

OFFICE OF ADJUDICATIONS

IN THE MATTER OF : **APPLICATION NO. 200103104**

ARTHUR & JUDITH SCHALLER : **AUGUST 22, 2002**

PROPOSED FINAL DECISION

I

SUMMARY

Arthur and Judith Schaller (the applicants) applied to the Department of Environmental Protection (DEP) for a permit to construct a fixed dock and associated structures in the Connecticut River located in Chester. The application was filed pursuant to General Statutes §22a-361, which regulates dredging, erection of structures and placement of fill in tidal, coastal or navigable waters of the state.

On January 10, 2002, the Commissioner issued a Notice of Tentative Determination to approve the application. General Statutes §22a-361 does not require that a public hearing be held prior to the granting or denying of a permit. However, due to the history of the original 1999 application and significant public interest in this application the Commissioner, in his discretionary authority, held hearings in order to facilitate and elicit public comment.

The parties to this proceeding are the applicants, the DEP Office of Long Island Sound Programs (staff) and the following intervenors: Jil Nelson; the Connecticut River Committee For the Public Trust; the Chester Land Trust; and the Hadlyme Ferry

Association. Staff recommends issuance of the permit and has entered on the record a draft permit with conditions that would authorize the proposed regulated activities. Hearings commenced with a session for the receipt of public comment on February 27, continued on February 28, 2002, and concluded on March 5, 2002. The record was closed on March 21, 2002, and parties filed post-hearing and reply briefs by May 6, 2002.

Upon review of the relevant facts and applicable law in this matter, I find that the proposed regulated activities, if conducted in accordance with the terms and conditions of the draft permit, are consistent with the applicable legal standards for issuance of a permit. General Statutes §§22a-361 and 22a-92. I conclude that the application strikes an appropriate balance between the applicants' common law riparian right to reasonably access deep water, and the rights and interests of the public to freely navigate in the waters of the State while minimizing adverse environmental impacts on coastal resources. I therefore recommend that a permit be issued to conduct the proposed regulated activities in accordance with the terms and conditions set forth in the draft permit (Attachment A) with one modification outlined herein.

II

DECISION

A

FINDINGS OF FACT

1

Procedural History

1. In 1999, the applicants filed an application with the DEP for a permit to construct a fixed dock, ramp, float and two boat lifts, 162 feet waterward of the high tide line that extended upon an area of tidal wetland vegetation¹ and submerged aquatic vegetation² (SAV) (the 1999 application). The 1999 application was filed pursuant to a tidal wetlands permit, General Statutes §22a-32, and a structures and dredging permit pursuant to General Statutes §22a-361. (Exs. APP-2, 13; test. G. Sharpe, 02-27-02, tape no. 1, 02-28-02, tape no. 4; test. S. Gradante, 03-05-02, tape no. 3.)³

2. After review and discussions with staff, the applicants' engineer modified the 1999 application and reduced the overall length of the fixed dock, ramp and float to 132 feet waterward of the high tide line to minimize adverse environmental impacts to a dense area of SAV. The 1999 application was later formally withdrawn. (Exs. APP-2, 9, 14; test. G. Sharpe, 02-28-02, tape no. 4; test. S. Gradante, 03-05-02, tape no. 3.)

3. On October 5, 2001, the applicants filed a new application, which is the subject of this proceeding. The applicants' engineer significantly modified the 1999 application by shortening and relocating the dock 160 feet north so it will not extend

¹ Three square rush. (Ex. APP-2)

² *Vallisneria americana*, *elodea canadensis*, *potamogeton perfoliatus* and *potamogeton crispus*. (Ex. APP-2)

upon any tidal wetland vegetation. (Exs. APP-1, 2, 9, 23f; ex. DEP-1; test. G. Sharpe, 02-27-02, tape no. 1, 02/28/02, tape no. 4; test. S. Gradante, 03/05/02, tape no. 3.)

4. The Commissioner received petitions to intervene pursuant to General Statutes §22a-19(a), and the following individual and organizations were granted status as intervening parties on the listed dates: Jil Nelson (Nelson), January 3, 2002; the Connecticut River Committee for the Public Trust (PT), January 3, 2002; the Chester Land Trust (CLT), January 3, 2002; and the Hadlyme Ferry Association (HFA), February 3, 2002. (collectively “intervenors”)⁴.

5. The DEP issued a *Notice of Tentative Determination* approving the application on January 10, 2002. Staff considers the application to be complete and consistent with all applicable policies and statutes and recommends that the Commissioner issue a permit subject to certain conditions contained in the draft permit. (Exs. DEP-1, 8, 10; test. S. Gradante, 03-05-02, tape nos. 3 and 4)

6. On January 28, 2002, Nelson filed an Amended Notice of Intervention petition that contained the same allegations in her original petition and one additional claim alleging that the proposed activity involves conduct “that is reasonably likely to unreasonably impair the public trust in the waters of the State, by proposing to conduct an activity upon a wetland regulated under the Tidal Wetlands Act, Sections 22a-28, et seq. of the Connecticut General Statutes, without also obtaining the permit required by that Act.” Nelson’s request to amend her petition was denied and the scope of the

³ The hearings were recorded on audiotapes and specific tape numbers identify reference to testimony.

⁴ These petitions and copies of rulings granting intervention are public documents and are included in the files of the Office of Adjudications.

discretionary proceedings limited to environmental issues relevant to General Statutes §22a-361.⁵

7. The intervenors and many of the sworn public speakers that testified are recreational kayakers and canoeists and oppose the application. They allege that the proposed regulated activities will interfere with the navigation of small craft and adversely impact coastal resources by significantly impairing and degrading the visual quality of the natural features of the vistas and viewpoints of the river landscape. (Exs. INT-CLT-1, 2; exs. INT-HFA-1, 2; test. sworn speakers, 02-27-02, tape nos. 1 through 4; test. M. Prisloe, 02-28-02, tape no. 3; test. C. Kimball, 02-28-02, tape no. 2.)

8. The Chester Harbor Management Commission (CHMC) reviewed the application and considered the navigational and visual impacts of the proposed regulated activities. CHMC found the proposed regulated activities to be consistent with the Town of Chester Harbor Management Plan and approved the application. (Ex. APP-22; exs. DEP-1, 16; test. G. Sharpe, 02-28-02, tape nos. 3 and 4; test. M. Prisloe, 02-28-02, tape no. 3; test. S. Gradante, 03-05-02, tape no. 3.)

2

The Site

9. The applicants own approximately twenty-two acres of property on Fort Hill in the town of Chester⁶, which includes a tidal creek, wetlands on the north and east portion, a residential home, and approximately 1000 feet of shoreline on the westerly side

⁵ See fn. 4, supra.

⁶ The town of Chester is located within a coastal area. General Statutes §22a-94.

of the river. On the east portion of the property is a field that grades down to the high tide line. The upland margin of the shoreline is significantly eroded due to the forces of wave action, wind, spring freshet and seasonal floods. The configuration of the shoreline is concave and waterward of the high tide line is an intertidal flat⁷ where the depth of water is less than two feet during most of the tidal cycle. The low elevation of the sandy substrate, wave climate, winds and seasonal weather changes are not conducive to support the establishment and growth of tidal wetland vegetation in the intertidal flat. Car tires, tree limbs and logs transported during the spring freshet and seasonal floods are randomly deposited landward and waterward of the high tide line. (Exs. APP-2, 7, 9, 10, 11, 11a, 19, 21, 23a-e; exs. DEP-1, 13, 14; ex. INT-Nelson-2; test. G. Sharpe, 02-28-02, tape nos. 4 and 5; test. S. Gradante, 03-05-02, tape nos. 2 through 4.)

10. Approximately ninety feet south of the location of the proposed dock are isolated clusters of *spartina pectinata* growing above the surface of the substrate in clumps of marsh peat transported and deposited on the site during spring freshet. Spot areas of three square rush are located approximately 100 feet north and 150 feet south respectively from the location of the proposed dock. Growing waterward of the mean low water mark are dense and sparse areas of submerged aquatic vegetation (SAV). The river at this location is classified as tidal and the cycle of currents flow in a northerly and southerly direction to Long Island Sound. (Exs. APP-2, 7, 9, 10, 11, 11a, 19, 21, 23a-e; exs. DEP-1, 13, 14; ex. INT-Nelson-2; test. G. Sharpe, 02-28-02, tape nos. 4 and 5; test. S. Gradante, 03-05-02, tape nos. 2 through 4.)

⁷ “Intertidal flats” is defined as “very gently sloping or flat areas located between high and low tide, composed of muddy, silty and fine sandy sediments and generally devoid of vegetation.” General Statutes §22a-93 (7) (D)

11. Barbara D. Botti, an adjacent neighbor and property owner on the north, owns a seventy-six foot private dock located 700 feet from the proposed regulated activities. The depth of water at the waterward terminus of the Botti dock at low tide is eight feet. Donald H. McGannon owns adjoining property on the south with approximately 300 feet of river frontage. (Exs. APP-1, 2, 9, 10; ex. DEP-1; test. G. Sharpe, 02-28-02, tape no. 4; test. S. Gradante, 03-05-02, tape no. 3.)

12. Directly south of the McGannon property line and 600 feet from the proposed regulated activities is the Chester-Hadlyme Ferry, the second oldest continuously operating ferry in the United States, providing service to and from the Towns of Chester and Hadlyme. The Chester ferry slip⁸ extends 124 feet waterward of the high tide line and is partially protected by stone riprap on the north side. The ferry landing is built on a protrusion of land that extends the slip some 240 feet waterward of the average shoreline in the area. The depth of water at the waterward terminus of the slip at low tide is nine feet. The slip is a constriction in the river that diverts the southerly ebb of water current causing significant scouring downstream. Water current accelerates off of the waterward terminus of the slip and small craft paddlers who navigate directly around it are forced into deeper water. (Exs. APP-2, 9, 10, 23c, 23e, 23f; ex. DEP-13; test. Gail Carmody, 02-27-02, tape no. 2; test. G. Sharpe, 02-28-02, tape no. 4; test. S. Gradante, 03-05-02, tape no. 3.)

The Proposed Regulated Activities

13. The applicants propose to install a 4 feet by 104 feet open timber pile fixed dock, ninety-eight feet of which is waterward of the high tide line, thirteen battered double pilings, four sets of triple pilings and a single boatlift⁹. Stairs on the north and south side of the dock just waterward of the mean high water line will allow members of the public unobstructed access to the shore and beach. Batter and icebreaker out-haul pilings are located on the north side at the waterward terminus of the dock. The purpose of the proposed dock and associated structures is to provide berthing space for the applicants' boat¹⁰ and access to the river for recreational boating and fishing. (Exs. APP-7, 9, 16, 17: ex. DEP-1; test. G. Sharpe, 2/28/02, tape no. 4; test. S. Gradante, 3/5/02, tape no. 3.)

14. At high tide the depth of water at the waterward terminus of the dock is 3.6 feet and at mean low water less than one foot. During most of the tidal cycle the dock will provide access to a reasonable amount of deep water to launch and retrieve the boat. (Exs. App-2, 11, 16, 17, 23f; ex. DEP-1; test. G. Sharpe, 02-28-02, tape no. 4.)

15. The dock elevation at mean low water is 6.5 feet and three feet at high tide. At mean low water the elevation of the pilings is ten feet. The distance and space between the pilings will provide adequate separation for water currents to flow and the dock will be sufficiently elevated to prevent the increase in the hazards of flooding. The

⁸ Constructed of timber fender pilings. (Ex. APP-23e; test. G. Sharpe, 02-28-02, tape no. 4)

⁹ The boatlift model is a Davit Master with a 7000 pound boat weight capacity. (Ex. DEP-1; ex. INT-PT-1; test. G. Sharpe, 02-28-02, tape no. 4.)

¹⁰ Twenty-four foot Sea Ray powerboat. (Ex. DEP-1)

dock and pilings will be similar in design to other private timber docks in Chester. (Exs. APP-17, 25-28a-b; ex. DEP-1; test. G. Sharpe, 02-28-02, tape no. 4.)

16. The boatlift located on the south side of the dock will occupy an area seven feet by twelve feet and be supported by four sets of triple pilings. When berthed on the boatlift the elevation of the boat's gunwale will be one foot above the deck of the dock. The boat will occupy an area 23 percent of the total length of the dock. (Exs. APP-16, 17; ex. DEP-1; test. G. Sharpe, 02-28-02, tape nos. 4 through 6.)

4

The River

17. The lower part of the river is recognized as aesthetically beautiful and scenic, historically unique and rich in mariner history and a vital coastal resource. The configuration of the east and west shorelines are irregular with different indentations and projections of land that vary in distance to the deepwater Federal Navigation Channel (the main channel) on the east side of the river. The bank of the east shore in Hadlyme is comprised of a sheer rock cliff that abuts the main channel. All along the river are private homes and docks, commercial marinas, popular recreational and tourist attractions and small craft public launch sites. *The Complete Boating Guide to the Connecticut River Boating* identifies flat water¹¹ as the level of difficulty and type of water conditions that can be expected from East Haddam to Essex. The river is in a constant state of flux and boaters who navigate this stretch are cautioned to beware of tides, currents, winds and boat wakes. During the summer months the main channel is heavily traveled and

congested with traffic from barges, riverboats, powerboats, sailboats and personal watercraft that produce chop and large boat wakes. Many small craft paddlers prefer to navigate on the westerly side of the river to avoid the traffic and hazardous conditions in the main channel. (Exs. APP-8, 20; ex. INT-HFA-1; exs. INT-PT-1, 2-11a, 13, 14, 24; test. sworn public speakers, 02-27-02, tape nos. 2 through 5; test. Gail Carmody, 02-27-02, tape no. 2; test. C. Kimball, 02-28-02, tape no. 2, 03-05-02, tape no. 5.)

18. Directly across the river from the proposed dock is Gillette Castle, a popular tourist attraction and landmark that sits atop the rock cliff. The views and vistas from Castle's promenade deck overlook the Connecticut River Valley. William Gillette once berthed his 140-foot houseboat, Aunt Polly, north of the Hadlyme Ferry landing and at low tide the remains of the dock pilings are visible. (Exs. INT-PT-2, 3, 7, 9; test. C. Kimball, 02-28-02, tape no. 2.)

19. Off the main stem of the river's easterly side are Chapman Pond, Whalebone Creek and Selden Cove and Creek. These protected coves and creeks are valuable coastal resource areas and popular destinations for small craft paddlers. To get to these coves and creeks, the *Tidewaters of Connecticut Guidebook; An Explorer's Guide to Hidden Coves and Marshes* recommends, and small craft paddlers prefer, using designated public launch areas and navigational routes on the easterly side of the river. (Exs. INT-PT-2, 24; test. C. Kimball, 02-28-02, tape no. 2.)

20. Parkers Point, Chester Ferry Landing, Chester Creek and the Carini Preserve launch areas are located on the westerly side of the river and are used less frequently by small craft paddlers because access and launching conditions are not as

¹¹ Smooth surface water with slight current. (Ex. APP-20)

favorable to those on the easterly side. (Exs. INT- PT-2, 24; ex. APP-11a; test. G. Sharpe, 02-28-02, tape no. 6; test. C. Kimball, 02-28-02, tape no. 2.)

5

Impacts of the Proposed Activities

(a)

Aquatic Life, Wetlands, Fish and Wildlife

21. The DEP Bureau of Natural Resources maintains a Natural Diversity Data Base, which indicates that the woodland pond snail (*Stagnicola catascopium*) has been documented at the site and Shortnose sturgeon (*Acipenser brevirostrum*) and Atlantic Sturgeon (*Acipenser oxyrinchus*) occur in the vicinity of the proposed project. The proposed regulated activities will not change water quality and depth and these species will not be adversely impacted. Bald eagles use this corridor of the river during the winter feeding months. To protect the eagles' winter habitat and prevent disturbance of the feeding areas, no on-site work will be conducted between December 31 and March 1. (Exs. APP-5, 7; exs. DEP-1, 4-6, 10; ex. INT-PT-8; test. G. Sharpe, 02-28-02, tape no. 4; test. S. Gradante, 03-05-02, tape no. 3.)

22. The applicants will establish a minimum ten-foot flagged setback area from any of the adjacent wetlands on site that are located in areas where work will be conducted or used for access to the work area. No equipment or material will be deposited, placed or stored in any wetlands on or off-site or within any delineated setback area. Pilings will be installed using a barge-mounted pile driver and construction of the dock will take place from a barge. The boatlift will be purchased from the manufacturer

and assembled on the barge. Turbidity associated with pile driving activities may have short-term impacts on finfish and benthic habitat but will have no long-term adverse impacts. The projected time to complete the proposed work will be thirty days. (Exs. DEP-1, 10)

23. The elevation of the dock and boatlift will eliminate any shading impacts to a sparse area of SAV growing in waterward of the mean low water mark. During periods of low tide and wave action, the boatlift will prevent the boat from pounding on the intertidal flat causing compression of the substrate and the suspension of sediments in the water column which can adversely impact aquatic organisms and fish. There is no evidence that the proposed dock and associated structures will cause adverse impacts to or lower the functioning of any of the adjacent tidal wetlands located at the site. (Ex. APP-7: exs. DEP-6, 14; test. H. Montrose, 02-27-02, tape no. 2; test. G. Sharpe, 02-28-02, tape no. 4; test. S. Gradante, 03-05-02, tape no. 3.)

(b)

***Prevention or Alleviation
Of Shore Erosion and Coastal Flooding***

24. Pile driving activities may have short-term effects on turbidity but will not pose any long-term adverse effects on water quality. The shore land along the flood plain is naturally eroding due to the natural forces of waves, wind, spring freshet and seasonal flood effects. The distance between pilings and the elevation of the deck have been designed to prevent any increase in the hazard of coastal flooding. There is no evidence that the proposed regulated activities will alter and degrade water quality, circulation,

erosion patterns or increase the hazard of coastal flooding. (Ex. APP-2; ex. DEP-1; test. G. Sharpe, 02-28-02, tape no. 4; test. S. Gradante, 03-05-02, tape no. 3.)

(c)

***Use and Development of Adjoining Uplands,
Adjacent Lands and Properties***

25. The proposed regulated activities will provide berthing space for the applicants' boat and access to the waters of the river for boating and fishing opportunities and support recreational water uses. There is no evidence that the proposed activities will adversely effect or interfere with the riparian rights of adjacent landowners and the use and development of adjoining uplands and properties. The area is residentially zoned and not suitable for use as a marina and commercial development. (Ex. APP-1; exs. DEP-1, 10; test. S. Gradante, 03-05-02, tape no. 3.)

(d)

***Navigation for all Vessels,
Including Small Craft for Recreational Purposes***

26. The river at the site is 1250 feet wide and the distance from the waterward terminus of the proposed dock to the main channel is approximately 800 feet. The proposed dock and associated structures will occupy no more than 8 percent of the distance of the total width of the river and .06 percent of the total river area between the applicants' river frontage and the main channel. At this location, all vessels, including small craft will have unobstructed access to 92 percent of the width of the river and 99.94

percent of an area of the river to freely navigate. (Ex. APP-9; test. G. Sharpe, 02-28-02, tape nos. 4 and 5; test. S. Gradante, 03-05-02, tape nos. 3 and 4.)

27. The length of the proposed dock will not extend and encroach as far into river as the Botti dock and Chester ferry slip. A line drawn from the waterward terminus of the Botti dock and waterward terminus of the Chester ferry slip is some eighty feet beyond the waterward terminus of the proposed dock. Small craft paddlers who navigate a course on this line will pass well offshore from the dock. (Exs. APP-9, 11; test. G. Sharpe, 02-28-02, tape no. 4; test. S. Gradante, 03-05-02, tape no. 3.)

28. Small craft paddlers who navigate a course directly along the Chester shoreline between the Botti dock and Chester ferry slip will have 700 feet available to safely maneuver and avoid the proposed fixed dock if traversing north and 500 feet if traversing south. (Exs. APP-9, 10, 12, 23b; test. C. Kimball, 02-28-02, tape no. 3; test. G. Sharpe, 02-28-02, tape no. 5.)

29. During more than one-half of the tidal cycle the depth of water in the intertidal flat landward of the dock is less than two feet and too shallow for small craft paddlers to safely navigate directly along the Chester shoreline. Small craft paddlers can safely navigate a course waterward of the terminus of the dock in deeper water and avoid the hazardous conditions of breaking waves and debris deposited along the shoreline. (Exs. APP-2, 9-11a, 16, 17; test. G. Sharpe, 02-28-02, tape nos. 5 and 6; test. S. Gradante, 03-05-02, tape no. 4.)

30. The location of the proposed dock and associated structures will not be in any close proximity to the designated launch sites on the east and west side of the river and will not interfere with the navigation of small craft to reach the popular coves and

creeks. The dock has been designed and located to minimize waterward intrusion to the absolute minimal length necessary for the applicants to access a reasonable depth of water during the full tidal cycle. Staff reviewed the application and found the proposed regulated activities will neither pose a safety hazard nor interfere with the navigation of vessels including small paddle craft in the waters of the river. (Exs. APP-9, 23b; ex. DEP-1: exs. INT-PT-2, 24; test. G. Sharpe, 02-28-02, tape nos. 4 and 5; test. C. Kimball, 02-28-02, tape no. 2; test. S. Gradante, 03-05-02, tape no. 4.)

(e)

Visual Impacts

31. The height of the proposed dock and boatlift will be considerably lower in elevation than the surrounding land and will occupy 8 percent of the distance of the river's width and less than 1 percent of the river's surface area. The dock and pilings will be constructed of timber materials and will naturally weather and blend into the river setting. (Exs. APP-9, 17; ex. DEP-1; test. G. Sharpe, 02-28-02, tape nos. 4 and 5; test. S. Gradante, 03-05-02, tape nos. 3 and 4.)

32. The contour of the applicants' shoreline is concave and the views and vistas from the Hadlyme and Chester shoreline, the Chester ferry landing, the Castle promenade show that the proposed dock and associated structures will not extend and encroach as far waterward as Chester ferry slip and the Botti dock. The size of the proposed dock and associated structures will be smaller in height, length and width compared to other manmade structures in the river landscape. (Exs. APP-9, 23g-23i, 24

through 28; test. G. Sharpe, 02-28-02, tape no. 5, 03-05-02, tape no. 1; test. S. Gradante, 03-05-02, tape nos. 3 and 4.)

6

Alternatives

33. The applicants considered several alternatives to the present proposed regulated activities that included taking no action; designing a shorter dock with a single boatlift; designing a dock without a boatlift; and a putting in a mooring. Taking no action will prevent the applicants from exercising their common law riparian right to reasonably access deep water. A shorter dock designed with a boatlift will not reach sufficient deep water to launch and retrieve a boat. A dock designed without a boatlift will require installing a ramp and float and lengthen the overall structure to 130 to 140 feet waterward of the high tide line onto a dense area of SAV. Wave climate and tidal action will cause the float and boat to pound on the intertidal flat during low tide compressing the substrate causing adverse environmental impacts to organisms and SAV. In order to function properly, a mooring will have to be put in and located at least 400 feet offshore, placing the boat closer to the main channel and creating a navigational hazard to commercial and recreational boat traffic, especially barges that navigate in this area of the river after dusk. During periods of high chop, fetch and wakes, boarding a moored boat will be unsafe and the continuous rotation and dragging of the mooring anchor chain on the bottom will cause adverse environmental impacts to the substrate and SAV. (Exs. APP-8, 9, 18; test. G. Sharpe, 02-28-02, tape nos. 4 and 5; test. S. Gradante, 03-05-02, tape no. 3.)

34. The intervenors propose that the applicants launch directly from the shoreline, relocate the dock to the creek and use a private commercial marina to gain access to the river as alternatives to the proposed regulated activities. The repetitive walking, dragging and carrying a boat or small craft on the intertidal flat during low tide would severely damage the substrate and destroy vital organisms growing and living in the substrate. The creek located on the northern boundary of the applicants' property is a fragile ecosystem that provides the only source of water to the large wetlands area located on the north and east portion of the property. During low tide the creek is completely dry and at high tide the water is too shallow to safely accommodate the applicants' boat and will not provide reasonable access to deep water. The intervenors suggested that the applicants not build a dock and use Chrisholm Marina located north of the applicants' property on the westerly side of the river. (Exs. APP-2, 11, 11a; test. Michael Prisløe, 02-28-02, tape no. 4; test. G. Sharpe, 03-05-02, tape no. 1; test. S. Gradante, 03-05-02, tape no. 3.)

35. CHMC and CLT recommend replacing the boatlift with a low profile lift smaller in size and scope than the one proposed in the application. The weight-load capacity of the boatlift model proposed in the application will safely accommodate the weight of the applicants' boat. There is no evidence that a low profile lift model is available with sufficient capacity to safely accommodate the weight of applicants' boat. (Ex. APP-22; ex. DEP-1; ex. INT-CLT-2; test. G. Sharpe, 02-28-02, tape nos. 4 and 5.)

III

CONCLUSIONS OF LAW

A

Introduction

Riparian Rights and the Public Trust

The public owns the soil between the “high and low water mark upon a navigable water where the tide ebbs and flows” and the State, as trustee, represents the public and holds title to the soil. *State v. Knowles-Lombard Co.*, 122 Conn. 263 (1936). The applicants own land adjoining the river and have “certain exclusive yet qualified rights and privileges in the waters and submerged land adjoining [their] upland”. *Rochester v. Barney*, 117 Conn. 462, 468 (1933). The applicants have the “exclusive privilege of wharfing out and erecting piers” upon the submerged land of the river for any purpose so long as it does not interfere with rights of the public to freely navigate in the waters of the state. *Id.* at 468.

For whichever purpose, whether commercial or recreational, the applicants by virtue of their property rights have the exclusive privilege to build a dock and use it “in any manner which does not interfere with navigation”. *State v. Knowles-Lombard Co.*, *supra*, 265. These property rights derive from common law and are termed “riparian rights” and belong to the owner of land bordering water. These rights are “distinct from the rights of members of the public” who navigate the water. *Richards v. New York, New Haven and Hartford Railroad Company*, 77 Conn. 501, 505 (1905). The applicants’ right to build a dock from the upland of their property is not absolute and is subject to General

Statutes §§22a-359 through 22a-363(f) (structures, dredging and fill statutes), which require that the applicants acquire a permit in order to erect a dock in tidal, coastal or navigable waters of the state. *Hotchkiss Grove Association, Inc. v. Water Resources Commission*, 161 Conn. 50, 54 (1971).

B

Statutory Criteria

The applicants have the burden to demonstrate that the proposed application is consistent with all applicable statutory requirements that regulate the erection of structures. General Statutes §22a-359. The proposed regulated activities will be conducted in a coastal area and support water-dependent uses¹² and must also be consistent with the policies and provisions of the *Coastal Management Act (CMA)*. General Statutes §§22a-90 through 22a-112. Because there will be no structure, dredging, or activity conducted upon any of the adjacent tidal wetlands at the site, the application is not subject to the Tidal Wetlands Act.

The present application was filed pursuant to the requirements of the structures, dredging and fill statutes. Section 22a-359 provides that the Commissioner shall regulate the erection of structures and associated work in the tidal, coastal or navigable waters of

¹² “Water-dependent uses” are defined as “those uses and facilities which require direct access to, or location in, marine or tidal waters and which therefore cannot be located inland, including but not limited to: Marinas, recreational and commercial fishing and boating facilities, finfish and shellfish processing plants, waterfront dock and port facilities, shipyards and boat building facilities, water-based recreational uses, navigation aides, basins and channels, industrial uses dependent upon water-borne transportation or requiring large volumes of cooling or process water which cannot reasonably be located or operated at an inland site and uses which provide general public access to marine or tidal waters”. General Statutes §22a-93 (16).

the state waterward of the high tide line with due regard for:

indigenous aquatic life, fish and wildlife, the prevention or alleviation of shore erosion and coastal flooding, the use and development of adjoining uplands, the improvement of coastal and inland navigation for all vessels, including small craft for recreational purposes, the use and development of adjacent lands and properties and the interests of the state, including pollution control, water quality, recreational use of public water and management of coastal resources, with proper regard for the rights and interests of all persons concerned.

The CMA sets forth the legislative goals and policies, which must be followed when any development, preservation or use of the land and water resources is proposed within a coastal area. General Statutes §22a-92. The Commissioner is charged with assuring consistency with these goals and policies when granting, denying, or modifying permits in a coastal area. General Statutes §22a-98. Included among the policies in §22a-92 that I must therefore consider are:

- (a) (1) To insure that the development, preservation or use of the land and water resources of the coastal area proceeds in a manner consistent with the capability of the land and water resources to support development, preservation or use without significantly disrupting either the natural environment or sound economic growth;
- (a) (4) To resolve conflicts between competing uses on the shorelands adjacent to marine and tidal waters by giving preference to uses that minimize adverse impacts on natural coastal resources while providing long term and stable economic benefits;
- (b) (1) (D) to require that structures in tidal wetlands and coastal waters be designed, constructed and maintained to minimize adverse impacts on coastal resources, circulation and sedimentation patterns, water quality, and flooding and erosion, to reduce to the maximum extent practicable the use of fill, and to reduce conflicts with riparian rights of adjacent landowners;
- (b) (1) (G) to encourage increased recreational boating use of coastal waters, where feasible, by (i) providing additional berthing space in existing harbors, (ii) limiting non-water-dependent land uses that preclude boating support facilities, (iii) increasing state-owned launching facilities, and (iv)

providing for new boating facilities in natural harbors, new protected water areas and in areas dredged from dry land;

- (b) (2) (D) to manage intertidal flats so as to preserve their value as a nutrient source and reservoir, a healthy shellfish habitat and valuable feeding area for invertebrates, fish and shorebirds; to encourage the restoration and enhancement of degraded intertidal flats; to allow coastal uses that minimize change in the natural current flows, depth, slope, sedimentation, and nutrient storage functions and to disallow uses that substantially accelerate erosion or lead to significant despoliation of tidal flats;
- (b) (2) (E) to preserve tidal wetlands and prevent the despoliation and destruction thereof in order to maintain their vital natural functions;
- (b) (2) (I) to regulate shoreland use and development in a manner which minimizes adverse impacts upon adjacent coastal systems and resources; and
- (c) (1) (K) to require as a condition in permitting new coastal structures, including but not limited to, groins, jetties or breakwaters, that access to, or along, the public beach below mean high water must not be unreasonably impaired by such structures and to encourage the removal of illegal structures below the mean high water which unreasonably obstruct passage along the beach.

“Adverse impacts on coastal resources” are defined to include but are not limited to: the degrading of water quality, circulation, natural erosion and drainage patterns; the degrading of visual quality through significant alteration of the natural features of vistas and viewpoints; the degrading or destroying of essential wildlife, finfish or shellfish habitat; the degrading of tidal wetlands through significant alteration of their natural characteristics or function; and increasing the hazard of coastal flooding. General Statutes §22a-93 (15).

The Commissioner shall grant a permit to conduct the proposed regulated activity only if it is determined that the application is consistent with the applicable standards set forth in the structures, dredging and fill statutes and with the goals and policies set forth

in the *CMA*. The policies and goals concerning the development or use of land and water resources within a coastal area and the statutory provisions regulating the erection of structures must therefore be assessed.

(1)

General Statutes §22a-359

(a)

Aquatic Life, Fish and Wildlife

The proposed regulated activities will not result in significant adverse impacts on marine fisheries, aquatic life, fish and wildlife. The woodland pond snail has been documented at the site and sturgeon occurs in the vicinity of the proposed dock. Because the proposed dock and associated structures will not change water quality and depth, there will be no adverse impacts to these species. Seasonal work restrictions will assure that there will be no adverse impacts to migrating bald eagles that use the area for feeding and winter habitat.

(b)

***The Prevention or Alleviation
of Shore Erosion and Coastal Flooding***

The proposed activity will have no adverse impacts on water quality, currents, water velocity, natural erosion or sedimentation patterns. Pile driving activities will cause some short-term turbidity but will have no long-term adverse impacts on water circulation and water quality. There is no proposal to fill, dredge or excavate as part of

the project and the shoreline at the site is naturally eroding due to the forces of waves, spring freshet and seasonal weather conditions. Ice-breaker batter piles will break sheets of ice flowing from the north down the main stem of the river and alleviate shoreline erosion at the site. There is no evidence that the proposed dock and associated structures will increase the potential hazard of coastal flooding or storm damage on adjacent or adjoining properties.

(c)

***Use and Development of Adjoining Uplands,
Adjacent Lands and Properties***

The applicants' proposal to construct a private fixed dock extending from the upland of their property to engage in boating and fishing opportunities will support and promote water-dependent recreational uses. On the westerly side of the river, the adjoining upland properties to the north and south are comprised of residential homes and some private docks. The proposed activities will not unreasonably interfere with the riparian rights of adjacent landowners and the use and development of any of the adjoining properties.

(d)

Navigation

The regulated activities proposed by the applicants will not unreasonably interfere with the public's right to freely navigate in the river and will not interfere with navigation in the main channel. After careful review of the evidence presented by the intervenors

and the testimony of sworn public speakers, I cannot reasonably conclude that the proposed dock will obstruct or interfere with the public's right to freely navigate in the river, including small craft for recreational purposes. The proposed dock will be located 800 feet from the main channel, occupy 8 percent of the total width of the river at this location, and is designed to minimize waterward encroachment to the greatest extent possible to allow the applicants access to navigable water. There is enough river surface area both waterward and landward of the terminus of the proposed dock for small craft paddlers to safely navigate. The proposed dock will not interfere with the public launch sites on the main stem of the river and will not obstruct or hinder the navigation of small craft to reach any of the popular cove and creek destinations. Further, the Chester Harbor Management Commission reviewed navigational impacts and found the application to be consistent with the Town of Chester Harbor Management Plan.

(2)

Coastal Management Act

(a)

Minimal Impacts on Coastal Resources

The Commissioner must consider whether the proposed activities are consistent with the goals and policies of the CMA requiring that any proposed structure in tidal wetlands and coastal waters be designed and constructed to minimize adverse impacts on coastal resources. The applicants, in consultation with the DEP, are proposing a plan that provides for a structure that is no greater in length, width and height than necessary to

accomplish its intended function and is designed so that it will not impair, restrict or obstruct public access along the shore.

The proposed dock will be located in an area of the intertidal flat where there is no tidal wetlands vegetation directly growing or capable of growing because of unfavorable site conditions. The functioning of any of the adjacent tidal wetlands on the site located landward of the mean low water mark will not be significantly altered by the proposed dock and associated structures. The draft permit includes conditions with stated control measures that will establish a ten-foot setback from any wetlands in and adjacent to any of the areas where work will be conducted to prevent, preserve and minimize any adverse impacts to tidal wetlands.

The intervenors and sworn public speakers claim that the proposed activities will adversely impact coastal resources by significantly altering and degrading the visual quality of the natural features of vistas and viewpoints of the river landscape. While sensitive to the aesthetic quality and natural beauty of the river, I cannot reasonably conclude from the evidence that the proposed dock and associated structures will significantly alter and degrade the visual quality and natural character of the river's landscape. Docks historically have aligned the shores of the river and are not uncommon manmade structures found in this type of setting. The proposed dock has been shortened to the greatest extent possible to reasonably reach deep water and will neither extend nor encroach as far waterward as the Botti dock and Chester ferry slip. The elevation of the dock and associated structures will be considerably lower in elevation than the surrounding land and will occupy an area less than 10 percent of the width of the river and leave more than 90 percent of the water surface area unobstructed, open and visible.

While the proposed dock and associated structures may be aesthetically displeasing to the perception of some and will minimally alter the appearance of the river's natural features, I do not find it to be a significant alteration that will adversely impact coastal resources.

The specific limitations and restrictions listed in the draft permit, the activities that it will authorize, and the procedures by which the applicant will conduct the work will not cause any adverse impacts to coastal resources. I find the proposed regulated activities consistent with the *Coastal Management Act*.

C

General Statutes §22a-19 and Alternatives Analysis

The intervenors Nelson, PT, CLT and HFA have intervened under the provisions of §22a-19 (a). Under this statute, intervenors allege that a proceeding or action “involves conduct which has, or which is reasonably like to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state”. Subsection (b) of this statute further provides that no conduct shall be authorized or approved that does have such an effect if there exists, considering all the relevant surrounding circumstances and factors, “a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare”.

The burden of proving that the proposed project would have, or would be reasonably likely to have, the effect of “unreasonably polluting, impairing or destroying” belongs to the intervenors. *Manchester Environmental Coalition v. Stockton*, 184 Conn. 51 (1981). The intervenors have not presented sufficient evidence to support such a

conclusion. There is no evidence that the proposed regulated activities are inconsistent with statutory requirements or with any policies to protect the natural resources of the State.

Section 22a-19 (b) requires the consideration of alternatives only when it is first determined that the proposed activities will cause unreasonable pollution. Because the intervenors failed to meet their burden the Commissioner is not required to determine whether a feasible and prudent alternative to the proposed regulated activities exists. *Paige v. Town Planning & Zoning Commission of the Town of Fairfield*, 235 Conn. 448 (1995). However, the applicants, in their efforts to minimize adverse impacts to coastal resources, presented several alternatives to the proposed dock that included building a shorter dock, putting in a mooring and eliminating the boatlift.

The intervenors also proposed alternatives that included relocating the dock to the creek, launching directly from the shoreline and that the applicants use a commercial marina. The evidence presented demonstrates that there is no “feasible and prudent alternative to the proposed regulated activities consistent with the reasonable requirements of the public health, safety and welfare”. General Statutes §22a-19 (b).

IV

CONCLUSION

The application meets the relevant statutory criteria, policies and goals that guide the Commissioner's decision to grant or deny such an application. This proposal to construct a dock, boatlift and associated structures will support water-dependent recreational boating uses while avoiding, minimizing or limiting any significant adverse environmental impacts as a result of the activity.

I conclude that the application strikes an appropriate balance between the responsibility of the DEP to protect the rights and interests of the public while minimizing adverse environmental impacts on coastal resources.

V

RECOMMENDATION

I recommend that the Commissioner issue the requested permit incorporating the terms and conditions set forth in the draft permit with the following modification proposed by CHMC and CLT:

1. ***Permit No. 200103104-SG***

The following language is to be added to the noted section of the Permit.

SPECIAL TERMS AND CONDITIONS

7. The Permittees shall not store fuel, oil or other chemical pollutants on the dock.

August 22, 2002
Date

/s/ Elaine R. Tata
Elaine R. Tata, Hearing Officer