

IN THE MATTER OF : *APPLICATION No. 200103104-SJ*

ARTHUR & JUDITH SCHALLER : *JUNE 26, 2003*

FINAL DECISION

I. INTRODUCTION

On August 22, 2002, pursuant to General Statutes §§ 22a-361 and 22a-92, the Hearing Officer issued a *Proposed Final Decision* in the above-referenced matter. The Hearing Office recommended that the Commissioner issue to Arthur and Judith Schaller (the applicant) a permit to construct a fixed dock and associated structures in the Connecticut River located in Chester in accordance with the terms and conditions set forth in the draft permit with one modification outlined in the *Proposed Final Decision*.

On September 6, 2002, the applicant, DEP staff and two intervenors, Jil Nelson and the Connecticut River Committee for the Public Trust, filed exceptions to the *Proposed Final Decision*. Briefs and Reply Briefs were timely filed by December 2, 2002 and December 17, 2002 respectively.

Having considered the arguments raised by the applicant, DEP staff and the intervenors in the briefs, there was nothing presented that dissuades me from upholding the Hearing Officer's recommendation that the proposed permit be issued. However, while the Hearing Officer in the Proposed Decision reached the right conclusions, there are substantive errors in the *Proposed Final Decision*. In particular, there is a misinterpretation of General Statutes §§22a-92(b)(1)(A) and

93(16) of the Connecticut Coastal Management Act (CMA) regarding the definition of “water dependent use” as applied to a private residential dock. In addition, there are several issues related to the analysis and conclusions of law that merit further comment and clarification based on the points raised in the exceptions and briefs.

II. ISSUES

A. **Water-Dependent Uses**

A private recreational dock is not a “water dependent use” as defined by §§92(b)(1)(A) and 93(16). Riparian or littoral property owners do, however, enjoy a common-law property right of riparian access regardless of the water-dependency of their upland use under the CMA. The *Proposed Final Decision* incorrectly puts these two concepts – “recreational boating facilities” as water-dependent uses and riparian access – together to demonstrate that the proposed dock will support water-dependent recreational boating uses. *Proposed Final Decision* Conclusions of Law III(B), III(B)(1)(c), and IV.

This misinterpretation of the CMA as applied to private recreational docks could seriously undermine one of the central policies of the CMA. Since the enactment of the CMA, this agency has consistently held that a private residential dock is not a water-dependent use pursuant to §§92(b)(1)(A) and 22a-93(16). The plain language of the statute is clear in that water-dependent use policies of the CMA apply to upland waterfront uses and appurtenant structures, if any, not solely to in-water structures. A private recreational dock for the use of the landowner is merely an accessory to the primary upland use, private residence. Docks at a marina are, in contrast, necessary to further water-dependent activity by providing significant non-owner access to coastal, tidal or navigable waters of the state. This is one of the pivotal policies of the CMA that through this agency’s coastal permitting and municipal coastal site plan review processes have preserved valuable waterfront property for statutorily defined water-dependent uses such as marinas and boatyards, shipping terminals and general public recreational access as opposed to floating restaurants and nightclubs. *DEP*

Staff Brief, December 2, 2002 at 4; in short, activities that may be enhanced by a waterfront location but can function without one.

B. Minimization of Impacts on Protected Coastal Resources

Through interaction with staff during review of the application, the applicant appropriately and adequately minimized the extent of the original proposed structure and altered its location and design to minimize impacts on protected coastal resources and public navigation. The original application proposed a dock that was approximately 30 feet longer and located approximately 160 feet further south, encroaching on an area of tidal wetland and submerged aquatic vegetation (SAV). That application was withdrawn and the present application submitted in response. It was altered to minimize or avoid adverse impact to tidal wetland and submerged aquatic vegetation and to provide riparian access with the least amount of dock length to meet reasonable access needs. *Proposed Final Decision* Finding of Facts # 1-3, 30.

In addition, despite no statutory requirement for a public hearing, staff nevertheless sought public comment. Subsequently briefs were requested to further define and narrow the arguments with respect to issues of riparian rights and public trust responsibilities (hereinafter “public trust doctrine¹”)

C. Balancing Proprietary Riparian Rights and Public Trust Responsibilities

It is clear from extent case law in Connecticut and nationally that upland waterfront property owners have a proprietary interest in reasonable access to navigable water or the “right to wharf out.” See *Rochester v. Barney*, 117 Conn. 462, 468 (1933) (owners of adjoining waters have “certain exclusive yet qualified rights and privileges in the waters and submerged land adjoining [their] upland” including the “exclusive privilege of wharfing out and erecting piers” for any purpose that does not interfere with

¹ The common law public trust doctrine should not be confused with the reference to one of the intervenors, the Connecticut River Committee for the Public Trust, as the “Public Trust.” The public trust doctrine is the body of common law under which the state holds in trust for public use in title waters and submerged lands waterward of the mean high tide line. *Brenden P. Leydon v. Town of Greenwich* SC 16356 July 26, 2001 at footnote 17.

free navigation.); *See Orange v. Resnick*, 94 Conn. 573, 574, (1920) (right of access can be exercised for any purpose that does not interfere with navigation).

The bounds of such accessibility are by necessity defined on a case by case basis by public and private interests and site specific conditions. The applicant owns approximately 1000 feet of frontage on the largest river in the State, the Connecticut River, and, based on the nature of the site, they have reduced and relocated their proposed dock to the minimum length that will support a boat. *Proposed Final Decision* Finding of Fact # 33. In addition, the proposed dock will cause no significant adverse environmental or navigational impacts. *Proposed Final Decision* Finding of Fact # 21-32.

The riparian “rights” of the upland owner must be balanced with the State’s responsibility for public trust resources. Under the Public Trust Doctrine, the State has a fiduciary responsibility to protect and manage the State’s public trust resources and uses for the benefit of the citizens of Connecticut. The State in fact holds title to submerged lands and tidal and navigable waters waterward of the mean high water in trust for the public. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988) (“States, upon the entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide.”); *Mihalezo v. Woodmont*, 175 Conn. 535, 538, 400 A.2d 270 (1978); *Brower v. Wakeman*, 88 Conn. 8, 11, 89 A.913 (1914); *Simons v. French*, 25 Conn. 345, 351 (1856).

As the official with fiduciary responsibility as trustee and representative of the public with respect to Public Trust properties, the Commissioner has been granted by the legislature broad powers and responsibilities over submerged lands, water-related resources and the use and development of them. See, e.g., General Statutes §22a-90 et seq. (CMA) and §22a-359 et seq. (Structures and Dredging statutes). The Coastal Management Program is grounded in part in the principles of the Public Trust Doctrine and in part on the police power. In the exercise of that authority, the Commissioner has implemented programs the effect of which prevent harmful activities and encroachments,

foster the development of water-dependent uses, and require general public access where feasible and appropriate while at the same time balancing the riparian “rights” of upland owners. Viewed in that context, the proposed application is neither an excessive grant of the private right to access nor a significant diminishment of public trust resources.

D. Impact upon Navigation

The majority of the area adjacent to the proposed dock is not generally navigable. The configuration of the site, the width and depths of the river and the location and proximity of nearby structures do not support CRCPT’s claim of unreasonable interference with navigation. There is nothing presented in the briefs nor the record to indicate otherwise.

The proposed 104 foot dock traverses an extensive area of intertidal flat and extends only 20 feet beyond mean low water at a segment of the River which is approximately 1250 feet wide. The proposed dock would extend approximately 8% of the 800 to 1000 feet from the shore to the designated navigational channel and would occupy approximately .06% of the river area between the applicants waterfront and the channel. Existing permitted structures to both the north and south protrude further into the river than the proposed dock. For example, the Botti dock to the north encroaches 700 feet while the ferry slip to the south encroaches 500 feet. *Proposed Final Decision*, Findings of Fact # 26-30, Conclusions of Law B(1)(d).

Further, presuming a two foot minimum depth requirement to be generally necessary to support small craft navigation, the Hearing Officer found that such depths were present over the adjacent intertidal flat for less than half the tidal cycle. Hence, the area of river obstructed by the fixed dock is generally not navigable for significant periods of time daily independent of the interfering larger structures to the north and south. *Proposed Final Decision* Finding of Fact # 29. In light of the foregoing and given the applicants relocation and shortening of his first proposal, the proposed dock will not unreasonably interfere with public navigation.

E. Relevance of Tidal Wetlands Act

The Hearing Officer properly reviewed the proposed dock under the Structures and Dredging statutes. See §22a-359 *et seq.* *Proposed Final Decision* at 12,19 and 28. The Hearing Officer found that the river location of the proposed dock does not support tidal wetlands vegetation and is not capable of supporting such vegetation. Consequently, the proposed dock would not adversely affect any tidal wetlands. *Proposed Final Decision* Finding of Fact 21-23; Conclusions of Law B(2)(a). As a result, the Hearing Officer properly concludes that the application is not subject to the Tidal Wetlands Act, General Statutes §§22a-28 – 22a-35. *Proposed Final Decision* at 19.

There is no credible evidence in the record that would suggest intertidal flats including the flat in question, support or are capable of supporting the necessary vegetative communities to qualify as tidal wetlands vegetation. On the contrary, expert testimony suggests that an intertidal flat does not and cannot support such wetland vegetation for specific reasons relating to substrate elevation and exposure to waves and ice flows. *DEP Staff Reply Brief*, December 17, 2002 at 3.

Having said that, however, even if the intertidal flats were viewed as tidal wetlands, as argued by intervenor Kim Nelson, the outcome would unlikely be different. The DEP has historically granted dock applications to riparian applicants for the express purpose of exercising riparian rights over and through tidal wetlands. In fact, modern or contemporary applications in such instances both in Connecticut and elsewhere would suggest a longer dock at a higher elevation would be a likely outcome if the subject application were determined to be subject to the tidal wetlands statute.

F. Consideration of a Feasible Alternatives that would not Diminish or Extinguish Applicants' Riparian Rights

In considering alternatives to the proposed application, the Hearing Officer found that taking no action would “prevent the applicants from exercising their common law riparian right to reasonably access deep water.” *Proposed Final Decision* at 16. The

question I posed for the parties and intervenors to specifically address in their briefs was whether or not the availability of allegedly reasonable alternatives to the exercise of riparian rights diminishes or extinguishes those riparian rights. No compelling argument for extinguishing those rights was presented.

If the applicant were required as suggested by the intervenors to use a marina as an alternative site, they would have no greater rights than a non waterfront property owner and will have essentially forfeited their riparian property right to “wharf out” to navigable water. *See Port Clinton Associates v. Board of Selectman*, 217 Conn. 588, 597 (1991). While a riparian right is clearly subject to reasonable police power regulation, *Shorehaven Golf Club v. Water Resources Commission*, 146 Conn. 619, 624 (1959), if this agency were to extinguish that property right, it would presumably constitute a taking requiring compensation. *See e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) *on remand* 304 S.C. 376 (1992).

While it may be argued that placing the boat off premise at a commercial marina would obviate any short-term, albeit acceptable impacts of dock construction, as a riparian property owner that decision rests with the applicant and the applicant alone. Under current statute and Court interpretation of the Public Trust Doctrine, I do not believe that the state acting through the DEP can compel the applicant to yield his property rights without at least offering compensation. The proposed dock would be a reasonable encroachment with minimal impact upon the public trust area as an exercise of the applicants’ right to access navigable water.

G. Responsibilities of Staff

Let me clearly dispel the claim by intervenor, the Connecticut River Committee for the Public Trust, that staff is an “interested party” in this or any other proceeding before this agency. In permit proceedings, staff is not an advocate for any party. Staff’s primary concern in carrying out the responsibilities of the applicable statutes as informed by the public trust doctrine is to preserve and protect coastal resources,

appropriately balance competing interests and uses and to honor the states fiduciary interests in the public tidelands. In large measures this is done through consistent application of regulatory standards for all permit applications. As a result, DEP staff cannot arbitrarily decide to scrutinize some applications and not others nor to interpret general statutory criteria differently based solely on the level of expressed public interest. *DEP Staff Brief*, December 2, 2002, at 3.

III. FINDINGS OF FACT

I adopt the findings of fact set forth in the *Proposed Final Decision* dated August 22, 2002.

IV. CONCLUSIONS OF LAW

Except as discussed in the above-referenced ISSUES section and as noted below, I adopt the analyses set forth in the *Proposed Final Decision* dated August 22, 2002.

Conclusion of Law III (B): The second sentence in the first paragraph is revised to read: “*The proposed regulated activities will be conducted in the coastal area and must be consistent [and support water-dependent uses] with the policies and provisions of the Coastal Management Act (CMA). General Statutes §§22a-90 through 22a-112.*” Footnote 12 is also deleted.

Conclusion of Law III (B)(1)(c) is deleted.

V. CONDITIONS

I authorize the issuance of the subject permit consistent with this *Final Decision* and subject to the Special Condition set forth in the *Proposed Final Decision* dated August 22, 2002.

VI. CONCLUSIONS AND RECOMMENDATIONS

Except as noted below, I adopt the conclusion and recommendation of the *Proposed Final Decision* dated August 22, 2002 with the following modification.

Conclusion of Law IV: The following second sentence in the first paragraph is deleted: “*This proposal to construct a dock, boatlift and associated structures will support water-dependent recreational boating uses while avoiding,*

minimizing or limiting any significant adverse environmental impacts as a result of the activity.”

June 26, 2003
Date

/s/ Arthur J. Rocque, Jr.
Arthur J. Rocque, Jr.
Commissioner

PARTY LIST

Final Decision in the matter of Arthur & Judith Schaller
Application No. 200103104-SJ/SG

PARTY

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