Connecticut Department of
ENERGY &
ENVIRONMENTAL
PROTECTION

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OFFICE OF ADJUDICATIONS

IN THE MATTER OF	:	ORDER No.: LIS-2015-3744-V
NICOLA PIELENZ DOWLING	:	November 3, 2016

RULING ON MOTION TO DISMISS AND FINAL DECISION

On November 18, 2015, the Department of Energy and Environmental Protection issued an "Order to Abate Public Nuisance" ("Order") to the Respondent, Nicola Pielenz Dowling. Ms. Dowling requested a hearing on the Order and, on February 18, 2016, filed a Motion to Dismiss ("Motion") challenging the Department's jurisdiction to issue the Order. The Motion claims that the Department may not issue an Order pursuant to General Statutes § 22a-108 when the Respondent has received Coastal Site Plan approval from the local zoning authority for the work performed. Department staff filed an objection to the Motion on February 23, 2016 ("Objection"). At my direction, the parties undertook discussions to determine if they could stipulate to those facts necessary to resolve the motion, but failed to reach agreement.[1] A preliminary hearing was held on June 15, 2016 to take testimony and admit exhibits relevant to the narrow jurisdictional question raised by the Motion. On August 15, 2016, I ordered the Respondent and Department staff to seek clarification from the East Lyme Zoning Commission regarding the Commission's approval of a Coastal Site Plan sought by the Respondent. I received that clarification on

[1] A partial stipulation of facts was admitted to the preliminary hearing record as Ex. Resp-1.

September 10, 2016. Having reviewed the parties'[2] filings and the evidence admitted to the record of the preliminary hearing, for the reasons discussed below, I grant the Respondent's Motion.

I
A Motion to Dismiss

As I indicated to the parties at the preliminary hearing, for the purposes of adjudicating the Respondent's motion, any disputed facts must be construed in the light most favorable to the non-moving party, in this case, the Department. *Whitaker v. American Telecasting, Inc*., 286 F.3d 81, 84 (2d Cir. 2001).

II
Facts

I find the following facts:

1. On June 11, 2015, Keith Neilson, P.E., filed an application with the East Lyme Zoning Commission ("Commission") for Coastal Area Management Review ("Coastal Site Plan" or "CSP") for property located at 235 Old Black Point Road in Niantic ("Application"). The Application calls for "a 2:1 stone revetment 'Living Shoreline' for protection against waves . . . The project consists of adding 485 (+/-)CY of new armor stone over 5,000 (+/-)SF, 3,000 (+/-)CY of gravel fill, topsoil and vegetation over 37,000 SF, along the shore, and a plastic timber root barrier along the north property line. All work is landward of the High Tide and CT Coastal Jurisdiction Lines. . . . switch grass will be planted into the armored slopes creating the living shoreline." (Exs. RESP- 1 – 2.)

2. The Application was placed on the Commission's agenda for its July 9, 2015 meeting and consideration of the Application was continued until the August 6, 2015 Commission meeting. The agendas for both meetings characterize the Application as "Request of

[2] The parties to this matter are the Respondent, Department staff and Daniel Adams, an intervening party.

Keith Neilsen [sic] for Docko, for Colin Dowling for a Coastal Area Management Review for the raising and re-orientation of a historic home to meet flood standards, including raising the grade, at property identified in the application as 235 Old Black Pt Rd, Niantic, CT." (Exs. RESP- 1, 4, 7.)

3. On July 2, 2015 and July 31, 2015, respectively, copies of the agendas for the Commission's meetings were e-mailed to Marcy Balint in the Department's Office of Long Island Sound Programs. Neither a copy of the Application, nor any other materials concerning the Application, was sent to the Department. (Exs. RESP-1, 3, 6; test., M. Balint, 6/15/16.[3])

4. At its August 6, 2015, meeting, the Commission heard a presentation from Keith Neilson, P.E. and approved the Application. The Commission made no statement of the reasons for its approval. Notice of the approval was published in the New London Day newspaper on August 13, 2015. The published notice of approval uses the same language to characterize the Application as was used in the meeting agendas. (Exs. RESP-1, 8, 9, 10; test. W. Mullholland, M. Walker, 6/15/16.)

5. No copy of the Commission's decision was sent to the Department. The Department subsequently learned of the work in progress at the Property and was sent a copy of the Application and the Commission's approval by Mr. Neilson on October 22, 2015. (Exs. DEEP-10, RESP-1; Test., M. Balint, 6/5/16.)

6. On October 30, 2015, the Department sent to the Town of East Lyme notice of its intent to issue an Order to Ms. Dowling ("Notice"). That Notice states, in part, that "[o]ngoing work [on the Dowling Property] was apparently authorized through local Coastal Site Plan Approval in a letter dated August 11, 2015 . . ." The Notice further states that the proposed work constitutes a "shoreline flood and erosion control structure" mandating,

[3] At the time of this ruling, a transcript of the Preliminary Hearing on the Motion to Dismiss, held June 15, 2016, has not been prepared. The hearing was recorded, and copies of the recording are available by contacting the Office of Adjudications.

among other actions, a referral of the Coastal Site Plan, within fifteen days of its receipt, to the Commissioner for comment and the provision of a copy of the decision of the Commission to the Department within fifteen days after that decision is made. The Department did not receive a response. (Ex. DEEP-10; test. W. Mullholland, M. Walker, M. Balint, 6/5/16.)

7. On November 18, 2015, the Order was issued to Ms. Dowling The Order required Ms. Dowling to stop work in progress and prepare and implement a removal and restoration plan for work already performed. On December 7, 2015, Ms. Dowling requested a hearing regarding the Order.

8. On August 15, 2016, I ordered the parties to request that the Commission answer the following question:

> When approving the Dowling Coastal Site Plan, did the Commission consider the approval to be of a 'shoreline flood and erosion control structure' as defined in General Statutes § 22a-109 or of a different type of activity, such as a living shoreline, requiring Coastal Site Plan approval?

At the Commission's September 1, 2016 meeting, it took up this question and responded that, "[w]hen approving the Dowling Coastal Site Plan, the East Lyme Zoning Commission considered the approval to be of a living shoreline activity requiring coastal site plan approval."

Additional facts, such as the nature of the allegations made in the Order and the Respondent's Answer and Request for hearing, or inferences therefrom, may be set out below.

III
Conclusions of Law

A
The Relevant Statutory Scheme

Our Supreme Court has recognized that under the Coastal Management Act ("CMA") General Statutes §§ 22a-90 through 22a-111, regulatory authority over work proposed along the shoreline, but landward of the coastal jurisdiction line is divided between the Commissioner and

coastal municipalities, with "primary authority" residing with municipalities. *Sams v. Department of Environmental Protection*, 308 Conn. 359, 392 (2013). Municipal zoning authorities are statutorily authorized to review CSPs submitted by property owners who, like the Respondent, seek to perform activities in a statutorily defined coastal boundary area. Id. And, while the Commissioner is directed to provide support for municipal oversight, and by right may participate in local zoning hearings, the Commissioner may not dictate whether a municipality approves a CSP in a given case. Id.

If a CSP involves a shoreline flood and erosion control structure, under General Statutes § 22a-109, there are certain additional requirements involving input from the Commissioner that apply.[4] These additional requirements do not apply to CSPs for activities other than shoreline flood and erosion control structures.

The Commissioner may, after providing notice to the municipality in which an activity is conducted, issue an order to halt, abate, remove or modify a public nuisance, which § 22a-108 defines as "[a]ny activity" performed "within the coastal boundary" that is

> not exempt from coastal site plan review pursuant to subsection (b) of section 22a-109, which occurs without having received a lawful approval from a municipal board or commission under all of the applicable procedures and criteria listed in sections 22a-105 and 22a-106, or which violates the terms or conditions of such approval.

General Statutes § 22a-108. The Commissioner may also "appeal . . . a municipal decision concerning [the review of a coastal site plan] whether or not he has appeared as a party before a municipal board or commission." General Statutes § 22a-110. Our Supreme Court has determined that this statutory scheme provides two options for the Commissioner to take issue with work

[4] Section 22a-109 requires a Commission to send a copy of the CSP to the Commissioner for comment, to wait thirty-five days for the Commissioner's comments, to set out its decision in writing and to transmit a copy of its decision to the Commissioner within fifteen days.

requiring a CSP approval. For work performed without a lawful municipal approval, or work which violates the terms or conditions of such approval, the Commissioner may issue an order.[5] *Sams*, supra, 308 Conn 393 (2013). When work which has received a municipal approval that the Commissioner disagrees with, the Commissioner may take an appeal. Id. at 392. Our Supreme Court has also determined that this statutory scheme ensures that municipal determinations are given the primacy required under the CMA. Id. at 394.

B
The Commissioner May Not Issue an Order Because
of a Substantive Disagreement With a Local Approval.

It is not disputed that the Respondent received a municipal approval, nor is it alleged that the work performed exceeds that local approval. Department staff argue, however, that the municipal approval is deeply flawed since, according to Department staff, the Commission approved a "shoreline flood and erosion control structure" without complying with the procedural requirements set out in General Statutes § 22a-109. Department staff argues that none of these additional requirements applicable to shoreline flood and erosion control structures were complied with and, as such, that it has properly asserted jurisdiction over the Respondent because the Commission's approval of the Respondent's work was unlawful. I disagree.

There are three facts that are necessary to my analysis of this question. The first is characterizing the regulated activity proposed and partially completed on the Property. As I have previously indicated on the record, I must construe this disputed fact – whether the work proposed and partially completed is a living shoreline or shoreline flood and erosion control structure – in the light most favorable to the non-moving party, in this case Department staff. I must assume,

[5] The Commissioner may also request that the Attorney General institute a proceeding to enjoin or abate the activity.

therefore, that the work on the Property is a shoreline flood and erosion control structure. Next, I also assume, for the purpose of resolving this Motion, that the Commission's approval was granted without the referral of the CSP to the Commissioner and the mailing of the Commission's decision to the Commissioner as is required by § 22a-109 for a shoreline flood and erosion control structure.[6] Finally, as was made clear by the Commission, when it issued its approval[7], the Commission considered the work proposed to be a "living shoreline."[8] As stated in my clarification to my August 5, 2016 order, what the structure is and what the Commission understood it was approving at the time it issued its approval are separate and distinct facts.

It is clear that the obligation to refer the CSP to the Commissioner only exists when the Commission has determined that a CSP involves an application for a shoreline flood and erosion control structure pursuant to § 22a-109. The Commission has the discretion to determine, in the first instance, whether the work proposed is a shoreline flood and erosion control structure; here the Commission determined that it was not. As our Supreme Court made clear in Sams, coastal municipalities, and not the department, have the sole authority to approve, modify or deny a coastal site plan under § 22a–109 (a)." *Sams*, supra, 308 Conn. 393 (2013). Once the Commission, acting

[6]To the extent there is any question about whether the agendas e-mailed to the Department were sufficient to provide Department staff notice regarding the type of work proposed, I assume for the purposes of this motion, that the agendas did not satisfy the requirments of § 22a-109.

[7] At the time it made its decision, the Commission made no collective statement as to why it approved the Application. It would be inappropriate to credit the statements of individual commission members, contained in either the minutes of the meeting where an application was discussed or in testimony before me, as evidence of the Commission's intent when it approved the proposed activities on the Dowling property. See *Verrillo v. Zoning Board of Appeals*, 155 Conn. App. 657, 673–74 (2015) (individual reasons given by certain members of zoning agency do not amount to formal, collective, official statement of agency, are not available to show reasons for, or grounds of, zoning agency's decision and it is not appropriate for reviewing court to attempt to glean such formal, collective statement from minutes of discussion by members prior to zoning agency's vote). I instead rely on the clarification issued in response to my request as the Commission's formal collective statement regarding its intent when approving of the Application.

[8] Department staff were aware, at the time they issued the Order, that the Commission may have considered the work to be a "living shoreline" as the Order itself states, in relevant part, "[t]he proposed work was also described as 'a 2:1 stone revetment 'Living Shoreline' . . ."

with the discretion accorded to it by the legislature, determined that the Application was not for a shoreline flood and erosion control structure the additional procedural requirements of General Statutes § 22a-109 do not apply.

The dispute between the Department and the Respondent emanates from this determination, made by the Commission. Department staff's quarrel with that determination is substantive; this dispute is about whether the Commission properly applied the definitions in the Coastal Management Act in approving the CSP. In particular, Department staff argue that the work authorized by the Commission constitutes a shoreline flood and erosion control structure, not a living shoreline. Given this alleged legal error, coupled with the failure to comply with the additional procedural requirements in § 22a-109, Department staff argue that the work in question has not received a "lawful approval" as that term is used in § 22a-108. Since, according to Department staff, the work in question never received a lawful approval, the Commissioner can proceed with an order, pursuant to § 22a-108. However, our Supreme Court has found otherwise. "Should the Department disagree with a municipality's decision, *its sole source of relief* is through an appeal to the courts" pursuant to § 22a-110. *Sams*, supra, 308 Conn. 392 (2013)(Emphasis added.); see also *Shanahan v. Department of Environmental Protection*, 305 Conn. 681, 720 (2012). Based on this holding, in a case like the present one where the Commission has approved a CSP – even if the Commission misapplied a definition and reach the wrong conclusion about whether an activity is a shoreline flood and erosion control structure – the Commissioner's remedy is to appeal the Commission's decision, not issue an order.

Although Department staff's real issue is with the Commission's approval, it argues that issuing an order to the Respondent is appropriate because "[t]he municipality has had every opportunity to defend the legality of its August 6, 2015 approval." But that is not necessarily the

case. The Commission is not a party to this matter. Section 22a-108 does not permit the Department to issue an order *to the Commission* to force it to defend its actions, and the Commission cannot be made a party to this matter unless it choses to intervene. (See "Ruling on Motion to Implead the Commission," April 25, 2016). In an appeal of the local approval, however, the Commission would be named as a defendant and the entire record of the proceeding before the Commission compiled. This avoids forcing the Respondent into the unnecessarily difficult position of having to defend the actions of the Commission without the Commission's assistance.

Department staff also raises concerns that local commissions will continue to misapply the law and argue that only the power to issue orders to those proposing to conduct regulated activities will prevent this continued misapplication of the law. But our Supreme Court has made it clear that local commission's decisions have primacy, and the Commissioner's remedy is to appeal decisions it deems incorrect. *Sams*, supra, 308 Conn. 392, 399 (2013) In addition, there is a "strong presumption of regularity in the proceedings of a public body such as a municipal planning and zoning commission . . . " (Internal quotation marks omitted.) *Clifford v. Planning & Zoning Commission*, 280 Conn. 434, 441 (2006). It must be assumed that local commissions will properly apply the law, and the Commissioner's right to appeal serves as a check on the authority of local commissions when they do not.

Department staff's view also seems to leave open the possibility that the Commissioner could issue an order at any time, even years after a local commission has authorized work, which would both violate the Supreme Court's exhortation to respect the primacy of local decisions and mean landowners could never really obtain finality with respect to a locally issue approval.

These conclusions are also consistent with the intent of the legislature. In a briefing summary prepared regarding H.B. 7878 for the General Assembly's 1979 session which adopted

the CSP procedure now in question, and is now maintained on file in the Connecticut State Library, it is clearly stated that "DEP [now DEEP] is not given authority to override local decisions as was the case in last year's bill. Rather DEP must, if a municipal decision is not substantially consistent with the policies in H.B. 7878, appeal to the courts." (Emphasis original.) *Briefing Summary*, H.B. 7878 – An Act Concerning Coastal Management. In the debate on adoption of H.B. 7878 on the floor of the Senate, Senator Schneller stated that,

> [i]t's a local commission that will be making decisions relative to the site review plans as to whether or not they conform to the intent of the coastal legislation. It's only when a local board or commission totally disregards the intent of the legislation that the state will then step in and review that decision; and even then, the final decision will be made in a court of law and is not the state's decision to be made.

22 S. Proc., Pt. 15, 1979 Sess., p. 5159. This statement reflects the General Assembly's intent to allow courts to determine, on appeal, whether a commission has acted properly even when, as Department staff allege, the Commission has failed to properly apply the relevant statutory scheme.

C

The Town of East Lyme's Failure to Respond to the Notice Does Not Create Jurisdiction Where Jurisdiction Would Not Otherwise Exist.

Department staff next argue that because the Town of East Lyme failed to respond to the Notice, it properly issued the Order to the Respondent. This argument is based on our Supreme Court's holding in *Sams*, which states that

> [b]efore taking any action against an activity . . . the department must notify the municipality of its intention to do so. By requiring such notice as a predicate to the department's enforcement action, the scheme ensures that the municipality's determinations are given the primacy required under the act. *If the municipality informs the department that the municipality has given approval for the activity or deemed no such approval necessary, the department could not initiate an action because the predicate for the department's action under § 22a-108 – an unlawful activity – would not exist. At that point, the department's sole source of relief is*

> *through an appeal to the courts pursuant to § 22a-110.* Similarly, if the municipality informs the department that the activity is the subject of a pending site plan or an administrative appeal, the department's role is limited under the scheme to being a party to those proceedings. If, however, upon notice from the department, the municipality confirms that the activity is one for which lawful approval is required but none has been obtained, or *declines to express an opinion on that matter, there would be no statutory bar to the department's initiation of enforcement proceedings.*

(Citations omitted; emphasis added; internal quotation marks omitted.) *Sams v. Department of Environmental Protection, supra*, 308 Conn. 394 (2013). Department staff argue that since it sent notice to the Town of East Lyme and no response was received, that under *Sams* the town "declined to express an opinion on the matter" allowing the Department to move forward with issuance of an order. While it is true that the Town of East Lyme did not respond to the Notice, this failure to respond alone cannot form the basis of the Department's jurisdiction. The purpose of the notice, as envisioned by *Sams,* is for the Commissioner to ascertain from the municipality the status of an activity, assuming, of course, that such status is unknown to the Commissioner when he sends the notice.

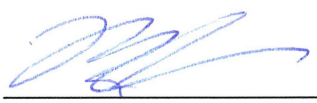
In this case, however, at the time the Department sent the Notice, it already knew the work had been approved by the Commission. In fact, the Notice itself states that, "[o]ngoing work at this site was apparently authorized through local Costal Site Plan Approval in a letter dated August 11, 2015 to Keith Neilson of Docko, Inc. based on a decision taken at the Zoning Commission's August 6, 2015 meeting." It is unclear that the municipal response could have provided any information about the approval not already set out in the Notice.

Under *Sams,* "[i]f the municipality informs the department that the municipality has given approval for the activity or deemed no such approval necessary, the department could not initate and action because the predicate for the department's jurisdiction under § 22a-108 – an unlawful activity – would not exist. Id. at 394. In this case, Department staff's argument is hard to reconcile

with the logic of *Sams*. A response to the Notice was not necessary to resolve ambiguity as to the status of the work conducted. Instead, Department staff are essentially arguing that even though they knew the work had been approved, the prohibition against issuing an order set out by the *Sams* decision shouldn't apply only because the Town of East Lyme failed to send the Department a letter in response to the Notice. There is no reason that the Town's failure to act should give the Department jurisdiction when jurisdiction over the Respondent would not otherwise exist.

IV
Conclusion

For the foregoing reasons, I conclude that the Order is invalid and grant the Respondent's Motion to Dismiss. This is, therefore, the Final Decision in this matter and this proceeding is hereby terminated.



Brendan Schain, Hearing Officer

cc: service list

SERVICE LIST

In the matter of Dowling – Order No.: LIS-2015-3744-V

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