

***IN THE MATTER OF***

:

***APP NO. 201810092-SDF***

:

:

***HEERDT***

:

***January 22, 2021***

***Final Decision***

This Final Decision concerns an application submitted to the Department of Energy and Environmental Protection (“DEEP” or the “Department”) to construct a residential dock structure waterward of the coastal jurisdiction line. John and Lisa Heerd (the “Applicants”) filed an application for a structures, dredging and fill permit in accordance with § 22a-361 on August 10, 2018 that was identified as application number 201810092-SDF (the “Application”). A Notice of Tentative Determination (“NTD”) recommending that the Commissioner approve the Application and issue a permit, was published on April 1, 2019, and, on April 22, 2019, a petition for hearing was filed, initiating this hearing process. Specifically, the draft permit published with the NTD authorizes construction of a residential dock to include a four-foot wide, thirty six-foot long wooden pier, three foot wide, twenty eight-foot long aluminum ramp, and an eight-foot wide, twelve and one half-foot long floating dock (“proposed dock”); requires the removal of five granite blocks from the intertidal area; and permits the retention of a granite block seawall and granite access steps.

The parties to this matter are the Applicants and Department staff. Doris Zelinsky and Joseph Murray (“Intervenors”) were granted status as intervenors, pursuant to Regs., Conn. State Agencies § 22a-3a-6(k)(2), on June 19, 2019.

On February 3, 2020, the Department’s hearing officer issued a Proposed Final Decision (“PFD”), adopting with supplemental conclusions of law, an Agreed Draft Decision (“ADD”), jointly submitted by the Applicants and DEEP staff. Overall, the PFD recommended that the Commissioner approve the Application and issue the Draft Permit as a final permit. The intervenors filed exceptions to the PFD and I heard oral argument regarding those exception on July 29, 2020. In addition, I have been provided access to the entire hearing record, including all exhibits and briefs of all parties and the exceptions filed by the Intervenors.

Based on the material in the hearing record and preponderance of the evidence before the hearing officer, I affirm the decision of the hearing officer and approve the application and the issuance of the final permit. The Intervenors raised concerns relevant to my determination. However, these concerns were addressed by the Applicants and DEEP staff in their review of the application and throughout the course of the hearing process. Despite the assertions made in the exceptions and at oral argument, I do not agree that the hearing officer ignored relevant facts or shirked his duty to consider applicable legal principles in arriving at his decision and final recommendation.

## **Response to exceptions**

The Department's Rules of Practice require that exceptions state with particularity the intervenor's objections to the proposed final decision, and may not raise legal or factual issues which could have been, but were not, raised at the hearing. Regs., Conn. State Agencies § 22a-3a-6(y)(3). The hearing officer's duty is to base his or her decision on materials in the evidentiary record and witness testimony. The intervenors did not fully avail themselves of the opportunity to present witness testimony supporting their claims. When they did, cross examination revealed the claimed impacts of the proposed dock were minimal and typical for the area in question. Rather than ignore the record, the Applicants and DEEP staff presented an Agreed Draft Decision based on the hearing record which the hearing officer closely scrutinized and determined was supported by the hearing record, past determinations of the Department, and judicial interpretation of the statutory requirements and common law principles. In addition, the hearing officer expanded the analysis of some of the legal issues in play. Overall, the exceptions filed by the intervenors repeat a central theme that express an objection to this particular exercise of littoral rights by the Applicants. I will not address each exception specifically because they can be grouped into categories of disagreement with the PFD that would have me ignore the private property rights held by the Applicants as waterfront property owners in favor of other legal principles. I am unwilling to ignore such rights as further explained in the remainder of this decision and affirm the balance struck by the PFD between the competing interests at issue.

## **The Commissioner's authority to regulate coastal structures is not a prohibition on private use of the public trust area.**

As recognized by the intervenors, there are two interests in play when the Department reviews a permit application for a structure that extends waterward of the coastal jurisdiction line as defined in § 22a-359 of the Connecticut General Statutes. The two interests are: (1) the rights of the public to traverse and use the intertidal area and navigable waters and (2) the right of a waterfront property owner to reasonable access to the water, including through structural means. The fact that two competing interests exist requires an appropriate balance to be struck. The alternative to striking a balance would have the Commissioner either subject to countless takings claims by waterfront owners prevented from exercising littoral rights unique to waterfront ownership or consistently approving piers and docks hundreds of feet long to deep navigable water regardless of environmental or public trust impacts. Neither of these paradigms are acceptable. Instead, the Department takes very seriously the variety of legal rights to be considered when it receives an application for a structure, such as the proposed dock. Often the first task is to limit the expectations of the applicant in consideration of the public interest in the area and the requirements for consideration under the Coastal Management Act. §§ 22a-93 et seq. Are applications for dock permits often approved? Yes, because the authority to issue such a permit is subject to requirements to respect private property rights, while also considering applicable environmental issues and public trust issues, as mandated by statute and common law. There is no indication in the statutory requirements or in the case law that the Commissioner's authority over the permit requirements for structures, such as the one proposed, is in any form a prohibition or in any way presumed to be

impermissible. The application and its review demonstrate that an appropriate balance has been struck between competing interests in the intertidal zone.

**Access in the Public trust was adequately considered and maintained.**

The record reflects that DEEP staff and the hearing officer performed a detailed review of the proposed structure's impact in the public trust area waterward of mean high water. Through the application's technical review process, the Applicants and DEEP staff cooperatively determined an appropriate length for the proposed structure that provides for reasonable water access from the upland, in accordance with littoral rights held by the Applicants and without unreasonably interfering with navigation and while still permitting sufficient access under the structure in the intertidal zone. In addition, the proposed permit included a requirement to remove five large granite blocks that historically had been placed directly on the land surface and which impeded access along the waterfront in the public trust area.

Despite assertions in the intervenors' exceptions, the hearing officer did not ignore the witness testimony they presented regarding impacts in the public trust area. The hearing officer considered the entirety of their testimony, including information provided during cross examination that indicated the overall impact to the use and enjoyment of these areas would be minimal. It is understood that the intervenors have concerns. However, these concerns, upon review of the entire hearing record, are appropriately addressed in the PFD.

DEEP's expert on navigation impacts concluded the proposed dock would not interfere or hinder navigation and that the placement of the dock within the littoral boundary ensures boats can continue to be launched from other on-shore areas to which the intervenors have access. DEEP-21. Under cross-examination, this conclusion never changed. Despite their assertions, the intervenors and their other witness acknowledge that the use of the area they currently enjoy can continue upon completion of the proposed structure, as it does with other existing structures. ADD Finding of Fact ("FOF") #27.

**The structure provides reasonable access**

The exceptions raise the concern that the dock cannot be approved because of the limited depth of water during parts of the tidal cycle. This issue has been reviewed time and time again by the Department. I decline the invitation of the intervenors to deviate from prior interpretations by the Department on this issue, as those determinations were made with due regard for the applicable legal principles.

The rights to wharf out are not unfettered. There is no obligation that the Department approve a dock that gives 24-hour access to a certain depth of water. Instead, the requirements of the Coastal Management Act, as considered in the context of the application, require that the interest in gaining boating access from the upland be balanced against numerous resource concerns and policy objectives within the Coastal Management Act. To strike the appropriate balance, the applicant must be willing to accept the limitations of the topography of the area they have rights to access. In the same vein, this does not mean that a waterfront property owner cannot be approved for some level of access to navigable water, even if less than 24 hours of access is available in this

area on a daily basis. The applicants will need to exercise the same precautions as anyone else operating a vessel in an area subject to changes in depth throughout the tidal cycle. The limitations on full boating access shown in the record are not cause to reject the Application.

The intervenors raise the use of a dock design known as a 4/40 dock, authorized by a General Permit, by neighbors and whether this would be an option for reasonable access at the applicant's property. However, the intervenors raise this as if it had not been considered and addressed in the evaluation of the application and in the hearing record. The PFD is clear that it was addressed and upon closer examination of the record, the reasoning behind eliminating this option was sound and respects the proper balance between littoral rights to access the water and the interests of the public in navigation and use of the area below mean high water. The testimony of Krista Romero, a member of Department staff, clearly points out that such a structure was initially recommended due to similar structures on adjacent property. However, the lack of access that those docks provide, due to a potential miscalculation of mean-low water when those docks were permitted, was noted as the reason it was eliminated from consideration and review of options for an individually permitted structure proceeded rather than further review of the 4/40 option available under the General Permit. (Ex. APP-11). This is the only evidence on this issue. The intervenors provided no expert testimony or documentary evidence to refute this reasoning. As a result, I find that such a 4/40 structure was properly rejected as an alternative, as it would not provide reasonable water access to the Applicants.

That the intervenors would have elected otherwise is not sufficient to support their claim that the proposed dock violates requirements of statute. The structure was effectively minimized to avoid unnecessary impact to public trust and coastal resources through the application review process, as reflected in the hearing record.

**Alternative means of access do not preclude a waterfront property owner from seeking structural access from their upland.**

The littoral rights of the Applicants are tied to the upland area they own and the rights they enjoy to access navigable water from this upland. Others that do not own waterfront property or that have not been transferred littoral rights associated with waterfront property do not have the same rights. A right to access water through an easement is not the same as owning waterfront property. Waterfront owners have an additional stick in their bundle of property rights that entitles them to some level of occupation of the public trust area from their waterfront property to access the water. "The owner of the adjoining upland has certain exclusive yet qualified rights and privileges in the waters and submerged land adjoining his upland. He has the exclusive privilege of wharfing out and erecting piers over and upon such soil and for these purposes of occupying and using it in any manner which does not interfere with navigation...." Stefanoni v. Duncan, 282 Conn. 686, 701 (2007). This right is in addition to any other rights shared by the general public, including others with right of access to the water, like those held by the intervenors. The case law cited by the intervenors supports this notion and does not stand for the premise they assert that the exercise of these rights is based on a determination of need. Instead these cases clearly indicate the fundamental, yet qualified, right of waterfront property owners to wharf out, provided they can do so without unreasonably interfering with navigation. The determination of reasonableness is based

on the impacts to access by others. This requires the objective review of existing access and uses as well as neighboring property rights. “It is well established that while the state, as the representative of the public, is the owner of all land between the high and low water marks upon navigable waters, owners of adjoining upland have the exclusive, yet qualified, right and privilege to dig channels and wharf out from the owner's land in a manner that does not interfere with free navigation.” Water St. Associates Ltd. P'ship v. Innopak Plastics Corp., 230 Conn. 764, 769 (1994). Common law, as well as the Coastal Management Act, require these rights to be examined along with the rights of others. “However, where a party's upland bordering on navigable waters adjoins and abuts the property of another, each must exercise his respective littoral rights with due regard for the corresponding rights of the other. The right of access is distinct from that which each has as a member of the public. The fundamental riparian right on which all others depend is the right of access. This is the most important consideration in any division of the respective rights of the parties to land under water.” (internal citations omitted) Rochester v. Barney, 117 Conn. 462(Conn. 1933). Nowhere in this case law is the concept of need a consideration in determining whether the rights were being exercised in a reasonable manner.

Here, all respective rights were reviewed and the materials in the record demonstrate there will be no unreasonable interference with rights of access and use of the intertidal area and the navigable water. The intervenors’ focus on whether there is a need is misguided and does not show an adequate respect for the property rights of the applicant. This Department has never required an applicant to document a need, and requiring such documentation and conclusion is not supported by law. As already discussed, the proposed dock sufficiently balances the exercise of such rights against the need to protect coastal resources, as articulated in statute, and the rights of the public to access areas below mean high water and to navigate freely.

## **Conclusion**

The preponderance of the evidence indicates that impacts from the proposed dock have been minimized and that competing interests have been balanced in accordance with applicable legal requirements and principles and the Department’s past practices. These all indicate consistently that a right to wharf out cannot be eliminated based solely on the subjective preference of neighbors or other members of the public who may share an interest in the use of the intertidal area and navigable waters of the state with waterfront property owners, such as the Applicants. Based on the evidence in the record, the Applicant has demonstrated that the proposed dock would not unreasonably interfere with the rights of others. There is, therefore, no defensible, objective reason to overturn the hearing officer’s determination and recommendation to issue the permit. The Proposed Final Decision, including its findings of fact and conclusions of law, is adopted and affirmed by this Final Decision and the final permit may be issued accordingly.



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Graham J. Stevens

*SERVICE LIST*

In the matter of Heerd  
Application No.: 201810092-SDF  
PARTY

REPRESENTED BY

The Applicants

John and Lisa Heerd

John P. Casey, Esq.  
[jcasey@rc.com](mailto:jcasey@rc.com)

Department of Energy and Environmental Protection

Land and Water Resources Division  
Bureau of Water Protection and Land Reuse

Brian Golembiewski  
[Brian.golembiewski@ct.gov](mailto:Brian.golembiewski@ct.gov)

Intervenors

Doris Zelinsky  
Joseph Murray

Edward A. Zelinsky, Esq.  
[edward.a.zelinsky@gmail.com](mailto:edward.a.zelinsky@gmail.com)