IN THE MATTER OF : APPLICATION NO. 200102561 – MG

TAMIM BRAISH
TERESA SMOLAREK : SEPTEMBER 15, 2004

FINAL DECISION

Hearing Officer Jean F. Dellamarggio issued a Proposed Final Decision in this matter on July 20, 2004, in which she recommended that I grant the permit requested by applicants Braish and Smolarek in accordance with an Agreed Draft Decision negotiated by the applicants and their agents, the Department by the Office of Long Island Sound Programs (OLISP) and intervenor Robert Fromer. Subsequent to issuance of the Proposed Final Decision intervenor Fromer requested oral argument requesting revisions and listing four specific exceptions. I heard arguments on August 18, 2004.

Applicants Braish and Smolarek seek a permit for an encroachment in tidal wetlands and a structures and dredging permit. General Statutes Sections 22a-32 and Section 22a-361. They propose to retain an existing stonewall and to construct a fixed pier, a ramp and a floating dock in Bakers' Cove in Groton. OLISP has determined that the proposed regulated activities will not have a significant impact on coastal waters and tidal wetlands in Bakers' Cove and meets all standards for approval under the provisions of the

aforementioned underlying statutes and the Connecticut Coastal Management Act (CCMA). General Statutes Section 22a-90, et seq.

At oral argument all parties stated that they were in agreement with the Agreed Draft Decision and had no objection to permit issuance in accordance with its provisions. Yet intervenor Fromer who had requested the oral argument insisted that both the record and process for developing it were flawed and further insisted on changes to the underlying documentation supporting permit issuance.

This case is interesting in several aspects. First, it is not common for the Department and a permit applicant to negotiate an Agreed Draft Decision with an intervenor having no direct proprietary interests in the matter before the agency. Second, it is more rare still for an intervenor who admits to being satisfied with the outcome of the regulatory process to insist on oral argument to "correct" the record. Lastly, these requests by the intervenor were previously evaluated by the hearing officer and rejected after due consideration and careful thought and the result clearly articulated in her Proposed Final Decision.

At the outset, it is clear from the Uniform Administrative Procedures Act (UAPA), Section 4-180(b), a proposed final decision shall contain findings of fact and issues of law necessary to the decision (emphasis added). Insofar as Mr. Fromer agrees with the decision and has no argument with its outcome, it seems clear that none of the issues that

he raises, be they revisions or exceptions, are strictly necessary to the decision, particularly since they had been considered and rejected by the hearing officer prior to making her recommended decision. Further, given that the Agreed Draft Decision references the very revisions to the project specifications he had sought, it is hard to understand Mr. Fromer's issues with respect to either process or content.

It is instructive to go back to the hearing on this matter which was held on June 15, 2004, at DEP, 79 Elm Street, Hartford. At this hearing and in response, at least in part, to the very same revisions and exceptions raised by Mr. Fromer in his request for oral argument, OLISP supplemented their exhibits with the Agreed Draft Decision signed by both DEP and the applicants' agent. At that hearing, Mr. Fromer's initial motion for revisions was addressed. There were no objections to any exhibits or witnesses proposed by staff and the applicants. For his part, Mr. Fromer, did not introduce any evidence on the record other than his own testimony. It is clear from this and from the record at oral argument that Mr. Fromer seeks to revise only the underlying facts and findings in the hearing officers Proposed Final Decision to his own satisfaction although the hearing officer previously found no evidence in the hearing record to sustain such change and found no requirement by rule or law that such change be made. Given the paucity of testimony to support them in the record at either hearing or oral argument, Mr. Fromer's request for revisions is unsubstantiated and unsupported; they clearly are not necessary to the final decision. Taken individually, his three revisions consist of little more than plaintive complaints that staff did not conduct their analysis in either the manner or as

completely as Mr. Fromer apparently would have done. Yet each of his three revisions go beyond the standards at law or in rule which staff must consider. At oral argument, neither Mr. Fromer nor the other parties could offer any examples of where the standards that Mr. Fromer infers in his revisions are in effect. They are certainly not in effect in Connecticut at this time.

In addition to his revisions, Mr. Fromer, has offered four specific exceptions which were the focus of the oral argument. First and foremost, Mr. Fromer faults the applicants and subsequently departmental staff for not considering all feasible and prudent alternatives to the structures and their location as proposed by the applicants. Taken to its logical conclusion, such an evaluation would be an impractical and expensive burden for applicants. Moreover, the standards at law and in rule that apply to this particular application do not require it. The thin reed to which Mr. Fromer clings is the wording of an application form and the fact that the agency has not developed regulations for analyzing alternatives in spite of a lack of mandate to do so. Even if this argument were to have any merit, the forum in which Mr. Fromer raises it is not the appropriate one.

In his second exception, Mr. Fromer argues that the hearing officer was in error for failing to find a reasonable likelihood of unreasonable pollution caused by the materials to be used in constructing the dock and float, thereby triggering the feasible and prudent alternative analysis required under Section 22a-19(b). Setting aside for a moment the applicability of Section 22a-19 in this application process, it is clear from the record at

oral argument that there are no standards currently in effect nor any standards actively being considered in either this jurisdiction or in others pertinent to applications of this type which would lead to a conclusion regarding "unreasonable" pollution. Looking at the Connecticut Coastal Management Act, General Statutes Section 22a-90, et seq., and Sections 22a-92 and 22a-93 specifically, gives substantive context to the evaluation of "unreasonable" pollution. Specifically, Section 22a-93(15) defines "adverse impacts on coastal resources" and together with the requirements of Section 22a-98 provides precisely the context and, indeed, the analysis Mr. Fromer seeks. The record clearly indicates that OLISP staff performed the required analysis and made a positive affirmation that no unacceptable adverse impacts would result to coastal resources, including specifically evaluating toxics in marine waters (Section 22a-93(15)(A)) and all impacts to marine fish and wildlife (Section 22a-93(15)(G)) and associated habitat (Section 22a-93(15)(H)) including the tidal wetlands present at the Bakers' Cove site. However, we need not stop at the analysis performed by staff. For significant periods of history, structures similar to the ones proposed here and constructed of the materials originally proposed in the initial application have been built in marine waters including extensively along the Connecticut coast. The record indicates and Mr. Grzywinski testified at oral argument that there is no definitive research which suggests that any measurable pollution results. He further indicated that there are certainly no long-term construction related impacts of the type that concern Mr. Fromer that have been documented over the past two decades.

As to whether the hearing officer erred by not evaluating the application under the standards in Section 22a-19, given no evidence in the record of unreasonable pollution, it is hard to understand what that error would be. In fact, at oral argument, specific attention was given to whether the record could be bolstered on this point. Not only was Mr. Fromer unable to do so at that time, he has supplied no supplemental information although he was given the opportunity to do so. Given that Section 22a-19 was not raised until Mr. Fromer intervened, to require staff to go through a pro forma exercise on quantifying such standards is unnecessary, burdensome and, likely, of no particular value. Moreover, the standards in the Connecticut Coastal Management Act clearly embrace the concept of minimization of encroachment, acceptability of associated environmental impacts of both construction and long-term use of any permitted activity and careful assessment of both short and long-term effects on the marine environment.

In his third exception, Mr. Fromer characterized the proposed final decision as "circumstantial evidence" of negligence, again because applicants and staff failed to consider <u>all</u> feasible and prudent alternatives. Further, he accused the hearing officer of "bias" because of her failure to acknowledge staffs' alleged negligence as evidenced by her refusal to include his revisions and exceptions in her decision. As outrageous as these accusations are on their face, they have no place in this process. Mr. Fromer is entitled to introduce evidence and make argument. He is not entitled to berate staff or the hearing officer for their failure to agree with him, especially when he has failed to provide such evidence in the record. Staff was not only careful in their evaluation of this application,

both they and the applicants showed amazing tolerance for Mr. Fromer's unsubstantiated claims of marine pollution and serious yet unspecified impact due to storm events. Their agreed revisions embodied in the Agreed Draft Decision exemplify this voluntary cooperation in the face of no substantive evidence to compel it.

In his final exception, Mr. Fromer, criticized OLISP for having no standards or criteria for evaluating alternatives. Although no such standards are required by statute, again taken on its face, this exception is at best misplaced. If Mr. Fromer's argument is that the agency should be required to produce additional rules regarding applications of this type, his audience should be the Connecticut General Assembly and not a hearing officer taking evidence on a single application. The fact is, however, that the Connecticut Coastal Management Act, as embodied in Sections 22a-92 and 22a-93, has provided a reasonably exhaustive list of standards from which the staff can and do evaluate alternatives. The list pertinent to this application and not otherwise objected to by Mr. Fromer is at page 5 of the Agreed Draft Decision.

In summation, Mr. Fromer's revisions and exceptions are not supported by the record at hearing or at oral argument, they are not required by current law or rule and they are not necessary to support issuance of a permit to the applicants. Therefore, I affirm the hearing officers decision to exclude them from the record in this matter.

It is also clear that Mr. Fromer does not object to the placement, size or use of the structure for which this application was made. Mr. Fromer's support for the application was won through a "voluntary" accedence to his "permit conditions" regarding construction methods and materials by the applicant. This was accomplished through revisions to the original application and memorialized in the Agreed Draft Decision. I find this approach problematic. These design and construction revisions in effect become permit conditions. Permit conditions are enforceable standards; failure by an applicant to meet or maintain them requires the agency to take appropriate legal action. Yet all of the revisions to this application pertain to aspects of construction, design and use of materials for which there are no standards currently in effect. Further, there are no standards currently proposed or contemplated for adoption in Connecticut and, from the clear record, no standards universally or generally in effect in any comparable marine jurisdiction. Therefore, in essence, we have applicant and intervenor, with acquiescence by agency staff, agreeing to adhere to enforceable permit conditions for which there is no evidence that any qualified expert believes they are either necessary or advisable. Mr. Fromer, the sole advocate for such conditions, is not a qualified expert nor did he provide qualified testimony for the record. Mr. Grzywinski for the agency, however, is a state qualified expert who was eloquent in his rebuttal of their inclusion based on contemporary research into the efficacy of such standards. Moreover, at oral argument Mr. Sharp, as agent for the applicants, provided insight into the origin of the revisions made to the original application by suggesting that the applicants were merely hoping to move forward an already three year long application process without additional delay.

In light of these facts, I hereby affirm the hearing officers decision that the permit issue in accordance with her Proposed Final Decision, dated July 20, 2004, with the following modification. The first paragraph under the heading Environmental Impacts on page 5 of the Agreed Draft Decision is hereby deleted in its entirety. Further, any reference in the permit to revisions in the applicants originally submitted technical specifications are to be clearly annotated as voluntary revisions submitted by the applicants and not required by standards or criteria currently in law and enforced by the Department of Environmental Protection (DEP); that their use does not imply, either directly or indirectly, that such revisions are required or endorsed by DEP. Implementation of any such revisions (e.g., the technical specifications specified on sheet 5A of 5 and related documents identified as exhibit DEP-38) is specifically not required under this permit.

If Mr. Fromer or agency staff choose to propose new criteria, standards or procedures governing applications of this type, there is a clear, recognized and well utilized process for doing so. An individual permit application is not the place to test the acceptability of new, generally applicable standards.

On a collateral issue, one not central to the findings necessary to support this decision but nevertheless important as to the process of evaluating permit applications more generally, Mr. Fromer raises a complaint about the obligation of the applicants' licensed professional engineer under the Code of Ethics for Professional Engineers to provide the

exhaustive analysis and documentation he seeks. At best Mr. Fromer's complaint here is misplaced, again having no place in a hearing for an individual application. Moreover, under both statute and long practice, it is the Commissioner, acting through staff, that determines the level of information necessary to complete an application before the Department, not the applicants' engineer and not an intervenor. Mr. Fromer is certainly within his rights to raise the issue; he has and it was not found meritorious by the hearing officer at hearing nor by me at oral argument.

September 15, 2004
Date

/s/ Arthur J. Rocque, Jr.
Arthur J. Rocque, Jr.
Commissioner