STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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In the Matter of a Petition for a	*
For a Declaratory Ruling by	*
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Thomas and Gail Lane	*
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DECLARATORY RULING

Pursuant to Conn. Gen. Stat. § 4-176, I am issuing this Declaratory Ruling in response to a Petition for Declaratory Ruling ("the Petition") filed by a representative of Gail and Thomas Lane ("the Petitioners"). This Declaratory Ruling concerns an authorization for a dock and a boardwalk, or more to the point, the lack of any such authorization. The Petitioners ask whether the Department: 1) wrongfully denied their application for a Certificate of Permission under Conn. Gen. Stat. § 22a-363b; 2) misinterpreted the term "continuously maintained and serviceable," as used in Conn. Gen. Stat. § 22a-363b(a)(2); and 3) wrongfully issued them a Notice of Violation for an unpermitted dock and boardwalk on their property.

I. FACTS

The Petitioners own property located at 32 Money Point Road, Stonington, Connecticut ("the property"). The Petitioner's property includes waterfront access, through a tidal marsh, to Fishers Island Sound.

The record in this matter indicates that sometime in 1937, the then owner of the property, Hugh Cole, built a dock on the property. He also made a path, of cinders or gravel, through the tidal marsh leading to the dock. The dock was approximately four feet wide and apparently

extended out seventy-five (75) to ninety (90) feet and ended in "T" shaped pier. The dock was damaged in the 1938 hurricane but was subsequently rebuilt.

A number of aerial photographs show the dock and path in various conditions since its original construction. These photographs show a lack of continuity in the size, configurations and even the presence of a dock and path at the property.[1] The following is a chronology of the aerial photographs.

- A 1951 aerial photograph shows an approximately 100-foot long pier with a timber crib located at the end of a "T" shaped pier head. There is a graded path through the marsh to the pier.
- A 1965 aerial photograph shows the pier in a state of disrepair without any decking. A graded path is still visible through the high marsh vegetation.
- A 1968 and 1970 aerial photograph shows a pier less than forty (40) feet long with a cleared or graded path through the tidal marsh.
- A July 1974 aerial photograph shows the graded path through the tidal marsh and a new pier/floating dock in place. The first pier section, beginning on land is less than fifty (50) feet long. This pier leads to a ramp, approximately 10 feet long, that leads to a floating section of dock, approximately sixty-five (65) feet long, connected to a 20' x 10' "T" float.
- A July 1981 aerial photograph shows a thinner path through the marsh with encroaching vegetation. Only the first approximately fifty (50) foot section of the pier - that begins on land - remains, in what appears to be a state of disrepair; there is no ramp, no section of floating dock and no "T" float present.

[1] All dimensions and measurements taken from the aerial photographs are approximate using traditional methods.

- In a March 1986 aerial photograph no pier, ramp, float or other dock structure is present. Also, the path through the tidal marsh is barely discernible as the tidal wetlands have mostly re-established. A July 1986 aerial photograph shows the same condition, except a 10' x 15' foot floating dock is situated on waterward edge of the marsh.
- A July 1990 aerial photograph shows an approximately 120' x 3' at-grade wooden boardwalk placed directly on the tidal marsh. This is the first time that a wooden boardwalk appears on the marsh. The boardwalk leads to a six (6) foot wide pier that begins on land and extends into the near shore waters. The pier is estimated to be seventy-eight (78) feet long. The pier is supported by two stone-filled cribs, approximately 8'x 8', located at the middle and at the end of the pier. Following the pier is a ramp longer than ten (10) feet that leads to a floating dock that is approximately 20'x 10' in size.
- In a 1995 aerial photograph, a portion of the at-grade walkway is missing, reducing the boardwalk to about 100 linear feet. The pier is in a state of disrepair as exposed stringers are visible. The ramp and float are still in place.
- In a September 2000 aerial photograph the pier is more dilapidated than in 1995, however replacement sections of the boardwalk are visible.
- In a March 2004 aerial photograph, the entire boardwalk is gone and a pier, ramp and float, consistent with 1990 aerial photograph, are in place.
- A September 2005 aerial photograph shows the pier repaired and only 80 feet of the boardwalk is present.

In the town of Stonington, structures such as a dock are added to the taxes assessed on a property as a separate item. In 1984, the Stonington tax assessor removed a dock from the taxes assessed on the property. At that time, the property was owned by the Estate of Emma Cole. In September 1985, Hurricane Gloria struck Connecticut. In November 1985, the property was transferred to Hugh Cole, Emma Cole's son. In March 1987, Hugh Cole transferred the property to Hudson Holdings, Inc., who in turn transferred the property to David Schilling and Claire Warren in July 1987.

During the time that the property was owned by David Schilling and Claire Warren a new dock was installed and a new wooden boardwalk was installed on top of the tidal marsh. Exactly when the new dock and boardwalk were installed is not clear. Dr. Schilling puts the date for construction of the dock at "circa 1988." His statement does not mention the boardwalk. The Stonington tax assessor apparently did not become aware of the new dock until 1991 and assessed taxes on the new dock retroactively to 1990.[2] So for six years, from 1984 until 1990, from the tax assessor's standpoint, there was no dock on the property. Also, regardless of when the new dock and boardwalk were installed, it is clear that no permits were either sought or obtained from the Department for either structure.

Schilling and Warren remained owners until November 1991 when the property was transferred to Robert and Ruth Stetson. The property was transferred to the Petitioners in October 2004.

In March of 2007, OLISP staff inspected the Petitioners property. This inspection resulted in the issuance of a Notice of Violation ("NOV") in May of 2007 for a dock and boardwalk that did not have the permits required by Conn. Gen. Stat. §§ 22a-32 and 22a-361.

[2] The assessor also added an assessment for a deck as well as the dock.

The NOV triggered a series of correspondence and meetings between the Petitioners, their representatives and the Department. In a December 31, 2007 letter, the Petitioners took the position that the structures constructed and installed were "grandfathered" since a dock had first been constructed at the site in 1937, before the enactment of any law requiring a permit. In letters dated July 27, 2007 and February 4, 2008, the Department noted, among other things, that there is no "grandfathering" provision in the law, that the structures were not eligible for a Certificate of Permission ("COP") under Conn. Gen. Stat. § 22a-363b and that both structures needed a permit under Conn. Gen. Stat. §§ 22a-32 and 22a-361.

Despite having been informed by the Department that the structures were not eligible for a COP, in July 2008, the Petitioners filed an application for COP seeking authorization to: 1) remove a 4' x 100' at-grade boardwalk as well as the landward 17' portion of a 5' x 74' fixed dock and replace it with a 4' x 152' wooden boardwalk that would be raised off the ground; and 2) retain and maintain an 8' x 16' floating dock, a 3' x 12' ramp and a 5' x 57' fixed dock with two 8' x 8' support cribs and pilings. The Petitioners asserted that pursuant to Conn. Gen. Stat. § 22a-363b(a)(2) the activities in their application were eligible for a COP on the grounds that the activities constituted substantial maintenance of structures, fill, obstructions or encroachments in place prior to June 24, 1939, and continuously maintained and serviceable since such time. No other ground for COP eligibility was asserted. On August 8, 2008, the Director of OLISP denied the Application, noting that the activities in question were not eligible for a COP.

Any additional facts will be discussed, as necessary, below.

I. THE PETITION FOR A DECLARATORY RULING

On August 29, 2008, the Petitioners filed their Petition. In accordance with Conn. Agencies Regs. § 22a-3a-4(a)(3), the Petition included an affidavit from the Petitioners' counsel stating that notice of the Petition and of the opportunity to file comments thereon or request intervenor or party status had been provided to interested persons.[3] The notice indicated that comments would be received by the Department until October 2, 2008.

On October 24, 2008, pursuant to Conn. Gen. Stat. § 4-176(c), and Conn. Agencies Regs. § 22a-3a-4(c)(3), I issued a Notice of Intent To Issue a Ruling and Notice to Additional Persons or Entities. This Notice indicated that the Petition had been accepted, that further proceedings may be ordered and that a ruling would be issued on or before February 25, 2009. The Notice also afforded certain other persons or governmental entities, who had not previously received notice of the Petition, but who had indicated their interest in this matter by submitting comments on the Petitioners' application for a COP, the opportunity to become a party or intervenor in this proceeding or submit comments on the Petition on or before November 24, 2008.[4]

On December 3, 2008, I issued a Notice of Further Proceedings which established a schedule for the submission of additional information by the staff of the Department of Environmental Protection ("the Department" or "DEP") and the Petitioners. This notice also stated that correspondence between the Department and Stonington tax assessor's office would be included as part of the record in this matter. After a brief extension of time was granted, the Department's staff submitted additional information on December 30, 2008. After a brief extension of time was granted, the Petitioners submitted additional information on February 13,

[3] A list of the persons and entities to whom the Petitioner provided notice is included as Appendix A to this Declaratory Ruling.

[4] A listing of the persons and governmental entities who received the October 24, 2008 notice is included as Appendix B to this Declaratory Ruling.

2009. Pursuant to Conn. Gen. Stat. § 4-176(i), with the agreement of the Petitioners, the date for issuing a ruling in this matter was extended to March 20, 2009.

II. THE ISSUES RAISED IN THE PETITION

The Petitioner seeks three rulings as follows:

1) Did OLISP err in denying the Petitioners' Application for a COP for substantial maintenance of structures that have existed at their property since prior to June 24, 1939;

2) Is OLISP's literal interpretation of the "continuously maintained and serviceable" provision of Conn. Gen. Stat. § 22a-363b contrary to the legislative intent of the statute to grandfather structures existing prior to June 24, 1939; and

3) Did OLISP err in issuing an NOV for twenty year old repairs to a pre-1939 structure to the Petitioners, who are innocent purchasers of the property and did not perform the repairs, where a) the basis for the NOV was that OLISP had no record of a permit for the repairs; and b) the reason for the absence of a permit is that DEP did not require such a permit at the time the repairs were performed by the prior owner?

III. SUMMARY OF PUBLIC COMMENTS

During the public comment period, the Department received comments from fifteen (15) commenters. All but one firmly supported the Department's decision to deny the COP sought by the Petitioners and encouraged the Department to proceed with enforcement of the NOV. The commenters include the Town of Stonington, a former member of the DEP Long Island Sound Advisory Board, a former member of the Coastal Area Management Board, a marine ecologist, boaters, fishermen, users of Long Island Sound and others that live near the Petitioners' property.

The predominant theme running through all of the comments was a concern for protection of the tidal salt marshes. The commenters noted the ecological importance of such marshes, including providing avian habitat, flood control and aiding in the restoration of fish, crustaceans and oysters. Significant concern was expressed about the adverse impacts on this habitat from the dock and boardwalk. The commenters noted that it was the Department's responsibility to protect such areas and expressed support for rejecting the Petitioners' application while encouraging the Department to continue with its enforcement efforts against unpermitted structures. Failure to do so, observed many, would establish a dangerous precedent by allowing a violation of law in a sensitive area to go unabated.

One commenter supported the Petitioners efforts to develop their property on the grounds that what the Petitioners sought to have approved would benefit the environment. This commenter urged the Department to expedite the approval of this environmentally beneficial activity.

One commenter provided a lengthy submission with attachments in which it was argued that OLISP has been clear and consistent in its reasons for denying the COP and issuing an NOV. This commenter argued that the dock and boardwalk have not been continuously maintained and serviceable, and the OLISP's conclusions in this regard are supported by the available evidence. This commenter also noted that the Petitioners have failed to address Conn. Gen. Stat. § 22a-363b(c), which, it is argued, requires the Commissioner to determine if the information in a COP application is sufficient to determine if the proposed activity complies with all applicable standards and criteria specified in Conn. Gen. Stat. § 22a-363b(c). The commenter argued that in this case, the structures in question do not comply with the standards and criteria in the Coastal Management Act, which requires that structures be designed, constructed and

maintained to minimize adverse impacts to coastal resource. Conn. Gen. Stat. § 22a-92(b)(1)(D). This commenter also stated that the dock in particular, may conflict with the littoral rights of adjacent property owners, and as such, failed "to reduce conflicts with the riparian rights of adjacent landowners." This commenter also urged denial of the COP on the grounds that the dock and boardwalk violated policies in Conn. Gen. Stat. § 22a-359(a) of the Structures, Dredging and Fill Act as well as the Tidal Wetlands Act, Conn. Gen. Stat. § 22a-28 et seq. This commenter also noted that denial of the COP is not a violation of the Petitioner's littoral rights since the Petitioners are being subjected to regulation, not denied their ability to access the water.

IV. DISCUSSION

Conn. Gen. Stat. § 22a-359 provides in pertinent part, that:

> [t]he Commissioner of Environmental Protection shall regulate dredging and the erection of structures and the placement of fill, and work incidental thereto, in the tidal, coastal or navigable waters of the state waterward of the high tide line.

For decades, the principal means used to implement section 22a-359 was the requirement to obtain a permit. Conn. Gen. Stat. § 22a-361 provides, in pertinent part, that:

> [n]o person ... shall dredge, erect any structure, place any fill, obstruction or encroachment or carry out any work incidental thereto or retain or maintain any structure, dredging or fill, in the tidal, coastal or navigable waters of the state waterward of the high tide line until such person ... has submitted an application and has secured from said commissioner a certificate or permit for such work and has agreed to carry out any conditions necessary to the implementation of such certificate or permit.

In 1990, the General Assembly enacted a new means of implementing the requirement in section 22a-359. This new provision, in section 22a-363b, among other things, allowed certain activity that formerly would have required a permit under section 22a-361 to be authorized under

a certificate of permission.[5] Since this new provision relied on a simpler, more abbreviated permit process, its use was specifically limited to activities with lesser impacts. Activities not eligible for a certificate of permission, for which a permit is required, remain subject to the permitting requirements of section 22a-361.

Sections 22a-361 and 22a-363b are not the only provisions aimed at protecting Connecticut's coastal resources. Conn. Gen. Stat. § 22a-28 declares that the public policy of the state is "to preserve the wetlands and to prevent the despoliation and destruction thereof." Conn. Gen. Stat § 22a-32 provides, in pertinent part, that

> [n]o regulated activity shall be conducted upon a wetland without a permit. Any person proposing to conduct or cause to be conducted a regulated activity upon any wetland shall file an application for a permit with the commissioner, in such form and with such information as the commissioner may prescribe.

The term "regulated activity" includes, but is not limited to, the erection of structures, driving of pilings or placing of obstructions, whether or not changing the tidal ebb and flow. Conn. Gen. Stat. § 22a-29(3). "Wetland" includes, those areas which border on or lie beneath tidal waters, such as, but not limited to, banks, bogs, salt marsh, swamps, meadows, flats or other low lands subject to tidal action. Conn. Gen. Stat. § 22a-29(2).

This Petition concerns activities involving coastal resources subject to the statutes noted above.

A. THE DENIAL OF A CERTIFICATE OF PERMISSION

In this case, the Petitioners decided not to seek a permit under Conn. Gen. Stat. §§ 22a-361 or 22a-32. Rather, the Petitioners sought a COP under Conn. Gen. Stat. §22a-363b(a)(2).

[5] Section 22a-363b also included a limited class of specific activities, routine maintenance, which can be conducted without either a certificate of permission or a permit under section 22a-361.

This provision makes eligible for a certificate of permission "substantial maintenance of any structures, fill, obstructions or encroachments in place prior to June 24, 1939, and continuously maintained and serviceable since such time." "Substantial maintenance" is defined as "rebuilding, reconstructing or reestablishing to a preexisting condition and dimension any structure, fill, obstruction or encroachment ..." The Petitioners seek a COP more than twenty years after the fact for the new dock installed in 1988 as well as for the removal of the existing boardwalk and the construction of a new raised boardwalk. The Director of the Office of Long Island Sound Programs ("OLISP") concluded that the dock and boardwalk were not eligible for a COP. The Director determined that: a) the boardwalk had not been in place prior to June 24, 1939; b) while a dock had existed at this location before June 24, 1939, it had not been continuously maintained and serviceable; c) for both the dock and the boardwalk the activities that the Petitioner sought to be authorized under a COP went beyond rebuilding, reconstructing or reestablishing to a preexisting condition and dimension; and d) that the dock and walkway, as presently constituted are inconsistent with the Department's standards and criteria for private residential docks and are causing adverse impacts to the environment. Given the facts in this case, I conclude that the Director's conclusions were correct.

1. The Boardwalk

In their application for a COP, the Petitioners seek to remove a 4' x 100' at-grade boardwalk and 17' of the landward portion of a dock and replace this with a 4' x 152' raised boardwalk. The Petitioners claim that the installation of this raised boardwalk constitutes substantial maintenance of what was formerly a cinder or gravel path. I cannot agree.

The information supplied by the Petitioners indicates that the original path was made of cinder or gravel, with no structures upon it. No information has been provided to show that a

wooden boardwalk was in place before June 24, 1939. The aerial photographs show that a path on the property - with no structures upon it - until 1990, when, for the first time, a boardwalk appears in the aerial photographs. The Petitioners did submit a letter from David H. Van Winkle, who says that he did see a wooden walkway on the marsh, perhaps sometime in 1943 or 1944. See the June 11, 2007 letter from David H. Van Winkle to Mr. and Mrs. Thomas Lane, in the Application, Attachment H. However, Mr. Van Winkle's notes that his recollections do not predate 1939 and his letter is neither intended to nor is it sufficient to overcome the other available evidence or demonstrate that an at-grade boardwalk has been continuously maintained and serviceable at the property since June 1939.

A COP can only authorize activities that constitute substantial maintenance, or rebuilding, reconstruction or reestablishing a structure, fill, obstruction or encroachment to a preexisting condition of dimension. In this case, this means activities related to rebuilding, reconstructing or reestablishing a cinder or gravel path, not a wooden walkway.

Accordingly, based upon the facts in this case, I conclude that the removal of the existing boardwalk and replacing it with the construction of a 4' x 152' boardwalk, raised three (3) feet or more above the ground, is not eligible for a COP under Conn. Gen. Stat. § 22a-363b(a)(2) since:

1) there was no at-grade boardwalk in place prior to June 24, 1939;

2) a wooden boardwalk has not been continuously maintained and serviceable at the Petitioner's property since June 24, 1939; and

3) the requested activity does not qualify as "substantial maintenance" since the construction of a 4' x 152' raised boardwalk, as requested, goes well beyond merely rebuilding,

reconstructing or reestablishing what was formerly a cinder or gravel path, with no raised boardwalk upon it, to its preexisting condition.[6]

2. The Dock

a. Not Continuously Maintained and Serviceable.

The information provided by the Petitioners establishes that there was a dock in place at the property prior to June 24, 1939. It appears that the dock extended out seventy-five (75) to ninety (90) feet into the nearby cove and had timbers cribs located at the end of a "T" shaped pier head.

However, to be eligible for a COP under Conn. Gen. Stat. § 22a-363b(a)(2), it is not enough that there was a dock at the property before June 1939. The statute requires, among other things, that the dock be continuously maintained and serviceable. These terms are not defined in the statute, but the American Heritage Dictionary defines "continuous" as extending or prolonged without interruption or cessation, unbroken. "Maintain" is defined as to continue, carry out, keep up or to keep in a condition of good repair or efficiency. "Serviceable" is defined as ready for service, usable. In the context of section 22a-363b(a)(2) these terms mean that to be eligible for a COP, the structure in question must have not only been in place before June 24, 1939, it must have been in good repair and usable, without interruption, from June 1939 until the time a COP is sought. This the Petitioners have not demonstrated.

An aerial photograph from 1965 shows the dock with no decking, a state in which the dock was clearly not usable. A 1968 aerial photograph shows that the original dock, which was close to 100 feet long, has not been maintained and is less than forty (40) feet in length. A 1970 aerial photograph shows the dock has remained at this forty (40) foot length. A 1974 aerial

[6] While I conclude that the boardwalk is not eligible for a COP under Conn. Gen. Stat. § 22a-363b, I express no opinion on whether the raised boardwalk proposed by the Petitioner could be authorized by a permit under Conn. Gen. Stat. §§ 22a-32 and 22a-361.

photograph shows a new dock has been built consisting of a fifty (50) foot pier that begins on land followed by an approximately ten (10) foot ramp that leads an approximately sixty-five (65) foot long floating dock that is connected to a 20'x 15' "T" float. The 1981 aerial photograph shows the fifty (50) foot pier section in disrepair, with no other portions of the dock, no ramp, no floating section, no "T" float, present. The March 1986 aerial photograph shows that neither the pier, nor any elements of the dock are present; it is clear that there is no dock in use. The July 1986 aerial photograph shows a 10'x 15' floating dock on the waterward edge of the marsh, but no pier, ramp or floating dock in use. In the July 1990 aerial photograph, a new dock has been installed, consisting of a 78'x 6' pier that begins on land and extends into the water. Following the pier is an approximately ten (10) foot ramp leading to a 20'x 10' floating dock. The 1995 aerial photograph shows the 1990 pier in a state of disrepair, as exposed stringers can be seen, again making use of the dock difficult. In the September 2000 aerial photograph the pier has deteriorated even further.

The aerial photographs show that there were clearly periods of time that the dock was in such a state of disrepair that it could not be used. At other times, only a truncated dock, only a portion of what was originally present, could be used. Other portions of the original dock were no longer present. Other aerial photographs show that there was no dock at the site at all. Given this evidence, it is clear that the original dock has not been continuously maintained and serviceable at the property.

Even the Petitioners acknowledge that for at least a three year period of time after Hurricane Gloria struck Connecticut in September 1985 there was no dock at the property. The Petitioners assert that it took three years to rebuild the dock since it took contractors from all over the region months, and in some cases more than a year, to clean-up the damage caused by

Hurricane Gloria and that as a result contractors were in high demand and generally unavailable for a considerable time after the hurricane. Petition p.6.

The difficulty with these assertions is that there is not a scintilla of evidence to support them. Hugh Cole owned the property from November 1985 to March 1987. His initial statement filed with the application and the Petition makes no mention of Hurricane Gloria or of *any* difficulty securing contractors or of *any* attempts to rebuild the dock after the hurricane. Even his subsequent letter, while noting that Hurricane Gloria had rendered the dock completely unusable says nothing about any attempts to have the dock repaired or of his inability to secure contractors. Similarly, while Dr. Schilling's statement provides some information about the construction of a dock at the property, it says nothing about Hurricane Gloria or any difficulty obtaining contractors. There is then, no basis for the position advanced in the Petition about the inability to rebuild a dock for a three year period after Hurricane Gloria. Without more, there is no other conclusion to reach other than that the dock was simply not continuously maintained and serviceable during this period of time.

Independent confirmation of the absence of a dock at the property comes from the Stonington tax assessor's records. The tax records for the property reveal that before 1984, taxes were paid on a dock at the property, but that beginning in 1984, the assessment for a dock was removed. If a dock was on the property it should have been reflected in the taxes paid and the assessor would not have removed the assessment for a dock. Moreover, the fact that the tax assessor affirmatively removed an assessment for a dock in 1984 and took action to add an assessment back in 1991 indicates that a dock was not at the property when, in 1984, the assessment was removed and was at the property, in 1991, when the assessment was restored.

These tax records support the conclusion that a dock at the property has not been continuously maintained and serviceable.

It is axiomatic that when applying for a license, like a COP, the applicant or in this case the Petitioners bear the burden of demonstrating that they are entitled to the license. Conn. Agencies Regs. § 22a-3a-6(f). The Petitioners have provided information from people who, at one time, were familiar with the dock, as well as photographs and aerial photographs of the property at various times. The information demonstrates that a dock was installed at the property before June 24, 1939. The information is less credible, especially when compared to other more objective information, and fails to establish that the dock at the property was continuously maintained and serviceable from June 24, 1939 until August 2008, when the Petitioners applied for a COP.

As has been discussed above, the aerial photographs, including those provided by the Petitioners, if anything, demonstrate that the dock was not continuously maintained and serviceable at the property. The Petitioners also provided information from two individuals about this matter. Peter Briggs noted that there was a dock at the property in 1948 and at some later date when his friends, the Stetsons, owned the property. (The Stetsons owned the property from 1991 to 2004). He also asserts that "the facility has been substantially equivalent for at least 60 years." [7] No basis for this sweeping assertion was provided. There is no evidence that Mr. Briggs himself had personal knowledge of the property over this sixty-year period or that he talked with others who had such knowledge. If anything, Mr. Briggs appears to have a passing familiarity with the property. Moreover, his statement is contradicted by aerial photographs

[7] Presumably, the sixty years referred to by Mr. Briggs begins in 1948, when he indicates that he first came in contact with the dock, until the present.

which show a number of significant changes in the dock from 1948 to the present, including times when no dock was present at all.

Hugh Cole provided a statement and later, a letter. In his first statement, submitted with both the application and the Petition, he states that a dock existed at the property from the 1930's through 1985. In this statement he notes that although the dock built by his father had to be repaired many times over the years, due to storms and high tides, it was still in existence in 1985, when having inherited the property, he sold it to Dr. Schilling.

However, while Mr. Cole did inherit the property in 1985, he did not sell it in 1985, nor did he sell it to Dr. Schilling. In fact, Mr. Cole became owner of the property in November 1985 and did not sell the property until March 1987. In addition, he sold the property to Hudson Holdings, Inc., not to Dr. Schilling.

In addition, Hurricane Gloria struck Connecticut in September 1985, two months before Mr. Cole became owner of the property. Even the Petitioners acknowledge that if there was a dock at the property before Hurricane Gloria, it was no longer there after the hurricane. As such, Mr. Cole's initial statement that the dock was in existence when he inherited the property in November 1985 is in error. Included with the Petitioners' supplemental submittal in February 2009, was a December 19, 2008 letter signed by Mr. Cole acknowledging that when he inherited the property all that was left of the dock was pilings and some stringers.

Even Mr. Cole's statement that a dock was "in existence" at the property would not suffice to demonstrate that the dock was eligible for a COP. To be eligible for COP, section 22a-363b(a)(2) requires more than that a structure be "in existence." The statute requires that the structure be continuously maintained and serviceable. So while the remnants of a dock may still have been in existence in 1965, the aerial photograph shows a dock without decking, a dock that

while "in existence" cannot be used or is clearly not serviceable. Similarly, the 1981 aerial photograph shows the first section of a rundown pier, but no ramp and no floating sections of dock. Again, a dock that may well be "in existence" may not be continuously maintained and serviceable. In short, for both credibility reasons and content, I find that Mr. Coles' statement does not demonstrate that a dock was continuously maintained and serviceable at the property from the 1930's through 1985.

The conclusion that the activities in the Petitioners' application is not eligible for a COP under section 363b(a)(2), is not based upon what the Petitioners claim is a "literal interpretation" of the terms "continuously maintained and serviceable." This case has never turned on whether each nail, plank and timber from a pre-1939 structure has remained in place, unchanged over time. Nor does the Department understand the term continuously maintained and serviceable to mean that a structure must remain unrepaired from June 1939 to the present. Rather, the term continuously maintained and serviceable must be evaluated in the facts and circumstances of each case and in this case it is clear for the reasons discussed above that the Petitioners have not been able to demonstrate that the dock at their property was in good repair or useable, without interruption, from June 24, 1939 until they sought a COP.

Nor do the Petitioners assertions about the legislative history of section 22a-363b suggest a contrary result. The Petitioners argue that if there is a dock or boardwalk built on a property before June 24, 1939, then regardless of what has happened after June 24, 1939, such structures can be rebuilt under a certificate of permission. This "grandfathering" argument is premised upon an understanding that the legislative history reveals an intention to favor such preexisting structures.

However, before resorting to legislative history, the text of the statute must first be examined. In this case, the statute makes eligible for a COP, substantial maintenance of any structures, fill, obstructions or encroachments in place prior to June 24, 1939 and continuously maintained and serviceable since such time. The statute does not make eligible for a COP *any* activity related to a structure, simply because a similar structure may have been in existence in June 1939. Rather, only substantial maintenance is permitted and only then if the structure in question has been continuously maintained and serviceable since June 1939. The text of the statute itself refutes the Petitioners claims regarding the grandfathering of structures.

Even if a resort to the legislative history was shown to be necessary in this case, the passages cited by the Petitioners are not persuasive and cannot override the unambiguous text of the statute itself. In support of its position, the Petitioners cite a comment by Senator Spellman in which he discusses the COP process as a "middle tier approach" that does not involve a hearing and compliance with other notice requirements. Petition, p. 14-15. However, this is a statement about the procedural aspects of a COP, it neither mentions nor addresses which structures, pre-1939 or otherwise, might be eligible for a COP.

The only other legislative history cited by the Petitioners was a comment by the then Commissioner of Environmental Protection, Arthur J. Rocque, Jr., about a bill that was introduced in 1987.[8] In this comment, former Commissioner Rocque is responding to a question about how a proposed change in the high tide line may affect existing structures, such as groins, not docks, and is commenting on the difficulty of regulating such existing structures, and in particular, the potential adverse environmental consequences associated with installing and removing such structures. However, former Commissioner Rocques's comments were not in the

[8] The bill former Commissioner Rocque was commenting upon was ultimately enacted as Public Act 87-495.

context of the legislature's consideration of section 22a-363b, the COP statute. Rather, his comments were made as the legislature was considering a change to section 22a-361 regarding the high tide line, a full three years before section 22a-363b was enacted. In addition, while the passage cited by the Petitioners makes clear the views of former Commissioner Rocque, there is no indication that any legislator agreed with or adopted his views, nor was this testimony noted by any legislator when the enactment of section 22a-363b was being considered. As such, since the passage cited by the Petitioners was three years before the enactment of section 22-363b, concerned a completely different bill, and did not express the views of a single legislator, I find the Petitioners' arguments about the legislative history of section 22a-363b unpersuasive.[9]

b. Exceeding Substantial Maintenance

A separate independent ground supports the denial of a COP for the dock at the Petitioners' property. Only activities constituting "substantial maintenance" are eligible for a COP under section 22a-363b(a)(2). Substantial maintenance is limited to rebuilding, reconstructing or reestablishing a structure to its preexisting condition and dimension. Conn. Gen. Stat. § 22a-363a. In this case, the dock built approximately twenty years ago, for which the Petitioners now seek a COP, goes beyond the preexisting condition and dimension of a dock at the property.

[9] It is somewhat ironic that the Petitioners cited the views of former Commissioner Rocque regarding the potential adverse impacts associated with removing a structure. The Petitioners contend that this concern with the impacts of removing structures informed the logic of section 22a-363b, namely that the legislature wanted to permit pre-1939 structures to remain in place out of a concern for the environmental impacts associated with removing such structures. Putting aside that no legislator articulated this view when section 22a-363b was being considered, in this case, the dock at the property was apparently completely removed by Hurricane Gloria. There is no evidence or claim that the absence of a dock at the property was causing any adverse environmental impact, nor are there any known environmental impacts associated with the removal of the dock. Instead, the undisputed evidence is that the dock installed by Dr. Schilling may be contributing to erosion of the tidal marsh along the shore. Also, placing a wooden walkway directly upon a tidal marsh clearly had, and is having, adverse environmental impacts. So in this case, contrary to the passage cited by the Petitioners, the removal of a structure at the property had no environmental impacts and the installation of unpermitted structures continues to have adverse environmental impacts.

The record indicates that the original dock at the property was apparently comprised of a pier with a timber crib located at the end of a "T" shaped pier head. There were no stone-filled cribs, no ramps to a floating dock, and no floating dock elements of the kind in the Petitioners' application for a COP. All of these elements appear well after June 24, 1939.[10] In short, the Petitioners application for a COP seeks authorization for a structure that is different in both condition and dimension to that which existed before June 24, 1939. As such, it exceeds what the legislature made available under a COP. Since what the Petitioners seek authorization for goes beyond simply rebuilding, reconstructing or reestablishing the dock to its pre-June 24, 1939 condition and dimension, I conclude that it goes beyond "substantial maintenance" and accordingly, is not eligible for a COP under section 22a-363b(a)(2).

3. Conclusion. For all of the reasons noted above, I conclude that the Petitioners' application for a COP, under Conn. Gen. Stat. § 22a-363b(2)(a), was properly denied.[11]

B. THE NOTICE OF VIOLATION

On March 30, 2007, staff from the Department conducted an inspection at the Petitioner's property. The Department's inspector observed what she describes as a plywood walk laid on

[10] The two stone-filled cribs are of particular concern since the evidence indicates that these cribs are apparently contributing to erosion of the tidal marsh.

[11] Since I have concluded that the Director properly denied the Petitioners application for a COP, it is not necessary for me to determine whether to exercise the authority granted under Conn. Gen. Stat. § 22a-363b(c). Under § 22a-363b(c) an activity that is eligible for a COP, that does not have a permit or has not received any prior permits, must be evaluated to determine if the activity complies with applicable standards and criteria specified in Conn. Gen. Stat. § 22a-363b(c). If the activity complies with applicable standards and criteria a COP may be issued. If not, the submission of a complete application for a permit under section 22a-32 or section 22a-361 may be required. I note that in this case, the undisputed evidence is that the dock the Petitioners would like to retain may be causing erosion of the shoreline tidal marsh and may be encroaching upon their neighbor's littoral area. Additional concerns have also been raised about the raised walkway proposed by the Petitioners. In short, given the facts as I understand them, even if the activities proposal by the Petitioners were eligible for a COP, I may well have exercised my authority to require the submission of an application for a permit under §§ 22a-32 and 22a-361.

top of the tidal marsh, a pier supported by two stone-filled cribs, a ramp and a floating dock, none of which had the required permits. The stone-filled cribs associated with the dock are apparently contributing to erosion of the shoreline and the placement of wooden walkway or boardwalk directly upon the tidal marsh is clearly having an adverse impact upon the tidal marsh. See the March 30, 2007 Inspector's Report and the November 5, 2008 report of R. Scott Warren. On May 7, 2007, the Director of OLISP issued an NOV for both of these structures citing a failure to obtain the permits required by sections 22a-32 and 22a-361.

The Petitioners question whether the Department erred in issuing a Notice of Violation ("NOV") for the unpermitted structures on their property. The Petitioners claim they are "innocent purchasers" who did not perform any repairs on the structures, and while OLISP has no record of a permit for the structures on their property, the Petitioners say that the reason for this is that Department did not require or issue a permit for the type of repairs made by Dr. Schilling.

Essentially the Petitioners are claiming that even if the Department properly denied their application for a COP, the unpermitted structures on their property, which the undisputed evidence shows is causing environmental harm, should be allowed to remain, as unpermitted structures, apparently indefinitely.[12] As is discussed below, there is no statutory or other basis for this novel claim.

Section 22a-361(a) provides, in pertinent part, that no person shall dredge, erect any structure, place any fill, obstruction or encroachment or carry out any work incidental thereto or retain or maintain any structure, dredging or fill, in the tidal, coastal or navigable waters of the state waterward of the high tide line without a permit. Both the dock and the entire boardwalk

[12] Under the Petitioners view, it is not clear if a permit or other authorization would ever be required for the structures on their property, even if those structures were modified in the future.

structure on the Petitioners property are clearly waterward of the high tide line. See Sheet 3 of 11, entitled "Overall Plan View Showing Existing Conditions," submitted with the Application. The plain language of section 22a-361(a) makes clear that it applies not only to a person who erects a structure, but also to those who retain or maintain a structure waterward of the high tide line. [13] Since the Petitioners are clearly retaining and maintaining structures waterward of the high tide line without a permit, there is ample justification for the issuance of an NOV to the Petitioners.

Despite the clear and unambiguous legal requirements, the Petitioners claim that no permit should be required for the structures on their property. The gist of the Petitioners claim is that Department neither required, nor issued permits for the repair or complete rebuild of pre-1939 docks or boardwalks when Dr. Schilling built these structures circa 1988. In support of this claim the Petitioners submitted an affidavit from Mr. Lane, one of the Petitioners, who claims that based upon a review of files produced by the Department in response to his wife's Freedom of Information Act ("FOIA") request, that for the time period and area covered by his wife's FOIA request, no permits were issued by the Department for the repair of residential waterfront structures after Hurricane Gloria. Petition, Exhibit 3. Mr. Lane also asserts that Michael Grzywinski, a Senior Environmental Analyst with OLISP, told the Petitioners that since it was not practical or possible for the Department to issue permits for all of the docks and seawalls damaged by Hurricane Gloria that it was the Department's policy to provide verbal permission for the repair of such docks and seawalls.[14] Id.

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[13] Similarly, section 22a-361a authorizes the imposition of a civil penalty for, among other things, any person who *maintains* any violation of sections 22a-359 to 22a-363f or any term or condition of any permit, certificate, authorization or order issued pursuant to the said sections.

[14] I note that Mr. Grzywinski disputes Mr. Lane's assertions and does not recall having made any statements about a DEP policy to provide verbal authorization for the repair of damaged docks or seawalls. See the December 30, 2008 Statement of Michael Grzywinski, paragraph 8.

In addition, the Petitioners provided information from former Commissioner Rocque. Mr. Rocque claims that prior to the adoption of Public Act 90-111, the original enactment of section 22a-363b that authorized the Commissioner to issue COPs, that the Department's "interpretation" of sections 22a-32 and 22a-361 was that a permit was not required for the repair or reconstruction of docks or boardwalks that existed prior to 1939. Mr. Rocque notes that any records regarding this matter were extremely spare and that in implementing this understanding there was no requirement that a landowner demonstrate that the structure being rebuilt was the same type, size, or dimension or the same method of construction as that originally constructed, nor was it necessary for a landowner to seek formal or informal permission for the rebuilding or reconstructing of such structures.

Based upon these submissions and the claim that a review of the Department's files reveals that the Department did not issue a single permit for the repair or reconstruction of a residential dock after Hurricane Gloria, the Petitioners assert that this explains why there are no permits for the structures on their property and why it was an error for the Department to issue an NOV for not having such permits.

There are several problems with this analysis. Most importantly, the claim is simply inconsistent with the current governing law. Regardless of whether the Department did or did not require or issue permits at the time that Dr. Schilling constructed a dock and boardwalk, it is clear that a permit is required now. Section 22a-361 requires a permit not only for erecting a structure, but also for retaining or maintaining a structure waterward of the high tide line. Conn. Gen. Stat. § 22a-361(a).

While this alone is sufficient to reject the Petitioners claims, I note that there is no question that there was no boardwalk structure at the property prior to 1939. The boardwalk

installed at the property, was not the repair or reconstruction of an existing structure, but rather was the installation of a new structure. As such, even if the Petitioners' understanding of the Department's policy was accepted, it is clear that the installation of a new boardwalk that first appeared in the 1990 aerial photograph required a permit under both sections 22a-361 and section 22a-32.

Moreover, the Department disputes the allegations made about its permitting policies in the 1980's. Staff of the Department submitted a statement from Mr. Brian Thompson, who as the Director of OLISP is authorized to articulate the policies of the program under his direction.[15] Mr. Thompson noted that there is no basis for Mr. Lane's statement that it was the Department's policy to provide verbal authorization for the repair or rebuilding of structures after Hurricane Gloria. In this regard, I also note that there is no evidence that anyone ever sought verbal permission from the Department, or that verbal permission was ever given, for the construction of any structures on the Petitioners' property.[16]

Moreover, Mr. Thompson noted that with respect to pre-1939, that when the Department's Water Resources Division had responsibility for issuing permits under section 22a-361, that the Department's understanding was that a permit was not necessary for the

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[15] The Petitioner's claim that Mr. Thompson's statement is based upon speculation is spurious. As its Director, Mr. Thompson routinely deals with the past and present policies of OLISP. He also spoke with employees who worked in OLISP in the mid-eighties including Mr. Fredrick Huntley who had direct knowledge of the Department's permitting policies during the mid-1980's, given that Mr. Huntley's job responsibilities included issuing permits both before and after the enactment of Pubic Act 90-111. Indeed, in his statement, Mr. Rocque acknowledges Mr. Huntley's role in permitting. So while Mr. Thompson did not work for the Department in the 1980's, I reject the Petitioners suggestion that the information provided by Mr. Thompson was pure speculation and should be disregarded. To the contrary, I find the information provided by Mr. Thompson was both candid and extremely credible. In fact, I note that while Mr. Rocque was employed by the Department during the time in question, he did not oversee the Water Resources Division, whose permitting practices are being called into question.

[16] The Petitioners did submit what purports to be a note written by Dr. Schilling regarding a conversation he had with Mr. Ralph Atkinson of the federal Army Corps of Engineers in which Mr. Atkinson apparently provides Dr. Schilling with verbal permission to construct a dock at the property. So while Dr. Schilling may have contacted the federal Army Corps of Engineers regarding the installation of a dock, there is no evidence that Dr. Schilling ever contacted the Department to determine if a permit was required and frankly, no claim by the Petitioners that any such contact was ever attempted.

maintenance or upkeep of a dock *provided* the dock was in place before June 24, 1939, it had been continuously maintained and serviceable and that the activities restored or maintained the structure to its preexisting size, configuration, method of support and construction. Mr. Thompson noted that it was unclear whether this policy would apply to the complete rebuilding of a dock as was done by Mr. Schilling. He also noted that when responsibility for issuing such permits under section 22a-361 was transferred from the Department's Water Resources Division to the Coastal Area Management Division, sometime in the late nineteen eighties, coincident with that transfer of responsibility, the Department changed its interpretation of section 22a-361 and required a permit even for the upkeep or maintenance of pre-1939 structures. Mr. Thompson concluded that under either interpretation of section 22a-361, the dock built by Dr. Schilling would have required a permit. He also noted that the placement of a boardwalk on tidal wetlands would have also required a permit.

In short, as might be expected there are different understandings of an unwritten approximately twenty year-old policy. While I cannot reconcile these different recollections, I do note that regardless of the Department's *policy*, the law, circa 1988, was clear; a permit was definitely required a) under section 22a-361 for the erection of structures, including the building of a dock and boardwalk waterward of the high tide line, and b) under section 22a-32 for engaging in regulated activity in a wetland, namely the placement of a boardwalk upon a tidal marsh.[17] The law made no exceptions for the complete rebuilding of structures that may have existed in some form in 1939. I also note that allowing unrestricted rebuilding or reconstruction

[17] In all material respects, the language of section 22a-361 regarding the erection of a structure, such as a dock or boardwalk, waterward of the high tide is the same as the current language of the statue. The same is true for section 22a-32. At that time, section 22a-363b had not been enacted, so a certificate of permission for such work was not available. In short, when the dock and at grade wooden walkway were constructed apparently circa 1988, the law clearly and unambiguously required that a permit be obtained for such work. The law made no exception for pre-1939 structures that were being newly installed in the 1908's.

of docks, as asserted by the Petitioners, is simply inconsistent with the declared policy of the state and my responsibility to protect the state's coastal resources. See Conn. Gen. Stat. §§ 22a-28 and 22a-359. This is especially so in cases like the present one, where the undisputed evidence is that the presence of both the dock and boardwalk is causing environmental degradation of the resources that I am statutorily charged with protecting.

The Petitioners claim that a review of files requested from the Department confirms that no permits were required for the repair of pre-1939 structures. This claim is based primarily on a review of files produced in response to a Freedom of Information request submitted by Ms. Gail Lane, one of the Petitioners.[18] It is the Petitioners' position that based upon the 151 permit files produced that not a single permit related to the repair of a residential docks and seawalls after Hurricane Gloria. However, even if this were so, it does not support the claim that pre-1939 structures were treated differently from other structures. In fact, it says nothing at all about the Department's approach to the repair of pre-1939 structures.

Moreover, information provided by Cheryl Chase, a Supervising Environmental Analyst who was also involved in gathering the records responsive to Ms. Lane's FOIA request, makes clear that some of the permit files produced in response to Ms. Lane's FOIA did in fact involve the reconstruction or repair of residential docks. A listing, by no means exhaustive, of these files was provided to the Petitioners' counsel. Whether such permits were applied for as a result of damage caused by Hurricane Gloria or for other reasons cannot be determined since such information is simply not reflected in the Department's files.[19]

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[18] Ms. Lane's request sought all documents related to the approval or denial of docks, both residential and commercial, from September 1, 1985 through January 1, 1989, inclusive from the Connecticut River east to the Rhode Island border.

[19] The Petitioners assert that the Department's files clearly reflect whether a dock was a new structure, extension of an existing structure, or reconstruction of a previous structure. While this may be so, such information sheds no light on whether the requested authorization is related to Hurricane Gloria.

Also, despite the Petitioners claims in their February 13, 2008 submission, the Department never claimed that the files brought to the Petitioners attention concerning the rebuilding or reconstruction of a residential dock demonstrates that permits were required for pre-1939 structures. The Department never made any such claim. Rather, a February 6, 2009 e-mail from Dean Applefield to counsel for the Petitioners notes that the files do not reflect and there is not enough information to determine whether the structure for which an application was submitted involves a pre-1939 structure. The Petitioners acknowledge this as well when discussing the files noted in their February submission. The Petitioners note repeatedly in their discussion of certain permits that it cannot be determined whether the permit involves a pre-1939 structure.[20]

Try as they might, whether based upon the files provided for their review or the recollections of others, the Petitioners have failed to demonstrate that circa 1988 the Department did not require or issue permits for the complete rebuilding of a pre-1939 dock or the installation of wooden boardwalk as was done by Dr. Schilling. Even if it could be shown that there was such a Department policy, any such policy was mistaken, since the law at that time clearly required a permit for such activities. Moreover, regardless of what may have happened in the nineteen eighties, it is clear that today a permit is required for retaining or maintaining docks or boardwalks waterward of the high tide line. Accordingly, I reject the Petitioners' claim that the Department erred in issuing them an NOV for the unpermitted structures on their property and reject any claim that such structures should be allowed to remain unpermitted.

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[20] I soundly reject any claim by the Petitioners that for the files brought to their attention, the Department required permits when it received complaints, when applicants were driven by external forces, or when adjacent property owners lobbied the Department. This does a disservice to those who apply for permits simply because a permit is required by law. The Department requires a permit when it understands that a permit is required by law. This is, and remains, the basis for the Department's decision that a permit is required.

C. Littoral Rights.

The Petitioner asserts that the denial of a COP and the issuance of an NOV by the Department violate their common law littoral rights.[21] There is simply no merit to this claim.

The Department denied the Petitioners request for a certificate of permission. The Department did not, and has never said, that the Petitioners are unable to have a dock at their property. To the contrary, in meetings with the Petitioners, the Department has offered to make itself available to discuss potential dock designs, locations, etc., at the Petitioners property. However, the current dock at the Petitioners' property does not have any authorization and the undisputed evidence is that this structure may well be causing environmental harm by eroding the shoreline. The dock may not even be wholly within the littoral area allocated to the Petitioners.[22]

The Petitioners have no common law right to retain such a structure on their property. To the contrary, the cases concerning littoral rights makes clear that the exercise of a littoral right is subject to the reasonable exercise of the state's police powers. Bloom v. Water Resources Commission, 157 Conn. 528, 536 (1969); see also Shorehaven Gold Club, Inc. v. Water Resources Commission, 146 Conn. 619, 624 (1959). The Petitioners could exercise their littoral rights by applying for a permit for a structure that complies with all applicable requirements, respects their neighbor's littoral rights and minimizes impacts to the environment. The Petitioners' littoral rights have not been denied; rather they remain unexercised in a legally permissible manner.

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[21] Since the concept of littoral rights involves the ability to wharf out or reach deep water, the Petitioners' argument can only concern the dock at their property, not the boardwalk.

[22] See the October 28, 2008 comments submitted by John Casey, Esq., p. 9 and Exhibit 17.

D. Equitable Estoppel.

Finally, the Petitioners assert that the Department should be equitably estopped from requiring that they either obtain the necessary permits or remove the unpermitted structures on their property. They claim that either result will subject them to a substantial loss in the use and enjoyment of their property as well as a significant reduction in the value of their property and that in this case "special circumstances" make it highly inequitable to enforce the applicable legal requirements. [23] The Petitioners claim that despite the exercise of due diligence that they lacked knowledge of the true state of affairs regarding the dock and boardwalk on their property and had no convenient means of acquiring that knowledge.

In support of their claim the Petitioners cite Dupuis v. Submarine Base Credit Union, 170 Conn. 344 (1976) and Greenwich v. Kristoff, 2 Conn. App. 515 (1984), cert. den. 194 Conn. 807 (1984). These cases recognize the general rule that estoppel may not be invoked against the government or a public agency functioning in its governmental capacity. Dupuis, at 353, Kristoff, at 552. This general rule is qualified where a person has been induced by the conduct of a governmental official and would be subject to substantial loss if the governmental entity were permitted to negate the acts of its agents. Id. The two essential elements of estoppel are that a party must do or say something that is intended or calculated to induce another to believe in the existence of certain facts and to act upon that belief; and the other party, influenced thereby, must actually change his position or do some act to his injury which he otherwise would not have done. Id. Citations omitted. Finally, the person claiming estoppel has the burden of establishing that he exercised due diligence to ascertain the truth and that he not only lacked knowledge of

[23] The Petitioners provided no evidence to substantiate any claimed loss in the use or enjoyment of their property or a reduction in the value of their property.

the true state of things, but had no convenient means of acquiring that knowledge, affairs. Id. Citations omitted.

In this case, the Petitioners are *not* claiming that a governmental actor induced them into taking some action. There is no claim, and no evidence to support any claim, that the dock and boardwalk were built on their property based upon consultation with or with the approval of anyone in the Department. See footnote 16 above. Rather, the Petitioners are claiming to have justifiably relied upon the Department not taking any action regarding the structures in question on their property. However, the evidence indicates that the Department was not even aware of the existence of these structures until 2006 and did take action thereafter. It is patently unreasonable for the Petitioners to claim that the Department should have taken action against structures that the Department did not know anything about. Moreover, the cases cited by the Petitioners involved claims where it was alleged that an agent of the government took some action to induce another to act. The Petitioners have cited no case where, as here, the alleged *inaction* by a governmental entity gave rise to a claim of estoppel.

Moreover, information about whether the structures in question on the Petitioners' property were permitted or not was readily available. The structures were apparently there when the Petitioners purchased the property in 2004. The Petitioners could have asked either the sellers of the property or the Department if the structures had the required permits. In short, the Petitioners had an extremely convenient and readily available means for ascertaining whether the structures on the property had the required permits.

The Petitioners claim of equitable estoppel has no merit. I agree that this situation is unfortunate and it would have been better if this situation had been rectified earlier. However, the denial of a COP and the removal of unpermitted structures does not mean that the Petitioners

cannot have any structures on their property. It means that any structure that the Petitioners would like to erect needs to be evaluated to ensure that it meet all applicable requirements and that all required permits are obtained. In fact, in a May 28, 2008 letter, the Department strongly encouraged the Petitioners to submit a permit application for the dock and boardwalk. To simply excuse the Petitioners from their obligations would be unfair to those who have taken the time and effort to obtain the required permit.

V. CONCLUSION

For all of the reasons noted above, I rule that the Department did not err when it denied the Petitioners' application for a COP under Conn. Gen. Stat. § 22a-363b(a)(2) and that the Department properly interpreted the term "continuously maintained and serviceable" in section 22a-363b(a)(2) regarding the Petitioners' application. I also rule that the Department did not err when it issued a Notice of Violation to the Petitioners for retaining and maintaining an unpermitted dock and boardwalk waterward of the high tide line and placed upon a wetland.

3/20/09
Date

Gina McCarthy
Commissioner of Environmental Protection

Appendix A – Persons and Entities to whom the Petitioners Provided Notice of the Petition

Jay Kszkiel

John Casey, Esq.

Marcia T. Robinson

Nancy t. Rankin

Margaret L. Jones

Josey Cole Wright

Sarah Moore Halberg

Hugh Cole

David H. Van Winkle

David J. Shilling, M.D.

Billie Palmer

Gary P. Sharpe, P.E.

Edward Halberek, Jr. (First Selectman. Town of Stonington)

Rufus Allyn (Harbormaster)

State Senator Andrew Maynard

State Representative Diana Urban

Appendix B – Additional Persons and Entities to Whom Notice of the Petition was Provided

Mr. & Mrs. Robert P. Anderson, Jr.

Peter G. Briggs

Patricial B. Copp

Brian Navano

May Katherine Porter

Trent J. & Barbara B. Rapko

Tracey Lane

Lana H. Ursprung

Sidney Van Zandt

R. Scott Warren

David H. Carey, Bureau of Aquaculture, Department of Agriculture

Diane Ray, U.S. Army Corps of Engineers

U.S. EPA, EPA New England, Region 1

David Carreau, Mystic Harbor Management Commission

Samuel Grimes, Stonington Waterfront Commission

Lynn Young, Stonington Planning & Zoning Commission

Peter Vermilya, Stonington Harbor Management Commission