

OFFICE OF ADJUDICATIONS

IN THE MATTER OF : **APPLICATION NO. 200102561-MG**

TAMIM BRAISH
TERESA SMOLAREK : **JULY 20, 2004**

PROPOSED FINAL DECISION

I
SUMMARY

The applicants, Tamim Braish and Teresa Smolarek, have filed an application with the Department of Environmental Protection (DEP) Office of Long Island Sound Programs (OLISP) for a tidal wetlands and structures and dredging permit. General Statutes §§22a-32 and 22a-361. The applicants proposed to retain an existing stone wall and construct a fixed pier, ramp, and floating dock in Bakers Cove in Groton. OLISP has determined that this proposed regulated activity will not have a significant impact on the coastal waters and tidal wetlands of Bakers Cove and has prepared a draft permit authorizing the project.

A hearing in this matter was held on June 15, 2004 at the DEP, 79 Elm Street, Hartford. During the hearing, OLISP supplemented its exhibits with an Agreed Draft Decision signed by the DEP and the applicants. (Attachment A). This document reflects the comments of OLISP staff, the applicants, and Robert Fromer, an intervening party. At this hearing, the parties

addressed the Motion For Revisions to the Draft Decision (Motion) filed by Mr. Fromer on June 1, 2004.¹

I have reviewed the draft decision and the record and have assessed the application with regard to relevant statutes and regulations. General Statutes §§22a-28 through 22a-35a; 22a-90 through 22a-113c and 22a-361 through 22a-363; Regs., Conn. State Agencies §§22a-30-1 through 22a-30-17. As set out in the following findings of fact and conclusions of law, I have also evaluated and addressed Mr. Fromer's Motion. §22a-3a-6(1)(3)(B). I adopt the Agreed Draft Decision as my Proposed Final Decision without the additional findings put forward by Mr. Fromer and recommend the Commissioner issue the requested permit.

II

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING COMMENTS OF INTERVENOR ROBERT FROMER

A

FINDINGS OF FACT

1. The Agreed Draft Decision contains findings of fact that describe the site, the application and its review history, the project and its purpose. It also contains the applicants' compliance history, the presence and characterization of the tidal wetlands in the project area, the proposed activity impacts on shellfish, wildlife, finfish, intertidal mudflats, navigation, the public trust, and the applicant's consideration of alternatives to the proposed activities. The findings reflect information and comments provided to staff by the applicant, the intervenor and various divisions within the DEP, including Wildlife and Fisheries. The findings also reflect the opinions and comments of the Department of Agriculture/Bureau of Aquaculture and the Groton Shellfish Commission. The draft decision sets forth conclusions of law that address relevant provisions of the Coastal Management Act, and pertinent statutes and regulations regarding tidal wetlands and the regulation of structures and dredging activities. (Ex. DEP-41; test. 6/15/04, M. Grzywinski.)

¹ Mr. Fromer requested that his proposed revisions be considered his objection to the draft decision. Regs., Conn. State Agencies §22a-3a-6 (1)(3)(B).

2. In his Motion, Mr. Fromer seeks to add the following facts to findings in the Agreed Draft Decision.²

- Finding of Fact 6: Tidal Wetlands Vegetation. “Neither the applicant nor DEP staff investigated faunal species in the application area to assess potential environmental effects.”
- Finding of Fact 7: Shellfish. “The prehearing submissions contain no evidence that the [Groton Shellfish] Commission considered the effects of pressure treated lumber on shellfish from any information provided on the subject.”
- Finding of Fact 12: Public Trust. “The applicant gave no consideration and the DEP required no consideration of alternatives to non-leaching construction materials and to other construction methods insuring integrity during a 100-year storm with 80 mph winds.”³

B

CONCLUSIONS OF LAW

The DEP Rules of Practice authorize me to adopt an agreed draft decision and issue it as my proposed final decision. Regs., Conn. State Agencies §22a-3a-6(1)(3)(A)(ii). A proposed final decision must be issued in accordance with §4-179 of the General Statutes. §22a-3a-6(y)(1). Section 4-179(b) provides that a proposed final decision shall contain “a finding of fact and conclusion of law on each issue of fact or law *necessary* to the decision. (Emphasis added.) The intervenor’s proposed facts must therefore be necessary to the decision.

The additional facts proposed by the intervenor can be characterized as statements of activities that he alleges did not occur during the permit review process. These allegations are not necessary to my determination of whether the proposed regulated activity complies with the

² The intervenor also requested that I divide Finding of Fact 2, entitled Application History, into three separate paragraphs with no textual revisions. The representatives of the DEP and the applicant indicated that they had no objection to this modification. However, because the Agreed Draft Decision contains the original signatures of the representatives of the DEP and the applicant, and since the requested change is an editorial suggestion, I have not changed Finding of Fact 2.

³ The Motion is a public document and is included in the docket file for this matter located in the Office of Adjudications.

requirements of relevant statutes, regulations and public policy goals. The substantive findings in the Agreed Draft Decision are necessary for such a determination. Nothing more is required. *Callahan v. Commission of Motor Vehicles*, 1991 Conn. Super LEXIS 554, Conn. Super. Ct., Dist. of New Haven, No. 29 76 69, (Mar. 14, 1991); citing *Chieppo Bus Company v. United States*, 383 F. Sup. 1192, 1198 (Dist. Conn. 1974).

In addition, findings of fact must be based on the evidence in the record. General Statutes §4-180(c). The record shows that staff evaluated the impact of the proposed activity on wildlife by consulting with the department's wildlife division and by requesting a search of the National Diversity Data Base.⁴ The finding proposed by the intervenor, that there was no investigation of the presence of "faunal species in the application area," contradicts the only evidence on the record related to this issue. Adding such a finding would directly contravene the statutory mandate that findings of fact must be based on the evidence.

The Agreed Draft Decision sets forth findings of fact that are supported by the record and uncontested by all parties, including Mr. Fromer. The additional facts he proposes are unrelated to the underlying facts and conclusions that must be reached in this matter and are not necessary to this decision. The facts found in the Agreed Draft Decision satisfy the requirements of §4-179(b). The unnecessary additional facts proposed by Mr. Fromer will not be incorporated into the draft decision.

III

CONCLUSION

The application complies with the relevant criteria outlined in General Statutes §§22a-28 through 22a-35a and 22a-361 through 22a-363 and relevant regulations. The proposed regulated activity, if conducted in accordance with the terms and provisions of the draft permit, would strike a proper balance between the applicants' riparian right to access navigable water and the

⁴ Agreed Draft Decision, Finding of Fact No. 8.

state's responsibility to minimize navigational and environmental impacts and encroachments into public trust land and waters. General Statutes §22a-90 through 113c. I therefore adopt the Agreed Draft Decision as my Proposed Final Decision and recommend its affirmation by the Commissioner. (Attachment A.) I also recommend that the Commissioner issue the permit that is the subject of this application. (Attachment B.)

7/20/04
Date

/s/ Jean F. Dellamarggio
Jean F. Dellamarggio, Hearing Officer