

IN THE MATTER OF : **APP NO. 201905859**
:
:
:
CONNECTICUT PORT AUTHORITY, STATE PIER : **August 3, 2021**

FINAL DECISION

I. Introduction

This Final Decision concerns an application submitted to the Department of Energy and Environmental Protection (“DEEP” or the “Department”) to conduct regulated activities associated with the reconstruction of State Pier in New London. The Connecticut Port Authority filed an application for a Structures, Dredging and Fill (“SDF”) permit and tidal wetlands permit in accordance with General Statutes §§ 22a-361 and 22a-32 respectively on May 27, 2019 that was identified as application number 201905859 (the “Application”). A Notice of Tentative Determination (“NTD”) recommending that the Commissioner approve the Application and issue the draft permit attached to it, was published on December 16, 2020. The Applicant requested a hearing, initiating this hearing process. Specifically, the draft permit published with the NTD authorizes placement of approximately seven cubic acres of fill between the two existing piers to facilitate the creation of additional “marginal wharf” area (an area for ships to land cargo parallel to shore); activities necessary to reinforce two berthing areas for heavy cargo; dredging near the berthing areas; and the placement of stone/gravel on the riverbed to support “jack-up” vessels (those that have legs used to raise themselves out of the water). The proposed activity will establish a heavy-lift capable port facility that will accommodate a wide variety of cargoes, but will namely be utilized for long-term regional wind-turbine generator (WTG) staging and assembly, while continuing to facilitate the handling of other bulk, breakbulk and general cargo operations associated with steel, coil steel, lumber, copper billets, and other cargo.

The parties to this matter are the Connecticut Port Authority (the “Applicant”) and Department staff. The City of New London was admitted as an intervening party on February 5, 2021, while DRVN Enterprises, Inc. (the “Intervenor”) was granted status as an intervenor, pursuant to Regs., Conn. State Agencies § 22a-3a-6(k)(2), on March 26, 2021.

On May 21, 2021, the Department’s hearing officer issued a Proposed Final Decision (“PFD”), adopting, with supplemental findings of fact and conclusions of law, an Agreed Draft Decision

("ADD") jointly submitted by the Applicants and DEEP staff on April 27, 2021. Overall, the PFD recommended that the Application be approved and that the Draft Permit be issued as a final permit. The Intervenor filed exceptions to the PFD, and oral argument regarding those exceptions was held on July 21, 2021.

The concerns raised in the exceptions have been previously addressed by the Applicant and DEEP staff both in the application process and through the presentation of relevant and material evidence during the hearing that supports issuance of the permit in accordance with the NTD. The PFD finds the ADD to be supported by the evidence in the record and further clarifies where the record supports permit issuance despite arguments made by the Intervenor in its objections to the ADD. Despite the assertions made in the exceptions and at oral argument, there is no support for arguments that the hearing officer ignored relevant facts or shirked his duty to consider applicable legal principles in arriving at his recommendation. Based on the material in the hearing record and the preponderance of the evidence before the hearing officer, the Proposed Final Decision to approve the application and issue the final permit is affirmed, and its findings of fact and conclusions of law are incorporated into this final decision.

II. Response to the Exceptions

The exceptions filed by the Intervenor were of a limited nature that did not refute the findings of fact or support an alternative legal analysis contrary to the PFD. Instead, the Intervenor alleged that a portion of the Notice of Insufficiency ("NOI") issued to the Applicant during the initial stages of the Application's review was not addressed by the Applicant, namely that the Applicant did not identify the Intervenor as a water dependent user being displaced by the proposed reconstruction project. The Intervenor maintains that this omission was not addressed in the hearing record and that as a result the hearing officer did not adequately consider relevant statutory criteria as required by the Coastal Management Act. In its second exception, the Intervenor alleged that a request for proposals (the "RFP") issued by the Applicant regarding the management of State Pier should be part of the record in this matter as the Intervenor's displacement from the pier is somehow inconsistent with the RFP.

The brief filed by the Intervenor prior to the oral argument focused primarily on the issue of the NOI and the Intervenor's status as a former occupant of the site. The import of the RFP was not briefed or argued at oral argument. Nevertheless, even though such an argument may be considered abandoned, the issue was addressed by the PFD, and the hearing officer's determination that the RFP is irrelevant given the scope of the proceeding is affirmed.

A. Notice of Insufficiency

The exception regarding the NOI assumes that a request for information in an NOI is the equivalent of a statutory or regulatory criterion on which one can base a rejection of the Application. The Intervenor's claim that the Application was somehow incomplete or did not

meet the statutory or regulatory criteria is not convincing and not supported by the record. DEEP staff's testimony is clear that the Application was complete and met the applicable statutory and regulatory criteria. (Ex. DEEP-15; Test. M. Grzywinski, 3/30/21).

The NOI, although a public document, is not a publicly noticed document that gives rights to third parties. It is a tool used to communicate to a permit applicant that further information is needed to proceed with a technical review of an application. Essentially, the NOI is the opening of a dialogue with the applicant to ensure the application is complete.¹ The NOI is not a final decision on the merits of the application. Ultimately, whether an application is complete is the Commissioner's determination to make through the Department's technical staff. What is notable in this matter is that after the initial NOI, a modified version of the application was submitted. This required further review in light of the design changes and the changed circumstances at the site and ultimately the Application in its modified form was deemed complete. (Ex. DEEP-15). Finally, at the time the NOI was issued, the Intervenor was already informed that its operations at the pier must cease. Further information about the Intervenor as a particular user of the pier in its existing configuration was not required to render the application complete or to issue a tentative determination that the Application met the statutory and regulatory requirements.

With no support to equate the information in the NOI to regulatory criteria, the Intervenor contends that its particular use of the pier enjoys a level of protection that supersedes the rights of the Applicant. This assertion is not supported by the applicable statutory and regulatory criteria. The Coastal Management Act (the "Act") gives "highest priority and preference to water dependent uses, including but not limited to commercial and recreational fishing and boating uses" when an existing pier is redeveloped. Connecticut General Statutes (CGS) § 22a-92(b)(1)(C). While the Act prioritizes water dependent uses over other types of uses, it does not establish or require a preference for certain water dependent uses or users over other water dependent uses or users. As such, there is no basis for determining that the use of the pier for the Intervenor's road salt business requires any level of deference or special consideration when compared to other water dependent uses.

The Act's preference for water-dependent uses is general in nature² and the Intervenor has consistently conflated the terms "water dependent use" and "water dependent user" throughout this process, in seeking recognition that the latter is protected by the Act and due some level of deference in this decision. Nowhere in the Act is the term "water dependent user." The legislature is assumed to understand the difference between the word "uses" and

¹ With the exception of information specifically identified as required in a statute or regulation, the Department is free to find an application complete without necessarily receiving all of the information listed in a Notice of Insufficiency.

² The limited exception to this general statement of priority are the references to commercial and recreational boating uses and commercial fishing that are offered as examples of water dependent uses.

“users” when identifying the policies of the Act. “It is an axiom of statutory construction that legislative intent is to be determined by an analysis of the language actually used in the legislation.” (Internal citations omitted.) *Gelinas v. Town of W. Hartford*, 65 Conn.App. 265, 275 (2001). The term “water dependent use” is used consistently in the Act and is a defined term that does not implicate a particular user except to provide examples. This consistency clarifies the Act’s focus on the support of water dependent uses generally. The Act does not prioritize current or former water dependent users, or enforce protections for any separate contractual rights held by them to use a site. As stated in the PFD, “the facts alleged show that it is not the decision in this matter that will determine whether DRVN can operate at State Pier. DRVN indicates that it is not operating at State Pier now, even though a decision in this matter has not been made.” This continues to be the case as the Intervenor’s use of the pier and the cessation of its operation there is due to the structure of its contractual arrangement with the Applicant and the Applicant’s exercise of its contractual rights to terminate the arrangement.

A waterfront property owner can exercise littoral rights in any number of ways. This could include updating infrastructure for water access that either is for a new water dependent use or that suits the evolving need of an existing waterfront user. The Commissioner is not authorized to interfere with the rights of the waterfront property owner to select who shall occupy the waterfront property when the use of the property will continue to be water dependent, as is the case here.

To support the proposed reconstruction, the Applicant clearly established through expert testimony that the proposed assembly, staging and berthing for WTG to be conducted at the reconstructed pier is a water-dependent use that would be consistent with the Coastal Management Act. (Test. M. Peterson, 3/30/21). This testimony is unrefuted and is consistent with the findings of Department staff that the pier’s reconstruction will support a water dependent use in accordance with the policies of the Act. (Test. M. Grzywinski, 3/30/21). It is clear, then, that water dependent uses continue to be prioritized at the site.

B. The RFP

Finally, regarding the RFP, the Department cannot base its decision in this matter on various contracting documents. Instead the Department can only determine whether the activity and use proposed in the Application are consistent with the applicable statutes and regulations under DEEP’s jurisdiction, namely the Coastal Management Act (§22a-92, *et seq.*) and the statutes concerning Structures, Dredging and Fill (§ 22a-359, *et seq.*). This review is shaped by the application before the Department, and the information deemed relevant and material to the Application as determined by the Applicant. Throughout the hearing process, the RFP, information regarding the RFP process, and the relationship of the RFP to the proposed reconstruction of the facility were deemed outside the scope of the Application’s review by the hearing officer. The Intervenor offered no further argument to support the relevance of the RFP and the RFP process to this determination in its brief or at oral argument.

The Application for the proposed activity did not end the Intervenor's use of the property. Instead, the use was terminated by a separate action of the Applicant under the authority of its separate contract with the Intervenor, an agreement to which the Commissioner and DEEP are not a party and over which the Department does not exercise oversight. The Applicant has elected to pursue a business arrangement with a different water dependent user for the State Pier. This arrangement may be enabled by the Commissioner if it is found to be consistent with the applicable legal standards, including the priority given to water dependent uses.

III. Conclusion

The preponderance of the evidence in the hearing record supports the hearing officer's Proposed Final Decision and the Agreed Draft Decision that it adopts. The exceptions filed are not persuasive and do not support overturning the Proposed Final Decision as inconsistent with the applicable legal standards. The Intervenor's frustration with the cessation of its business activity at the State Pier is apparent but by itself does not support the findings it seeks. Such a result would be contrary to law and to the Department's consistent practice to focus its permit proceedings on applicable legal authority and factual evidence in the record. The proposed activity, if conducted in accordance with the draft permit will be consistent with the applicable standards, including the priority to be given to water dependent uses. The continued water dependent uses will be maintained after the completion of the proposed activity. 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.



Katherine S. Dykes, Commissioner

SERVICE LIST

In the matter of
Connecticut Port Authority (State Pier)

Party

Land and Water Resources Division
Bureau of Water Protection and Land Reuse
Department of Energy and Environmental
Protection

AAG Lori DiBella, Esq
Lori.DiBella@ct.gov

Connecticut Port Authority

John Casey, Esq.
jcasey@rc.com

Jessica Bardi, Esq.
jbardi@rc.com

City of New London

Jeffery T. Londregan, Esq.
JLondregan@clsmlaw.com

Intervenor

DRVN Enterprises, Inc.

Keith Anthony, Esq.
keith@attorneykeithanthony.com

Steven Farrelly
steve@drvninc.com

Courtesy Copies

Kevin Blacker
kjblacker@sbcglobal.net