of the Town of Ocean City, Worcester County Planning and Zoning Commission for twenty-four years and currently serves as Chairperson.

Ms. Buckley testified that the proposed pier extension would be consistent with the neighborhood and would not adversely impact surrounding properties. In light of Ms. Buckley's experience, her testimony is credible. Likewise, Mr. Smiertka testified that given the unusable state of this current pier due to shallow water depths, the pier extension would enable him to utilize the pier, thereby increasing the property value as well as nearby properties in the neighborhood.

Moreover, additional evidence before the Commission further supported its decision. The Commission found that appellees' current pier was insufficient in length and that the alleged capacity of a neighboring property to build a pier in the future carried little weight on the issue of actual property values. The Commission also found that regardless of whether appellees extended their pier, the evidence demonstrated that many of the neighboring properties would be precluded from building a pier.⁸

⁸ Specifically, the Commission found that the deeded property lines for Ms. Birch would not permit her to extend far enough into the waterway to reach navigable water and, concerning Mr. Kelso, "Kelso's pier is, by all accounts sufficiently long enough to reach navigable water." The Commission also found that other owners' ability to build piers would have been precluded at the time Mr. Kelso built the joint pier.

Appellants' argument that the pier extension was not aesthetically pleasing, thus reducing property values, is unconvincing. The Commission appropriately concluded that it was a reasonable expectation by owners of waterfront lots in Worcester County that piers, docks, and other appurtenances will be constructed, some of which may impact the view an owner may have from their property. In similar vein, it is unlikely that building a pier extension, to a shoreline already comprised of several other piers and docks would significantly alter the aesthetic appeal of the neighborhood to the extent of adversely impacting property values.

We emphasize—as with the other factors considered by the Commission—that whether the pier extension would adversely impact the surrounding neighborhood and property values “is a question of fact best addressed by the expertise of the [Commission].” *See Assateague Coastal*, 223 Md. App. at 648. Accordingly, we conclude that the Commission's decision was supported by substantial evidence.

We also note that the *Stutchin* holding is similarly relevant here. *See* discussion *supra*. In crediting witness testimony that it deemed dispositive of the issue regarding aesthetics, the court held that “there was a substantial rational basis for reducing the size of piers in these waters, so as to limit human intrusion.” *Id.* at 105. We acknowledge, once more, the factual differences between *Stutchin* and the case at bar. However, the court's holding regarding the ordinance's impact on pier length and aesthetics further demonstrates the deferential standard we maintain when an administrative agency's decision is supported by substantial evidence in the record. *See generally Hilton*, 293 Wis.2d at 18-19 (holding

that substantial evidence in the record supported the Department of Natural Resources' decision that petitioners' pier had an adverse impact on the surrounding habitat).

D. Factor Six: Other Matters Germane to the Issue⁹

The Commission first addressed the necessity of appellees' proposed pier extension under factor six. The Commission acknowledged that the length of the extended pier was longer than what was usually presented before the Commission and may detract other property owners' ability to have common use and enjoyment of the waterway. However, the Commission concluded that the uniqueness of this location, particularly the shallowness of the wetland area where the pier crosses, "makes the length an unfortunate necessity." The Commission further concluded that appellees have few, if any, viable alternatives and noted the following limitations:

[Appellees are] constrained by the pre-existing piers of other neighboring properties, particularly [Mr.] Kelso; . . . constrained by the area's zoning, which dictates what portion of the water way he has a right to[,] [and primarily] . . . constrained by the environment of the land, marsh, and water in front of his property and over which the pier extends.

The Commission's interpretation is entitled to considerable weight. "In light of the considerable deference that is owed to the [Commission's] factual findings and to its interpretation of the statute it is charged with implementing," we will not disturb the Commission's determination that the pier extension was necessary. *See Assateague Coastal*, 223 Md. App. at 648.

⁹ Since riparian rights is not a factor considered under the Worcester County Code in itself, appellants' arguments concerning any violation of same will be addressed under this factor.

1. Riparian Rights and Governing Authority

Appellants contend that the Commission erred as a matter of law in refusing to consider appurtenant riparian rights. As a result, appellants conclude, because the Commission considered the determinations regarding the issue of property rights beyond the scope of the Commission, it in effect, deemed the county's zoning regulations to be dispositive on the issue of riparian rights. Consequently, limiting the opportunity to fully demonstrate evidence in support of their position.

Maryland recognizes the common law riparian rights possessed by waterfront property owners. A riparian owner is "one who owns land bordering upon, bounded by, fronting upon, abutting or adjacent and contiguous to and in contact with a body of water, such as a river, bay, or running stream." *Becker v. Litty*, 318 Md. 76, 82 (1989). In explaining the term "riparian rights," the Court in *Gunby v. Olde Severna Park Improvement Ass'n, Inc.*, 174 Md. App. 189 (2007) stated:

[R]iparian rights indicates a bundle of rights that turn on the physical relationship of a body of water to the land abutting it. These rights are significantly different from each other in many respects, and yet they share a common name just as riparian landowners attempt to share the common benefits that arise from adjacency to defined bodies of water. This bundle includes at least the following rights:

- (i) of access to the water;
- (ii) to build a wharf or pier into the water;
- (iii) to use the water without transforming it;
- (iv) to consume the water;
- (v) to accretions (alluvium); and

(vi) to own the subsoil of nonnavigable streams and other “private” waters.

Id. at 239-40. *See also Conrad/Dommel, LLC v. West Development Co.*, 149 Md. App. 239, 268-69 (2003). Thus, “access to the water is a primary asset of riparian rights.” *Gunby*, 174 Md. App. at 240.

We also note that the General Assembly granted riparian owners additional rights. “[A] riparian owner may not be deprived of any right, privilege, or enjoyment of riparian ownership that the riparian owner had prior to July 1, 1970.” Md. Code (1996, 2014 Repl. Vol.), § 16-103(a) of the Environment Article (“Envir.”). Additionally, Envir., § 16-201(a) provides, in pertinent part:

A person who is the owner of land bounding on navigable water is entitled to any natural accretion to the person's land, to reclaim fast land lost by erosion or avulsion during the person's ownership of the land to the extent of provable existing boundaries. The person may make improvements into the water in front of the land to preserve that person's access to the navigable water or, subject to subsection (c), protect the shore of that person against erosion. After an improvement has been constructed, the improvement is the property of the owner of the land to which the improvement is attached. . . .

Although waterfront property owners possess certain riparian rights as established by Maryland common law or expanded by statute, we find appellants’ argument that the Commission erred in refusing to consider appurtenant riparian rights unpersuasive. Although the Commission determined that it was not required to consider riparian rights, it still did so, in essence, by considering it as a factor independent of the Worcester County Code factors and by referencing a letter from the Worcester County Planning and Zoning, which laid out the parties’ ability to access the water from the land via setback lines. In

addressing the issue in its decision, the Commission found that appellants' and nearby owners' riparian rights would not be adversely impacted by the pier extension.

Moreover, in addressing this argument as a separate consideration in its decision, the Commission properly concluded that determinations concerning riparian rights exceeded the scope of its authority. Worcester County Code, NR § 2-102(f) clearly defines the scope of the powers and duties of the Commission, which the Commission appropriately considered and applied. Thus, the Commission was correct in concluding that it was the county zoning code that governed and "specifie[d] precisely where and how water rights are to be determined." Worcester County Code, § 1-335 of the Zoning and Subdivision Control Article ("ZS") provides, in pertinent part:

- (a) Intent. In order to prevent the undue crowding and congestion of the County's waterways, to maintain the safety of boaters, to control pollution and to maintain the beauty of the waterfront, additional restrictions shall apply to waterfront structures.
- (b) Definition. "*Waterfront structures*" include, but are not limited to, docks, piers, boathouses, riprap, bulkheads, dikes, wharfs, piling, breakwaters, jetties, groins, levees, soft shoreline stabilization measures, and other similar unnatural alterations of the shoreline.
- (c) Extension into water area. *Waterfront structures shall not extend into any body of water more than one-half the distance from the mean high-water line to the center line of the body of water upon which the structure is situated or one hundred twenty-five feet, whichever is less, except as a special exception by the Board of Zoning Appeals.*
- (d) Shared docks, piers or boathouses. *No private dock, pier, piling or boathouse shall be constructed closer than six feet to any side lot line, except that it shall be permissible for two adjacent waterfront owners to build a single shared dock, pier or boathouse, by agreement, beginning at their joint property line instead of individual private docks, piers or boathouses.* The rights of access and maintenance responsibilities of such

shared dock, pier or boathouse shall be spelled out in properly witnessed and recorded covenants.

(emphasis added). Subpart (e) of the Worcester County Code § ZS 1-335 specifically addresses how water rights are determined via setback lines:

(e) Application of setback lines. For the purposes of this section, side lot lines shall be construed as follows . . .

Additionally, pursuant to Title 16 of the Environment Article, the regulation of riparian areas is within the purview of the MDE. Appellants' contend that Title 16 of the Environment Article only limits the exercise of riparian rights by regulations intended to protect and preserve the State's wetlands, but does not authorize the MDE to alter or divest an owner's common law riparian rights. We disagree. Envir., § 16-105 states:

(a) The Department, jointly with the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays, shall:

- (1) Review existing regulations applicable to the construction of piers and bulkheads in the tidal wetlands of the State and in the Chesapeake Bay Critical Area; and
- (2) By regulation, develop a procedure to avoid duplication of regulatory jurisdiction by the State and local jurisdictions concerning the construction of piers and bulkheads in the tidal wetlands of the State and in the Chesapeake Bay Critical Area.

(b) The procedure that the Department and Commission develop under subsection (a) of this section shall include provision for recognition of:

- (1) *State jurisdiction over the construction of piers and bulkheads in State and private wetlands designated under this title; and*
- (2) *Local jurisdiction over:*

(i) *The construction of piers and bulkheads landward of the boundary lines of State and private wetlands as mapped under this title; and*

(ii) Zoning divisional lines and building codes.

(emphasis added).

Although riparian owners possess a qualified right, Envir., § 16-105 demonstrates that this right must still yield to the State's legitimate authority over state wetlands. Similarly, in *White v. Pines Cmty. Improvement Ass'n, Inc.*, 403 Md. 13 (2008), the Court of Appeals held:

And in addition to this right by reliction or accretion, the riparian proprietor, whose land is bounded by a navigable river, whether his title extends beyond the dry land or not, has the right of access to the navigable part of the river from the front of his lot, and the right to make a landing, wharf or pier for his own use, or for the use of the public, *subject to such general rules and regulations as the Legislature may think proper to prescribe for the protection of the rights of the public, whatever those rights may be. This is well established doctrine by both Federal and State courts.*

Id. at 16-17 (emphasis added) (footnote omitted). Thus, contrary to appellants' argument, the MDE has authority to alter or divest an owner's common law riparian rights under Title 16, to the extent that the regulations are reasonably related to protecting a legitimate public purpose. See *People's Counsel for Baltimore County v. Maryland Marine Manufacturing Co. Inc.*, 316 Md. 491, 503 (1989) (holding that the right to build a wharf or other structure into the water is a "mere privilege" that can only be derived from a grant or permission of the state until the improvement is completed).

Accordingly, appellants' reliance on *Gunby, supra* and *Wicks v. Howard*, 40 Md. App. 135 (1978), is misplaced. As the Commission explained in its decision, the issues concerning access rights to build on the waterway were decided by the Worcester County Planning and Zoning and not properly before it.¹⁰ We agree and find no error in the Commission's conclusions.

2. Consideration of Riparian Rights

Assuming, *arguendo*, that the Commission was required to consider riparian rights as appellants assert, there is no evidence in the record to support a reversal of the Commission's decision. Appellants' contentions on this point will be addressed in turn.

a. Concave versus Straight Shoreline

Appellants aver that because the properties of the parties and other owners are located along a concave shoreline, their respective, proportional riparian areas are defined by converging, rather than parallel lines, extended from the shoreline to the channel. Thus, if adjoining property owners come into conflict over respective riparian areas in which they can extend a pier, such areas must be apportioned according to their "coequal rights," where "one property owner cannot deprive another of his right to extend out."¹¹

¹⁰ The issues decided concerning this point were not before the Commission but subsequently incorporated by reference, in the Commission's findings of fact.

¹¹ Notably, appellees point out that in each of Mr. Woodward's drawings depicting how riparian areas could be established, the existing and permitted piers impair or violate the purported riparian areas and in fact, the pier in question and the neighboring pier extend across three riparian areas.

In contrast, citing *Baltimore v. Baltimore & Philadelphia Steamboat Co.*, 104 Md. 485 (1906), appellants aver that when “neighboring properties are located along a ‘straight shore,’ the riparian area of each property may be defined by parallel lines[,]” as opposed to a concave shoreline that is defined by converging lines.

We agree. However, for the reasons that follow, conclude that appellants’ arguments here are also unpersuasive. In determining the proportional riparian areas, the Worcester County Code, ZS § 1-335(e)(2) provides:

(e) Application of setback lines. For the purposes of this section, side lot lines shall be construed as follows:

* * *

- (2) In cases where property lines have not been platted into a body of water the following rules shall be used to establish the projections of the side lot lines into the body of water:
 - A. Where the shoreline is approximately straight and the property lines are relatively parallel to one another and perpendicular to the shoreline, the projections of the property lines shall be extended in a straight line into the water.
 - B. Where the shoreline is approximately straight but the property lines are not parallel to one another, the projections of the property lines shall be extended into the water perpendicular to the shoreline from a point at the intersection of the upland portion of the property line and the shoreline.
 - C. Where the shoreline is not approximately straight and is irregular, a base line shall be drawn between the two points of intersection of the side lot lines and the shoreline. The projections of the property lines into the water shall be at right angles with the base line. If by reason of the curvature of the shoreline the projections of the side property lines of adjoining properties diverge from each other, the area excluded by both lines shall be equally divided between the two adjoining properties. If by reason of the curvature

of the shoreline the projections of the side property lines of adjoining properties cross each other, the area included between the crossed lines shall be equally divided between the two adjoining properties.

See also Philadelphia Steamboat Co., 104 Md. at 498 (holding that the right of a riparian owner to wharf out to the deep-water line must be exercised within side lines at right angles to a straight shore, or, if the shore be concave, within converging lines, which proportionately divide the tidewater shore among such owners).

Although not specifically addressed in either the Commission's decision or at the hearings before the Commission, the fact that the Commission incorporated Ms. Burke's interpretation of the subject shoreline in its findings of fact is dispositive of the evidence the Commission deemed probative. Ms. Burke's letter stated, in part:

The property lines in the Bay Shore Acres subdivision follow the shoreline, identified as the tidal wetlands line. While the neighborhood *overall* appears to have an irregular shoreline with parallel property lines, the application of the law begins with an evaluation of the subject property.

Ms. Burke continued,

It was, and still is, my interpretation that the shoreline as it applies to the subject property is approximately straight. Since the property lines are also relatively parallel to each other, [Worcester County Code,] § ZS 1-335(3)(2)A applies. This section calls for the projection of the property lines to be extended straight into the water. A 6' side yard setback is required to be held for the projected line. This extension is what [Mr. Lynch] depicts on the site plan prepared for [appellees][.]

We conclude that the Commission appropriately accorded weight to Ms. Burke's interpretations over the opinions of the parties' respective witnesses, Mr. Lynch and Mr. Woodward in determining that the subject shoreline is not concave.

b. Preemption by State Granted Riparian Rights

Appellants contend that because there is conflict concerning whether the shoreline is in fact concave, as opposed to straight and parallel, the state granted riparian rights preempts application of the county's zoning code. We disagree. There is substantial evidence in the record to support the conclusion that the shoreline at issue was not concave. Accordingly, because the crux of appellants' argument depends upon the shoreline being concave, we defer to the Commission's incorporation by reference in its decision that the shoreline was not concave and decline to address this argument.

**JUDGMENT OF THE CIRCUIT
COURT FOR WORCESTER
COUNTY IS AFFIRMED. COSTS TO
BE PAID BY APPELLANTS.**