

**STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION**



OFFICE OF ADJUDICATIONS

IN THE MATTER OF : *APPLICATION NO. 200402741*

STEPHEN TONER : *JUNE 23, 2009*

PROPOSED FINAL DECISION

I

SUMMARY

Stephen Toner (applicant) has applied to the Department of Environmental Protection Office of Long Island Sound Programs (OLISP/staff) for a permit to install a fixed pier with davits for private recreational boating access in Ash Creek in Fairfield. The proposed dock would be located in coastal waters and tidal wetlands; the dock and review of this application are therefore subject to the following statutes and regulations. General Statutes §§22a-28 through 22a-35, §§22a-90 through 22a-112, and §§22a-359 through 22a-363f; Regs., Conn. State Agencies §§22a-30-1 through 22a-30-17.

The DEP issued notice of its tentative determination to approve this application and prepared a draft permit that would allow the applicant to build the proposed dock (Attachment A). An evening hearing on the application was held in Fairfield for the receipt of public comments and evidence was taken over three additional days in Hartford and in Fairfield. The parties to this proceeding are the applicant and DEP staff. The Ash Creek Conservation Association, Inc. (ACCA) also intervened as a party.

The applicant's proposed dock is designed and engineered specifically to accommodate a number of private recreational uses, included berthing and launching a twenty-four foot long, outboard-powered boat. At the time of the department's review of

the application, staff was of the opinion that the governing statutes and regulations did not authorize the Commissioner to consider the intended use of the proposed dock in permitting decisions. ACCA specifically raised the question of the Commissioner's jurisdiction to do so, which lead to my ruling that the Commissioner had the authority to consider the environmental impacts that result from use of the dock as any use would be inextricably linked to its presence in Ash Creek.

Given that staff's review of the application did not include consideration of the use of the dock, I cannot find that the structure and its intended use comply with the relevant statutes and regulations. I also cannot conclude that the proposed activities are consistent with the legislative goals and policies of the Coastal Management Act.

Tidal wetlands, intertidal mudflats, and seed oyster beds and habitat are valuable resources within Ash Creek that the legislature has indicated warrant protection. In fact, commercially viable seed oyster beds have been rejuvenated in areas of Ash Creek in recent years. Currently, there is no harbor management plan or other municipal regulation of boating activities within the jurisdiction of the Town of Fairfield, or draft permit terms and conditions that would serve to protect these important resources from any adverse impacts associated with the intended use of the proposed dock. I therefore recommend that the Commissioner deny this application without prejudice to the applicant to request a re-evaluation of the application or to submit a modified proposal. However, I also recommend that staff be provided an opportunity to review any such application and recommend any necessary permit conditions and/or modifications, after giving full consideration to the anticipated use of the structure and the means available to the department to protect and maintain the coastal resources present in Ash Creek.

II

DECISION

A

FINDINGS OF FACT

1

Procedural History

1. Mr. Toner applied for a permit to construct a private dock for recreational boating access to Ash Creek from his property located at 223 Riverside Drive, Fairfield. OLISP staff conducted a technical review of the environmental impacts of constructing and maintaining the dock and, on June 24, 2008, issued a notice of tentative determination approving the application. Staff also prepared a draft permit that would allow the applicant to construct the dock. (Exs. DEP-1, 14.)
2. The Ash Creek Conservation Association, Inc. (ACCA) filed petitions requesting a hearing and to intervene as a party. General Statutes §§22a-19 and 22a-361. The following allegations were raised in the intervention petition:
 - There “will be direct and adverse ecological impact at the site of the proposed facilities to the on-site fringing tidal wetland community, and to the marine invertebrate populations of the adjacent tidal flats.”
 - The “cumulative integrity of the biological support functions and contributions necessary to maintain and enhance the viability of the shellfish resources in Ash Creek will be adversely affected by the installation of the proposed pier, especially because of the unique nature of the relatively small and confined ecosystem.”
 - The “60 foot length of the fixed pier, necessitated in part by the proposed installation of davits for the berthing of a 24 foot long, 8 foot beam, 2 foot draft outboard powered vessel, will adversely affect the navigability of this relatively small, confined public waterway.”
 - The “proposed pier is sized for berthing [the above-referenced boat] and ... such berthing and usage during the months of June, July and August would

inherently subject the shellfish resources in Ash Creek to stress and harm, to the detriment of the public's right to use and enjoy this marine resource."

- There is a "feasible and prudent alternative to the applicant's recreational objectives which can be served without the proposed structures. The applicant can enjoy the recreational benefits of the Ash Creek ecosystem by using the same non-impairing and low-intensity boating operations currently used by many others.... The use of a shorter, fixed pier appropriate only for berthing or using smaller vessels such as kayaks, canoes, rowboats, small sailboats and other non-outboard motored craft would minimize harm to the shellfish resources and ... lessen the impediments to navigation in this small body of water."¹

3. I conducted a site visit on September 25, 2008 with representatives of the applicant, staff, ACCA and the National Oceanic and Atmospheric Administration National Marine Fisheries Service. A hearing to take public comment on the application was held in Fairfield on October 7, 2008.² The evidentiary portion of the hearing was continued in Hartford on October 15 and 29 and concluded on November 12 in Fairfield, at which time the record closed.

4. In response to the question of jurisdiction, the parties filed post-hearing legal memoranda on December 20 that addressed the following issues:

- a. Whether the relevant provisions of the Connecticut Tidal Wetlands and Coastal Management Acts, and/or those provisions regulating the erection of structures or dredging in tidal, coastal or navigable waters apply to known or anticipated uses of a proposed structure. For example, is the use of a structure (in this case, berthing and operation of a twenty-four foot long power boat) so inextricably linked to the structure that any adverse impacts from the

¹ Pleadings, rulings, briefs, formal notices, directives and conference summary memoranda are contained in the Office of Adjudications docket file and are a part of the record of this proceeding. General Statutes §4-177(d).

² Public comments were, for the most part, consistent with the allegations made by ACCA.

operation of the power boat should be factors to be considered for permit issuance?

- b. If the use of the structure is to be considered, are the facts in this case sufficient for a determination that such use will adversely impact a protected resource?
5. In its brief, staff proposed six special permit terms and conditions (STCs) to be incorporated into the draft permit in the event it was determined that the use of the structure could be considered as part of the application.³ The applicant objected to the admission of the proposed STCs. On April 14, 2009, I ruled that the Commissioner was authorized to consider the use of structures in permitting decisions.⁴ Without acting on the applicant's objections, I advised the parties that in the absence of an agreement on acceptable permit terms and conditions, I would proceed with the Proposed Final Decision on the record currently before me. On May 6, 2009, the applicant advised me that the parties could not reach agreement; I therefore considered the issues in this matter based on the record evidence without further consideration of the STCs.

2

Application History

6. In August 2004, staff received a complaint that the applicant was maintaining an unauthorized dock structure waterward of the high tide line. Following a DEP site inspection, the applicant was notified that the unpermitted structure was causing unacceptable impacts to coastal resources and had to be removed and an application filed to obtain a permit to construct a replacement dock. At the same time, the applicant was advised that a 159-foot stone retaining wall along the entire shoreline

³ During the hearing, staff testified that they were of the opinion that the statutory provisions governing the applicant's project do not authorize regulation of the use of a structure, which in this case includes the berthing and launching of the applicant's outboard-powered vessel. Consequently, staff limited its review of the application to the environmental impacts of the structure alone. (Test. J. Westermeyer, 10/29/08.)

⁴ The issue of whether the Commissioner is authorized to regulate the use of a structure is associated with her jurisdiction. Therefore, a ruling resolving the issue was necessary before proceeding with this proposed decision.

of his property waterward of the high tide line was also unauthorized and had to be removed. (Ex. DEP-13; test. J. Westermeyer, 10/29/08.)

7. Mr. Toner filed his initial application with OLISP on October 22, 2004. The application included plans for a fixed pier four feet wide by thirty-five feet long, a pierhead six feet wide by sixteen feet long with two boat-hauling davits, an aluminum ramp three feet wide by thirty feet long and a timber floating dock eight feet wide by twelve feet long. The overall length of the structure would be sixty-nine feet. The applicant also requested authorization to retain the stone retaining wall. (Exs. DEP-1, 13; test. J. Westermeyer, 10/29/08.)
8. On December 15, 2004, the Fairfield Shellfish Commission (Shellfish Commission)⁵ submitted written comments on the application advising staff of its unanimous vote to approve the application subject to a restriction to limit the waterward extension of the structure to sixty feet from the face of the retaining wall and a requirement that the applicant execute a Shellfish Easement to the town to mitigate any adverse effects of the structure. The United States Army Corps of Engineers also recommended that the structure be limited to sixty feet. (Exs. DEP-2, 4.)
9. On October 25, 2005, staff again advised the applicant that the retaining wall was inconsistent with state policies and standards; therefore, approval of the application was unlikely. Staff also requested revised drawings that (1) reflected a dock consistent with the Shellfish Commission recommendations and without the pierhead and davits; (2) included the berthing configuration, type, length, draft and beam of the vessel to be used at the dock; (3) provided details of the proposed float design; and (4) showed the location of any shellfish resources in the area of the dock. (Ex. DEP-4.)
10. The applicant submitted the revised plans on January 5, 2006. The plans described the area around the proposed dock as “mud and shells” and an area north of the dock

⁵ Applications for permits must be noticed to, among others, the chairmen of the planning, zoning, harbor management and shellfish commissions of each town where the proposed work that is the subject of the application is to be performed. General Statutes §22a-361(b).

as “shellfish concentration area and intertidal flats”. The plans also indicated the berthing location at the waterward terminus of the float for an “outboard-powered vessel (24’ [length overall], 8’ beam, 2’ draft).” (Ex. DEP-5; test. J. Hilts, 10/29/08.)

11. From January 2006 through September 2007, the applicant and the department continued to negotiate his request to retain the stone wall. The issue was resolved when the applicant agreed to establish an area extending from his property sideline boundaries and set back thirty-one feet from the high tide line as a “no mow zone” to encourage the restoration of high marsh vegetation in that area. The applicant also agreed to execute and record a restrictive covenant preserving the no mow zone and preventing any future restoration or maintenance of the wall. This agreement was contingent upon the applicant receiving a permit authorizing a dock. In the absence of such an agreement, it is unlikely that staff would have recommended a tentative determination to approve the application. (Exs. DEP-5 – 10, 12, APP-D(R); test. J. Westermeyer, 10/29/08.)

12. On December 21, 2007, the Connecticut Department of Agriculture Bureau of Aquaculture (BOA)⁶ issued its determination that the proposed structure would “create a significant impact to the shellfish resources, the recruitment of seed oysters and their unique habitat in Ash Creek.” The BOA noted that as designed, the float would land “within an area of Ash Creek that during [mean low water] has no water available for the float or any watercraft.” The BOA, indicating that it had no objection to a fixed pier that would provide the applicant with access to the water, based its significant impact determination on its finding that “operation of [a] power vessel will harm oyster habitat and recruitment.” (Ex. DEP-11; test. D. Carey, 10/15/08.)

13. In April 2008, the applicant submitted revised plans for a fixed pier, four feet wide by sixty feet long, with davits to berth the outboard-powered vessel. The ramp and float were eliminated from the plan. On April 15, 2008, the BOA issued a second determination that the structure would significantly impact a shellfish area. The

⁶ The BOA regulates commercial shellfishing activities in the state and is primarily concerned with the commercial viability of public shellfish beds. (Test. D. Carey, 10/15/08.)

Shellfish Commission reviewed the revised plans and on July 10, 2008, advised staff that the proposed structure was consistent with the town's Shellfish Management Plan and that the Commission had voted unanimously to recommend that the DEP approve the revised application.⁷ (Exs. DEP-11, 15.)

14. On July 31, 2008, the Fairfield Conservation Commission (Conservation Commission) submitted written comments on the application. The Conservation Commission noted its concerns over the impact of the structure and its proposed use on shellfish and that the application was inconsistent with the goals of its Multiple Use Management Plan for Coastal Open Space. The Commission voted unanimously to recommend denial of the application. (Ex. DEP-16.)

3

*Location of the Dock
Ash Creek, Coastal Resources and Shorebirds*

15. Ash Creek is an estuarine embayment located off Long Island Sound between the Town of Fairfield and the City of Bridgeport. The shores of Ash Creek are relatively undeveloped although surrounded by a densely populated and urbanized area. The estuary contains such coastal resources as tidal water and wetlands, intertidal flats, and shellfish. The waters in the area are shallow with a muddy bottom. Mean high water at the waterward end of the proposed dock is at elevation 4.2 feet NGVD⁸; mean low water is at elevation -2.8 feet NGVD. At low tide, the intertidal flats are exposed and there is little to no water in area of the proposed dock. (Exs. DEP-1, 12, 13, ACCA-8; test. J. Westermeyer, 10/29/08.)

⁷ This Commission licenses recreational shellfishing activities in Ash Creek. (Test. E. Crowley, 11/08/08.)

⁸ The National Geodetic Vertical Datum: defined by the United States Army Corps of Engineers as a fixed reference adopted as a standard geodetic datum for elevations, and formerly referred to as mean sea level. (Administrative notice is taken of the U.S. Army Corps of Engineers, Tidal Flood Profiles New England Coastline, September 1988.)

16. Ash Creek is a 137 acre state-designated natural shellfish area for hard clams and seed oysters.⁹ The creek area is conducive to seed oyster development because the shoreline is undeveloped and few boats venture into the creek due to its shallow waters. Lower salinity levels in the creek discourage predators to oyster larvae and seed oysters. The water warms earlier in the season, which promotes spawning earlier in the season, and the area is sheltered from severe storm surges that could disturb and dislodge sediment. Although the intertidal flats at the waterward end of the dock do not promote seed oystering, the oysters present in that area have the potential to spawn, which provides seed oyster “set” for other areas of the river. (Exs. DEP-11, ACCA-8; test. D. Carey, 10/15/09.)
17. The Shellfish Commission noted in its initial comments on the application that the area around the dock site “contributes to the ecological viability of the estuary through its bordering ‘marsh apron’ of saltwater cordgrass and mudflat containing habitat for fiddler crabs, worms, oysters, soft and hard clams and feeding opportunities for shorebirds, waterfowl, finfish and crabs. The channel slope immediately beyond the marsh apron is composed of a stony gravel material providing good habitat for seed oysters....” (Ex. DEP-3.)
18. The Conservation Commission characterized Ash Creek as “a very valuable estuarine embayment with its broad shallow mud flats and a narrow bank of salt marsh vegetation along its upland edge.... Ash Creek supports a wide variety of fish, shellfish, wading birds and waterfowl throughout the year, with special emphasis on its value during migratory periods. Ash Creek also supports one of the most productive natural beds for the seed oyster fishery in Connecticut with on-going seed harvests by local watermen on an annual basis.” (Ex. DEP-16.)

⁹ Seed oysters are very young oysters, approximately 2.75 inches in size, that are harvested for transplant to other oyster beds to mature. Ash Creek is designated as “prohibited” for harvesting mature oysters due to the presence of contaminated sediments in certain areas of the creek. (Test. D. Carey, 10/15/08.)

19. The proposed dock would be located in the center of the applicant's property extending from the retaining wall and terminating within the intertidal flat. The dock would span a contiguous band of *Spartina alterniflora* that runs along the waterward face of the retaining wall and grows to a maximum height of six feet. Other wetland vegetation, *Iva frutescens*, is growing along the top of the retaining wall, which has a top elevation slightly lower than high tide. High marsh tidal wetland vegetation, *Distichlis spicata*, is growing on the north side of the property. (Exs. DEP-1, 12, 13; test. J. Westermeyer, 10/29/08.)
20. The National Diversity Data Base indicates that an endangered plant, Saltmarsh bulrush, has historically been present, however, currently the species is not present on the site. Migratory shorebirds feed in Ash Creek mid-March through May 1 and July 1 through the end of September. An expert witness for the ACCA testified that a suite of birds, specifically high arctic migrant shorebirds, are totally reliant on mudflats for food during migration to southern countries. Many of these birds are currently on conservation watch lists. An emergent issue this witness believes should be considered when permitting docks is that this group of birds, which do not feed under docks, are losing vital mudflat habitat. However, a literature search conducted by the witness provided no scientific or empirical studies that supported his testimony.¹⁰ (Exs. DEP-2, 12, 13; test. J. Hilts, 10/29/08, test. M. Bull, 11/08/08.)

4

The Proposed Activity

21. The first twenty-four feet of the proposed sixty-foot dock would be constructed at elevation 10.5 feet NGVD to provide structural protection from flooding and wave action and sufficient height to avoid interference with vegetation growth under and around the structure. The next nineteen-foot segment would slope to an elevation of 7.5 feet NGVD; the last seventeen feet would be at elevation 7.5 feet NGVD and accommodate the two davits proposed to berth the applicant's boat. The design does

¹⁰ Milan G. Bull, Sr. Director of Science and Conservation, Connecticut Audubon Society, stated emphatically that his testimony was based on his personal observations and not on scientific study.

not contemplate anyone passing under the dock at high tide. (Exs. DEP-12, 14; test. J. Hilts, 10/29/08.)

22. The tidal wetland vegetation in the area of the dock extends waterward approximately thirty-five feet from the retaining wall or slightly more than half the length of the dock. That part of the dock that would span the *Spartina alterniflora* would be at an elevation one foot above the peak height of the vegetation and cross at the narrowest expanse. (Exs. DEP1, 12, 13; test. J. Hilts, J. Westermeyer, 10/29/08.)
23. Eight timber pilings would be used to support the dock. Pilings would be driven by vibratory or impact hammer from a barge-borne derrick crane. The barge would be moved to deeper waters during periods of low tides. All equipment and supplies would be stored on the barge. Batter pilings and x-bracing would be used at the two waterward piling bents for additional structural support to the area intended to berth the applicant's boat. The applicant has always planned to use a twenty-four foot long, eight foot wide motor boat at the dock. (Exs. DEP-1, 12, 13; test. J. Hilts, 10/29/08.)
24. The retaining wall and approximately 3000 square feet of associated backfill were placed waterward of the high tide line between 1990 and 1995. The applicant is not required to remove the wall but future maintenance is prohibited. The no mow zone must be identified on the site by a row of landscaping stones set four inches above grade. The restrictive covenant that prohibits mowing or placing additional fill in the no mow zone must be recorded on the Town of Fairfield land records prior to construction of the proposed dock. (Ex. DEP-13; test. J. Westermeyer, 10/29/08.)

5

Impacts From the Wall and the Structure and Its Use

25. The height of the retaining wall allows for inundation of the upland, which promotes growth of tidal wetland vegetation landward of the wall. Sea level rise is expected to lead to more frequent flooding and, when combined with the prohibition on mowing and filling, supports the colonization of tidal wetlands. Removal of the wall and re-grading of the area would cause disturbance to approximately 400 square feet of

existing wetland vegetation.¹¹ (Exs. DEP-13, APP-D(R); test. A. Sleicher, 10/15/08, J. Westermeyer, 10/29/08.)

26. The proposed dock would not affect the future colonization of the saltmarsh bulrush historically present in the area. The dock, constructed off the existing retaining wall, would span the low marsh, which cannot support saltmarsh bulrush.¹² The applicant would be prohibited from constructing the dock during portions of the year to minimize adverse impacts on the feeding patterns of migratory shorebirds identified in Ash Creek. (Ex. DEP-13.)
27. There is no float planned for the dock, only the fixed pier that would terminate within the intertidal flat. The construction work would only be conducted by the barge-mounted crane during periods of high water. The potential adverse impacts to the mudflat from construction would be limited to the areas of pile driving and the presence of the pilings after construction. Such impacts are acceptable encroachments on coastal resources. (Ex. DEP-13.)
28. The dock is designed to minimize adverse impacts to tidal wetland vegetation. The dock would be elevated one foot above the peak height of the *Spartina alterniflora* present on the site, a standard elevation required by the department to promote vegetation growth and prevent shading. The dock eliminates the need for the applicant to drag a boat through the wetlands vegetation and the dock would not be located over the *Iva frutescens* or the *Distichlis spicata* growing on the site. (Ex. DEP-13; test. J. Westermeyer, 10/29/08.)
29. The bottom stringers of the pier would be elevated a minimum of five feet above the substrate waterward of mean high water. This elevation is considered acceptable for public access along the shoreline waterward of mean high water. The proposed pier would not affect any federal navigational channel or fairway, or any adjacent or

¹¹ A low, metal fence was also placed landward of mean high water on the applicant's property. Although not authorized, the DEP has determined that the fence caused no adverse impacts to coastal resources and will not require its removal. (Ex. DEP-13.)

¹² Saltmarsh bulrush cannot tolerate the daily tidal inundation that occurs in the low marsh. (Ex. DEP-13.)

nearby navigational uses.¹³ The dock would be sufficiently offset from property sidelines to avoid impacts to abutting neighbors.(Ex. DEP-13; test. J. Westermeyer, 10/29/08.)

30. The construction of the dock and the presence of the structure in the estuary would not adversely impact such resources as coastal waters, submerged aquatic vegetation, coastal flooding, drainage and water circulation patterns, shore erosion, visual quality, water quality, finfish, navigation or public access. (Ex. DEP-13.)
31. Staff, believing that it had no authority to do so, made no specific determination of whether the use of the structure, berthing and operating a power boat, would adversely impact coastal resources or navigation in the area. Such a determination would require a review of studies of the impacts of prop-dredging and boating activity in shallow waters with sensitive resources, and site inspections of Ash Creek at low tide for indications of scarring or other evidence that prop-dredging may have altered the substrate. This review could alter the tentative determination on this application. (Ex. DEP-13; test. J Westermeyer, 10/29/08.)
32. Staff agrees with BOA concerns that “operating motorized vessels in shallow water can create adverse impacts to benthic resources, shellfish (specifically oyster in Ash Creek) and other shallow water habitat.” To avoid impacts to such resources, motorized vessels should operate during periods of high tide or Spring tide when waters levels are high and there is no risk of prop-dredging. (Ex. APP-E; test. J. Westermeyer, 10/29/08.)
33. The BOA stated that “the shallow area [of Ash Creek] lacks the necessary depth of water, other than at high tide, to operate powerboats without prop-dredging and

¹³ During the hearing, staff referred to the many public commenters expressing concern over the potential impacts of the structure on kayak and canoe navigation. Staff noted that the permitted dock should not extend into the navigable channel, however, it intended to recommend and had drafted an amendment to the standard permit condition requiring submittal of as-built drawings that would address any additional encroachment into the channel. I directed staff to provide a copy of the proposed amendment to the other parties so that the issue could be addressed on the record at the next hearing date. There was no subsequent offer of the draft amendment language for inclusion in the record. (Test. J. Westermeyer, 10/29/08.)

resuspending sediments in the water column. The impact from these activities would be significant and would prevent the recruitment¹⁴ of oysters during the summer months, the critical spawning season.” BOA noted that seed oystermen worked in the creek in the fall of 2007 removing oyster “set” from 2006.¹⁵ (Ex. DEP-11.)

34. BOA also stated that the “construction of this proposed dock for boating access will create a significant impact on the shellfish habitat, the shellfish resources, as well as seed oyster recruitment at the project location but also the entire length of Ash Creek to the open sound.” The BOA “has no objections or concerns to the fixed pier” to gain access for recreational activities and launching non-power boats without damaging the tidal flats or causing impacts to “the seed oyster habitat, resource, and recruitment.” BOA considers the area a good natural seed oyster bed, but a bad recreational boating area. (Ex. DEP-11; test. D. Carey, 10/15/08.)

35. The Conservation Commission noted that the “proposed fixed pier structure and motor vessel ... will diminish shoreline access to the shellfish resource for seed oystermen and may, on a cumulative basis, through agitation of sediment during the critical shellfish spawning periods, significantly interfere with the spawning success of shellfish. These impacts may be considered additive to those of deteriorated habitat and the water quality problems already associated with the urban estuary.” (Ex. DEP-16.)

36. The Conservation Commission determined that the application was inconsistent with its Multiple Use Management Plan for Coastal Open Space¹⁶ “in light of alternatives that could be imposed on the permit so as to have less adverse impact on the estuarine resource: such as the use of retractable launch ramps ... restrictions on use of vessels with motors during spawning periods, compensatory mitigation by removing fill and

¹⁴ Recruitment occurs when spawned larvae attach to a hard surface.

¹⁵ Seed oysters are harvested by hand-dredging; oysters are sold to growers and planted on beds for a minimum of six months. Most seed oysters are harvested from public oyster beds such as those in Ash Creek. (Test. D. Carey, 10/15/08.)

¹⁶ A general set of guidelines and options for recommendations on coastal open space planning. (Test. M. Bull, 11/08/08.)

restoring intertidal wetland habitat. No such mitigation is proposed in the application.” (Ex. DEP-16.)

37. Although the BOA and Fairfield Conservation and Shellfish Commissions commented on the application, the agencies did not collaborate with each other. The Fairfield Harbor Management Commission does not include Ash Creek in its management plan and did not provide comments on the application.¹⁷ Having issued its “significant impact” determination, BOA did not recommend any specific permit terms and conditions to address its concerns. David Carey, Director of BOA, stated that once the dock is constructed, there is no regulation of recreational boating in Ash Creek that will protect and preserve the seed oyster habitat.¹⁸ (Ex. DEP-13; Test. D. Carey, 10/15/08, J. Westermeyer, 10/29/08.)

¹⁷ Mr. Toner, a former chairman of the Fairfield Harbor Management Commission, noted that the Commission “has no jurisdiction or interest in the area of Ash Creek where [his] property is located.” (Ex. DEP-8.)

¹⁸ Carey provided the following additional information. Due to the status of Ash Creek as a state-designated, natural shellfish bed, the BOA recognizes the need to protect seed oysters and restore seed oyster recruitment for commercial purposes in its waters. After a warm-water disease caused a ninety percent loss of the oyster population along the east coast, very little oystering activity occurred from 1998 through 2004. The first positive signs of oyster recovery in Ash Creek were observed in 2004. The first significant population of seed oysters suitable for commercial harvesting in Ash Creek appeared in 2006 and 2007.

BOA attempts to reduce the high mortality rate of seed oysters by working toward providing an ideal habitat. Oysters spawn during the months of July and August. Larvae swim in the water column for approximately three weeks before attaching to a hard, clean surface substrate such as pre-planted shells (cultch) or shells of living oysters. Only a few centimeters of sediment (silt) can smother newly settled oysters. Shellfishing areas are closed to harvesters from July through September or October based on studies that show that dredging would raise sediments and create harm to recruitment.

Natural occurrences such as storm surges or ice flows can disturb sediments so BOA deems it necessary to protect as much of the seed oyster recruitment area as possible to promote a commercially viable amount of seed to be moved out. Disturbances to sediments in the upper areas of Ash Creek will have an impact on seed oyster beds in lower areas. Floats resting on the mud flats or powered boats operating during periods of low water (prop-dredging) will loosen hard-packed sediment. During July and August, disturbed sediment may remain in the upper areas of the creek, however, it takes a long time for disturbed sediments to compact and harden again. So in winter months, when water flows are stronger and water turbidity increases, the loose sediments will travel greater distances downstream and impact the seed oyster habitat. (Test. D. Carey, 10/15/08.)

Alternatives

38. The applicant would use the proposed dock for launching and retrieving two small dinghies and two small sailboats, and for berthing and launching a twenty-four foot long, eight foot wide motor boat. The dock would provide access to Ash Creek and avoid repeated crossings of the tidal wetland vegetation. In his consideration of alternatives to the proposed dock, the applicant dismissed a longer fixed pier as "insufficiently minimized for the project's purpose." The applicant also noted that anchor pilings were rejected as their use would result in a permanent obstacle to shellfish harvesting. (Exs. DEP-1, 12, 13.)
39. The applicant and staff determined that the project could not be further minimized. However, ACCA proposed an alternative structure, forty-five feet long, which could be an acceptable alternative provided the structure was subject to a technical review. The shorter structure proposed by the ACCA could not accommodate a boat twenty-four feet long. (Exs. DEP-1, 12, 13, ACCA-7; test. J. Westermeyer, 10/29/08.)

The Draft Permit

40. The draft permit authorizes construction of a 4 x 60 foot fixed pier with two davits on the south side located in the center of the applicant's property. The applicant is prohibited from placing any construction material on any wetland or watercourse on or off-site to prevent adverse impacts to the intertidal flats. Construction activities are also prohibited from March 15 through June 1 and from July 1 through September 30 to avoid impacts to migratory shorebirds. The applicant must insure that the pile-driving barge does not rest or come into contact with the bottom of Ash Creek, so pile-driving activities must only be conducted during periods of high water. (Exs. DEP-13, 14; test. J. Westermeyer, 10/29/08.)
41. The draft permit provides that, prior to construction, the applicant must record on the Fairfield Land Records the restrictive covenant that establishes and describes the boundary of the no mow zone. The terms of the covenant must be approved by the

Commissioner. If the applicant or any future owner of the site fails to abide by those terms or if the covenant is removed from the land records, the permit will be nullified and the dock must be removed. (Exs. DEP-13, 14; test. J. Westermeyer, 10/29/08.)

42. The applicant is required to use his best efforts to insure that the dock does not impede access by the Shellfish Commission to shellfish resources. The applicant's boat must not be tied at the dock during periods of low water, but instead, must be raised by the davits to avoid disturbance to the intertidal flat. (Ex. DEP-14; test. J. Westermeyer, 10/29/08.)

8

*Other Permitted Structures in Ash Creek*¹⁹

43. In 2003, Paul Ganim applied for a permit to construct a dock from his property in Ash Creek. Mr. Ganim received approval for a thirty-nine foot dock, which would span a band of *Spartina Alterniflora* and terminate approximately nine feet into the intertidal flats. Mr. Ganim's intended use of the dock was for swimming, fishing and launching small boats. A condition of the permit was that boats may only be berthed at the dock three hours before and after the predicted time of the local high tide to prevent boats that tied up or left the dock during low water from prop-dredging. (Final Decision, *In the Matter of Paul Ganim*, October 6, 2005.)
44. In 2001, Michael Mears also applied for a dock permit and received approval for a structure consisting of a fixed pier fifteen feet long, a ramp fifteen feet long and a five-foot wide float. Float stops would be built into the pilings at the level of mean high water to prevent the float from touching the intertidal flats during periods of low water. Six pilings would support the structure with no additional bracing proposed for berthing purposes. In addition to the required float stops, the Commissioner adopted a recommended permit condition that prohibited dredging, including prop-dredging that results from motor boats routinely tied to the dock. (Final Decision, *In the Matter of Michael Mears*, February 20, 2008.)

¹⁹ I take administrative notice of these final permitting decisions.

45. The restrictive condition in the Ganim permit is difficult to enforce. Absent direct observation by staff, use of the dock in violation of the condition would be difficult to establish from photographs. Staff does not recommend use of such a condition in the draft permit for this application. There is no draft permit condition that would address the effects of motor boat use in the area of the dock. In fact, it would be difficult to enforce the restrictive condition in the draft permit that requires Mr. Toner's boat, when at the dock, to be raised by davits during periods of low water. (Test. J. Westermeyer, 10/29/08.)

B

CONCLUSIONS OF LAW

This is the third in a series of permit applications filed with the DEP in recent years for private, residential docks to be constructed in Ash Creek. Because each dock would be located in coastal waters, tidal wetlands and in an established natural shellfish concentration area, the applicants were required to demonstrate that their proposals complied with the statutes and regulations that protect these coastal resources. As those before, Mr. Toner's application was reviewed under the applicable provisions of General Statutes §§22a-28 through 22a-35 (Tidal Wetlands Act), Regs., Conn. State Agencies §§22a-30-1 through 22a-30-17(implementing regulations); and General Statutes §§22a-359 through 22a-363f (commonly referred to as the "Structures and Dredging Act") . The application was also reviewed for consistency with the policies and provisions of the Coastal Management Act (CMA). General Statutes §§22a-90 through 22a-112. However, the review of the application focused primarily on the structure alone and not on its reasonably anticipated use.

In each of the previous permit applications, Mr. Ganim and Mr. Mears had an intended use for their individual docks. To the extent that the intended use dictated the design and engineering of the structure and the type and size of vessel that could be berthed and launched from it, the issue of use was considered and attempts were made to address it through specific permit terms and conditions. However, the Commissioner's

jurisdictional authority to consider the *environmental impacts* from the use of a structure in permitting decisions was expressly questioned in this proceeding and, therefore, required a formal ruling. Having found that the Commissioner has the authority to consider the impacts associated with the intended use of the structure in determining whether to authorize its construction, the issue now before me is whether Mr. Toner's application has undergone sufficient review to justify the issuance of the requested permit.

1
Tidal Wetlands Act

Individuals seeking to conduct regulated activities on tidal wetlands must obtain prior authorization from the DEP. In determining whether to permit such activities, the Commissioner is required to take into account such factors as the effect of the activity on public health and welfare, marine fisheries, and shellfisheries. §22a-32. The Commissioner is also required to consider the policy of the Tidal Wetlands Act, which is the preservation of the wetlands of the state and prevention of wetland despoliation and destruction. §22a-28.

The implementing regulations of the Tidal Wetlands Act provide the criteria for a determination that a proposed activity will be protective of the wetlands and include requirements intended to protect adjoining coastal resources. In accordance with the regulations, the applicant must demonstrate that there is no technically feasible alternative to accomplish his purpose that would further minimize impacts, the structure is no greater in length, width and height than necessary to accomplish its intended function, pile construction will be used, and all reasonable measures that would minimize adverse impacts on wetlands and adjoining coastal resources are incorporated into the permit. Regs., Conn. State Agencies §22a-30-10(b).

The record reflects that the intended function of the applicant's proposed dock dictates the extent to which the structure and its impacts have been minimized. The proposed dock is designed to accommodate a boat of a specific size and weight, which is

evident from the length of the dock and the additional structural supports proposed and necessary to berth the boat specified in the application.

Although the dock was evaluated by the department with regard to the criteria specified in the Tidal Wetlands Act and its implementing regulations, the intended use of the dock and associated impacts were not. For example, it is not clear from the record that there is no technically feasible alternative that would further minimize impacts if modifications to the use of the dock were part of that evaluation. There is also no evidence in the record that demonstrates whether motor boat use in the area of the dock would be protective of wetlands and adjoining coastal resources and no permit condition that would minimize any such impact. In the absence of such evidence, I cannot evaluate whether the proposed structure complies with the requirements of the Tidal Wetlands Act.

2

Structures and Dredging Act

The Structures and Dredging Act authorizes the Commissioner to regulate dredging, structures and the placement of fill in tidal, coastal or navigable waters and, in doing so, to consider coastal resources, and state and public interests. §22a-359(a). Therefore, an individual must apply for and secure a permit to dredge, erect structures, or place fill or other obstructions or to conduct the work associated with such activities within the Commissioner's jurisdiction. This statutory scheme also requires consideration of the use of these regulated activities on coastal resources. §22a-361(c).

The Commissioner is also required to assure that the implementation of the Structures and Dredging Act is consistent with the policies and goals of the CMA. §22a-98. The CMA and the Structures and Dredging Act are interrelated and the legislature has manifested its intent that the DEP fulfill the policies, goals and standards of the CMA, in part, through the implementation of the Structures and Dredging Act. §22a-92(2). Therefore, to determine whether the application is consistent with the requirements

of the Structures and Dredging Act, I must first look to the goals and policies of the CMA.

3

Coastal Management Act

The legislature enacted the CMA to protect fragile, coastal resources from the effects of unplanned and unregulated development in coastal areas. §22a-91(7). In establishing its purpose, the legislature acknowledged that development poses a threat to valuable coastal resources that are essential to the “economic well-being of the state”. §22a-91(3) and (5). Private residential docks supplement upland use and, as such, can be characterized as accessory to upland development. Having recognized that development is causing harm, the legislative purpose of the CMA is fulfilled, in part, only if the Commissioner’s permitting determinations in accordance with the Structures and Dredging Act include an examination of the impacts of the proposed dock *and* the impacts from the associated boating use.

The CMA does not empower the Commissioner to regulate boating traffic directly, however, the impacts associated with boating activity in the area of the dock should be examined to determine whether such activity will adversely and significantly affect protected resources. There is evidence in the record that the coastal resources of Ash Creek are likely to be adversely impacted to some degree by motor boat usage, particularly during periods of low water. However, it is evident that the DEP did not consider the impacts from boating activity when considering whether the applicant’s proposal is consistent with the legislative goals and policies of the CMA. Therefore, I cannot find that the application is consistent with the CMA. Accordingly, I must conclude that the application does not comply with the requirements of the Structures and Dredging Act.

Bureau of Aquaculture Significant Impact Determination

In accordance with the provisions of the Structures and Dredging Act, the Commissioner must cause notice of a dock permit application to be provided to, among others, the chief executive officer and the chairmen of the planning, zoning, harbor management and shellfish commissions of the town(s) where the work will be performed. §22a-361(b). In the present case, comments on the application were submitted by the Fairfield Shellfish and Conservation Commissions, but not by the Fairfield Harbor Management Commission, which has no management plan for the portion of Ash Creek that exists within the Town of Fairfield.²⁰

The absence of a management plan or other regulation or ordinance that governs boating operations in Ash Creek has caused the BOA to determine that a structure that encourages boating, specifically motor boating, poses a threat to the habitat, recruitment and restoration of commercially viable seed oyster beds in the area. It is notable that, notwithstanding the various officials or entities that must receive notice of an application, a significant impact determination of the BOA coupled with a petition signed by twenty-five or more persons triggers a public hearing on an application. §22a-361(b).²¹

From the plain language of the statute, it is evident that the legislature has recognized that a significant impact determination by the BOA is of sufficient importance to provide for a public hearing on an application. The notice provisions of the Structures and Dredging Act can therefore be construed to indicate a legislative intent that goes beyond merely alerting the municipality and BOA of a proposed activity. Given the

²⁰ A harbor management commission is authorized to prepare a management plan for “the most desirable use of the harbor for recreational, commercial, industrial and other purposes. §22a-113m. The plan must identify problems, establish goals and make recommendations regarding the use, development and preservation of the harbor. §22a-113n(a). The plan may also recommend “regulations for the operation of vessels on the harbor pursuant to §15-136, the state statutory provisions governing boating. In the event that a management plan has been prepared by the harbor management commission and approved by the Commissioner, any recommendation of the harbor management commission on an application would be binding on the Commissioner. §22a-133n(b).

²¹ The section provides that the Commissioner must hold a public hearing if the Commissioner receives a petition *and* a BOA significant impact determination, or determines that the project will have interstate ramifications or involve a certificate issued by the Federal Energy Regulatory Commission.

circumstances of this case, i.e., the express intent of the applicant to launch and operate a motor boat in a fragile coastal resource area, I am compelled to give greater weight to the BOA and its conclusion that the presence of this structure and the uses associated with it are likely to cause adverse impacts to coastal resources in the Ash Creek, despite the recommendation of the local Shellfish Commission.

The draft permit does not include any special terms or conditions that address the BOA determination. In addition, staff acknowledged that further modifications to the proposed dock were not considered based on the BOA determination. It is clear from the evidence and testimony on the record that staff conducted its technical review in the belief that the impacts of the anticipated use of the dock were not factors it could consider, even though staff acknowledged that the intended use of this structure could significantly impact protected coastal resources. Since I have concluded that staff can and should consider the applicant's intended use of his dock, staff must now have the opportunity to review the application with regard to the BOA determination and to recommend any appropriate modifications to the activity or permit conditions before the Commissioner takes final action on the application.

5

Riparian Rights/Other Permitted Docks

In the exercise of their riparian right to access navigable waters, Messrs. Ganim and Mears applied for and received permits to construct and use docks in Ash Creek.²² Each permit provides certain restrictions on the use of the dock that are intended to protect resources that are within the Commissioner's jurisdiction.

Mr. Toner also has a riparian right to access navigable water from his upland property, which is similarly subject to regulation that may include a requirement that his

²² Connecticut courts describe the riparian rights of an owner of property adjacent to tidal waters as "exclusive yet qualified rights and privileges in the waters and submerged land adjoining his upland. He has the exclusive privilege of wharfing out and erecting piers over and upon such soil and for these purposes of occupying and using it in any manner which does not interfere with navigation . . ." This right, however, is sufficiently restricted that it has been characterized as in the nature of a franchise. *State v. Knowles-Lombard Co.*, 122 Conn. 263, 265, 266 (1936); see, *Port Clinton Associates v. Board of Selectmen of the Town of Clinton*, 217 Conn. 588 (1991), (Riparian rights are so limited by superior public rights they are often referred to as a mere "franchise.").

proposed dock be limited in size to the minimum necessary for access. See, e.g., Regs., Conn. State Agencies §22a-30-10(b)(2) (structure must be no larger than necessary to accomplish intended function). I find no requirement that regulating access to navigable waters is limited by a specific use such as that contemplated by the applicant. In addition, the draft permit that is the subject of this proceeding contains no specific terms that restrict or condition the applicant's use of his proposed dock. See, e.g., §22a-30-10(b)(4) (all reasonable measures that minimize adverse impacts on wetlands and adjoining coastal resources must be incorporated as permit conditions).

It is not unreasonable to find that the design of the Mears and Ganim docks, combined with the special permit conditions, will, to some extent, limit the size, type, and time of use of any boat in the area of each dock and any associated impacts. In addition, although the Ganim and Mears applications were not specifically evaluated with respect to any such impacts, there is no reason to forgo such an evaluation here. The approval of the prior applications does not serve as a bar to the consideration of the issue of use specifically raised in this case, particularly in light of its jurisdictional implications. Moreover, each application is unique in its circumstances and must be evaluated on its individual merits. Mr. Toner's application must therefore undergo an evaluation of all aspects of his proposal, including the effects of his intended use of his dock.

6

Intervenor's Issues

The intervenors allege that the application involves conduct that violates the Connecticut Environmental Protection Act (CEPA), General Statutes §§22a-14 through 22a-30, as the proposed activity is "reasonably likely to have the effect of unreasonably polluting, impairing or destroying the public trust in the ...water ... and other natural resources of the State of Connecticut." General Statutes §22a-19(a). Specifically, ACCA maintains that the dock and its intended use will adversely impact tidal wetlands and shellfish resources in Ash Creek.

Under CEPA, the intervenors have the burden of establishing a prima facie case that, if the proposed conduct is authorized, unreasonable pollution and impairment will likely result. *Manchester Env'tl. Coalition v. Stockton*, 184 Conn. 51, 57-58 (1981). Where the legislature has created a statutory and regulatory scheme that specifically governs the proposed conduct, the question of whether it is unreasonable "must be evaluated through the lens of [that] entire statutory scheme" *City of Waterbury v. Town of Washington*, 260 Conn. 506, 549-551 (2002). Therefore, to demonstrate that the Applicant's proposal will cause unreasonable pollution, the intervenors must show that it does not comply with the provisions of §22a-32 and its implementing regulations and §§22a-359 and 22a-361.

The ACCA presented evidence that certain migratory birds may be threatened by development that causes a loss of mudflat habitat available to the birds as food sources during migration. Although noteworthy, the intervenor's evidence was general in nature, based solely on personal observation, and could not be tied directly to the applicant's proposed dock or its use. In the absence of more reliable and material evidence regarding this issue, I find the evidence insufficient to support a conclusion that the intervenor has established a prima facie case of unreasonable pollution or impairment.

ACCA also presented evidence, based primarily on a literature review, of the effects of bow wake and prop-dredging on the intertidal flats and tidal marshes, which could impact shellfish resources. At best this evidence supports and corroborates the conclusions of the BOA, and might be considered by the department in any subsequent review of this application. The alternative dock design proposed by ACCA may also be considered in a subsequent review of this application.

C

CONCLUSION

The present record leaves many key questions unanswered. The information presented is insufficient to determine whether this application should be approved and the requested permit issued. Although the applicant has maintained throughout these

proceedings that this application does not require an assessment of his intended use of the proposed dock, this particular dock is all about its use. It has been specifically designed to accommodate a motor boat of a specific size, which a smaller dock could not support.

Staff has not had the opportunity to consider this application in light of this intended use of the proposed dock. There is currently no permit condition that would adequately address any anticipated impacts from such use. The record reflects that the conditions similar to those incorporated in the Ganim and Mears permit may not be enforceable to the extent that they would provide adequate protection of the coastal resources within the Commissioner's jurisdiction.

The BOA adamantly opposes motor boat usage in Ash Creek unless and until such use can be sufficiently restricted to preserve and promote the re-establishment of seed oyster beds and viable commercial shellfishing in the area. There is currently no municipal regulation of boating traffic on the Fairfield side of Ash Creek and no harbor management plan that the Commissioner may look to for assurances that the coastal resources in Ash Creek are adequately protected.

The evidence supports a reasonable inference that there may be no precise understanding of the degree of impact associated with motor boat use in the area of the subject dock that may be used for permitting decisions. However, the legislature has recognized that highly valued resources such as those present in Ash Creek should be protected and maintained. The applicant's intended use of his dock should therefore be evaluated in accordance with this standard.

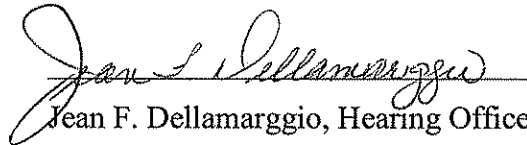
The Commissioner has been authorized by the legislature, through the CMA and the Structures and Dredging Act, to consider the impacts of use associated with any structure within the Commissioner's jurisdiction. This application has not been considered in light of this authorization and, without adequate safeguards incorporated into the permit that will address the applicant's intended use of this dock, I cannot conclude that the application complies with the requirements of the Structures and

Dredging, the Tidal Wetlands Act or that is it consistent with the goals and policies of the CMA.

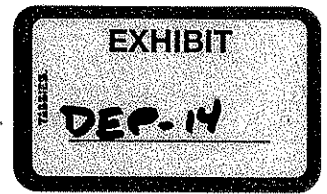
III

RECOMMENDATION

I recommend that the Commissioner deny this application without prejudice to the applicant to request a re-evaluation of the application or to submit a modified proposal. I further recommend that the Commissioner authorize staff to review any such application and recommend any necessary permit conditions and/or modifications to the application, after giving full consideration to the anticipated use of the structure and the means available to the department to protect and maintain the coastal resources present in Ash Creek.


Jean F. Dellamarggio, Hearing Officer

Draft



PERMIT

Permit No: 200402741-JW
Municipality: Fairfield
Work Area: Ash Creek off property located at 223 Riverside Drive
Permittee: Stephen Toner
223 Riverside Drive
Fairfield, CT 06824

Pursuant to sections 22a-359 through 22a-363f and sections 22a-28 through 22a-35 of the Connecticut General Statutes ("CGS") and in accordance with section 22a-98 of the CGS and the Connecticut Water Quality Standards dated December 2002, a permit is hereby granted by the Commissioner of Environmental Protection ("Commissioner") to install a dock for private recreational boating use as is more specifically described below in the SCOPE OF AUTHORIZATION, in Ash Creek off property identified as the "work area" above.

*******NOTICE TO PERMITTEES AND CONTRACTORS*******

FAILURE TO CONFORM TO THE TERMS AND CONDITIONS OF THIS PERMIT MAY SUBJECT THE PERMITTEE AND ANY CONTRACTOR TO ENFORCEMENT ACTIONS, INCLUDING PENALTIES AND INJUNCTIONS, AS PROVIDED BY LAW.

SCOPE OF AUTHORIZATION

The Permittee is hereby authorized to conduct the following work as described in application #200402741-JW including 2 sheets of plans attached hereto, as follows: Sheets 1 and 2 of 2 dated October 19, 2004 and revised April 7, 2008 submitted by the Permittee and attached hereto, as follows:

install a 4' x 60' fixed pier with two davits on the south side, in the center of the shoreline.

UPON INITIATION OF ANY WORK AUTHORIZED HEREIN, THE PERMITTEE ACCEPTS AND AGREES TO COMPLY WITH ALL TERMS AND CONDITIONS OF THIS PERMIT.

SPECIAL TERMS AND CONDITIONS

1. Except as specifically authorized by this permit, no equipment or material including but not limited to, fill, construction materials, excavated material or debris, shall be deposited, placed or stored in any wetland or watercourse on or off-site, nor shall any wetland or watercourse be used as a staging area or accessway other than as provided herein.
2. Not later than two weeks prior to the commencement of any work authorized herein, the Permittee shall submit to the Commissioner, on the form attached hereto as Appendix A, the name(s) and address(es) of any contractor(s) employed to conduct such work and the expected date for

commencement and completion of such work.

3. On or before (a) 90 days after completion of the work authorized herein, or (b) upon expiration of the work completion date or any authorized one year extension thereof, whichever is earlier, the Permittee shall submit to the Commissioner "as-built" plans prepared and sealed by a licensed engineer, licensed surveyor or licensed architect, as applicable, of the work area showing all contours, bathymetries, tidal datums and structures.
4. Prior to construction of the dock authorized herein the Permittee shall place on the Town of Fairfield land records a restrictive covenant that establishes and describes the boundary of the "no mow zone" identified on sheet 1 of 2 of the plans attached hereto, and clearly states that no mowing or filling shall occur within this area, nor shall any maintenance to the retaining wall be allowed. The terms of this covenant shall be submitted to the Commissioner for her review and written approval prior to its execution. If, at any time, the terms of this restrictive covenant are not abided by, or it is removed from the land records, this permit will become null and void and the dock authorized herein shall be removed.
5. The Permittee shall not construct the dock authorized herein from March 15th through June 1st, inclusive, and from July 1st through September 30th, inclusive, of any given year to avoid impacts to migratory shorebirds from such work.
6. The Permittee shall ensure that all work associated with the driving of piles for construction of the dock shall be conducted by a water-based barge only during periods of high water in the area of the proposed dock. Any such barge must move to deeper waters during periods of low water in the area of the proposed dock. It shall not be a defense to this provision for the Permittee to assert that it has no control over the operation of the barge.
7. During the time that pilings are being driven pursuant to SPECIAL TERMS AND CONDITIONS paragraph 5., above, the Permittee shall ensure that the barge used for such work does not rest on or come in contact with the bottom of Ash Creek.
8. The Permittee shall make best efforts to insure that the dock authorized herein does not impede access by the Town of Fairfield Shellfish Commission to shellfish resources.
9. During periods of low water the Permittee shall store his vessel on the davits authorized herein and shall not allow such vessel to rest on the bottom of Ash Creek.

GENERAL TERMS AND CONDITIONS

1. All work authorized by this permit shall be completed within three years from date of issuance of this permit ("work completion date") in accordance with all conditions of this permit and any other applicable law.
 - a. The Permittee may request a one-year extension of the work completion date. Such request shall be in writing and shall be submitted to the Commissioner at least 30 days prior to said work completion date. Such request shall describe the work done to date, work which still needs to be completed and the reason for such extension. The Commissioner shall grant or deny such request in her sole discretion.

- b. Any work authorized herein conducted after said work completion date or any authorized one year extension thereof is a violation of this permit and may subject the Permittee to enforcement action, including penalties, as provided by law.
2. In conducting the work authorized herein, the Permittee shall not deviate from the attached plans, as may be modified by this permit. The Permittee shall not make de minimis changes from said plans without prior written approval of the Commissioner.
3. The Permittees shall maintain all structures or other work authorized herein in good condition. Any such maintenance shall be conducted in accordance with applicable law including, but not limited to, sections 22a-28 through 22a-35 and sections 22a-359 through 22a-363f of the General Statutes.
4. Prior to the commencement of any work authorized hereunder, the Permittee shall cause a copy of this permit to be given to any contractor(s) employed to conduct such work. At the work area the Permittee shall, whenever work is being performed, make available for inspection a copy of this permit and the final plans for the work authorized herein.
5. The Permittee shall notify the Commissioner in writing of the commencement of any work and completion of all work authorized herein no later than three days prior to the commencement of such work and no later than seven days after the completion of such work.
6. All waste material generated by the performance of the work authorized herein shall be disposed of by the Permittee at an upland site approved for the disposal of such waste material.
7. In undertaking the work authorized hereunder, the Permittee shall not cause or allow pollution of wetlands or watercourses, including pollution resulting from sedimentation and erosion. For purposes of this permit, "pollution" means "pollution" as that term is defined by CGS section 22a-423.
8. Upon completion of any work authorized herein, the Permittee shall restore all areas impacted by construction, or used as a staging area or accessway in connection with such work, to their condition prior to the commencement of such work.
9. Any document required to be submitted to the Commissioner under this permit or any contact required to be made with the Commissioner shall, unless otherwise specified in writing by the Commissioner, be directed to:

Permit Section
Office of Long Island Sound Programs
Department of Environmental Protection
79 Elm Street
Hartford, Connecticut 06106-5127
(860) 424-3034
Fax # (860) 424-4054

10. The date of submission to the Commissioner of any document required by this permit shall be the

date such document is received by the Commissioner. The date of any notice by the Commissioner under this permit, including but not limited to notice of approval or disapproval of any document or other action, shall be the date such notice is personally delivered or the date three days after it is mailed by the Commissioner, whichever is earlier. Except as otherwise specified in this permit, the word "day" as used in this permit means calendar day. Any document or action which is required by this permit to be submitted or performed by a date which falls on a Saturday, Sunday or a Connecticut or federal holiday shall be submitted or performed on or before the next day which is not a Saturday, Sunday, or a Connecticut or federal holiday.

11. This permit may be revoked, suspended, or modified in accordance with applicable law.
12. This permit is not transferable without prior written authorization of the Commissioner. A request to transfer a permit shall be submitted in writing and shall describe the proposed transfer and the reason for such transfer. The Permittee's obligations under this permit shall not be affected by the passage of title to the work area to any other person or municipality until such time as a transfer is authorized by the Commissioner.
13. The Permittee shall allow any representative of the Commissioner to inspect the work authorized herein at reasonable times to ensure that it is being or has been accomplished in accordance with the terms and conditions of this permit.
14. In granting this permit, the Commissioner has relied on representations of the Permittee, including information and data provided in support of the Permittee's application. Neither the Permittee's representations nor the issuance of this permit shall constitute an assurance by the Commissioner as to the structural integrity, the engineering feasibility or the efficacy of such design.
15. In the event that the Permittee becomes aware that he did not or may not comply, or did not or may not comply on time, with any provision of this permit or of any document required hereunder, the Permittee shall immediately notify the Commissioner and shall take all reasonable steps to ensure that any noncompliance or delay is avoided or, if unavoidable, is minimized to the greatest extent possible. In so notifying the Commissioner, the Permittee shall state in writing the reasons for the noncompliance or delay and propose, for the review and written approval of the Commissioner, dates by which compliance will be achieved, and the Permittee shall comply with any dates which may be approved in writing by the Commissioner. Notification by the Permittee shall not excuse noncompliance or delay and the Commissioner's approval of any compliance dates proposed shall not excuse noncompliance or delay unless specifically stated by the Commissioner in writing.
16. In evaluating the application for this permit the Commissioner has relied on information and data provided by the Permittee and on the Permittee's representations concerning site conditions, design specifications and the proposed work authorized herein, including but not limited to representations concerning the commercial, public or private nature of the work or structures authorized herein, the water-dependency of said work or structures, its availability for access by the general public, and the ownership of regulated structures or filled areas. If such information proves to be false, deceptive, incomplete or inaccurate, this permit may be modified, suspended or revoked, and any unauthorized activities may be subject to enforcement action.
17. The Permittee may not conduct work waterward of the high tide line or in tidal wetlands at this permit site other than the work authorized herein, unless otherwise authorized by the Commissioner

pursuant to CGS section 22a-359 et. seq. and/or CGS section 22a-32 et. seq.

18. The issuance of this permit does not relieve the Permittee of his obligations to obtain any other approvals required by applicable federal, state and local law.
19. Any document, including but not limited to any notice, which is required to be submitted to the Commissioner under this permit shall be signed by «Signer» and by the individual or individuals responsible for actually preparing such document, each of whom shall certify in writing as follows: "I have personally examined and am familiar with the information submitted in this document and all attachments and certify that based on reasonable investigation, including my inquiry of those individuals responsible for obtaining the information, the submitted information is true, accurate and complete to the best of my knowledge and belief, and I understand that any false statement made in this document or its attachments may be punishable as a criminal offense."
20. This permit is subject to and does not derogate any present or future property rights or powers of the State of Connecticut, and conveys no property rights in real estate or material nor any exclusive privileges, and is further subject to any and all public and private rights and to any federal, state or local laws or regulations pertinent to the property or activity affected hereby.

Issued on _____, 2008

STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION

Gina McCarthy
Commissioner

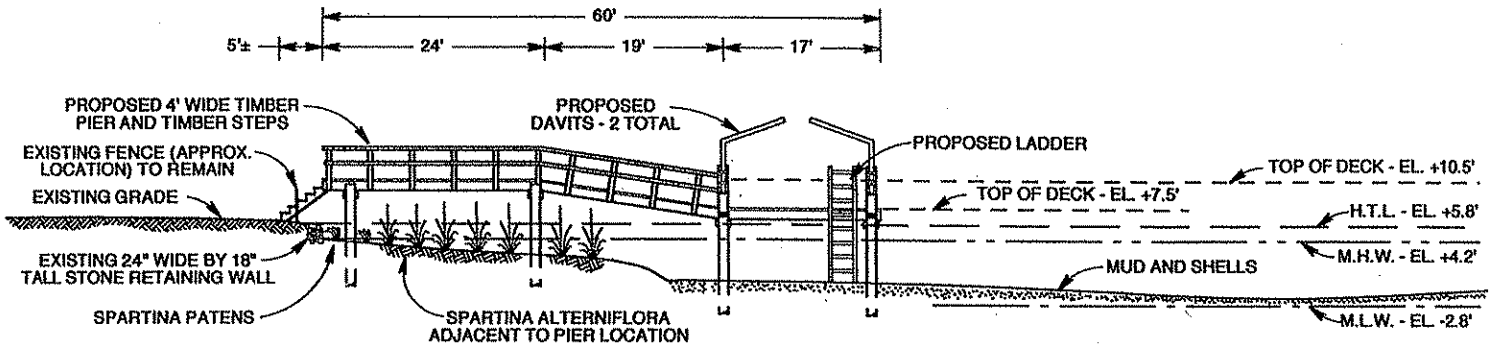
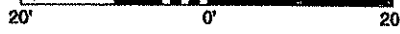
Permit Application No. 200402741-JW
Stephen Toner

Certified Mail # _____

jw

PROPOSED ELEVATION

SCALE: 1" = 20'

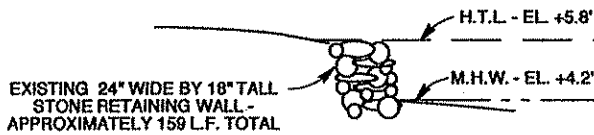


NOTES:

1. ALL STRUCTURAL TIMBERS AND PILINGS WILL BE CCA TREATED 2.5 LBS. MINIMUM RETENTION SOUTHERN YELLOW PINE OR SUITABLE EQUIVALENT.
2. ALL HARDWARE WILL BE HOT-DIPPED GALVANIZED OR STAINLESS STEEL.
3. PROPOSED BATTER PILINGS AND X-BRACING WILL BE INCLUDED ONLY AT TWO WATERWARD PILING BENTS.

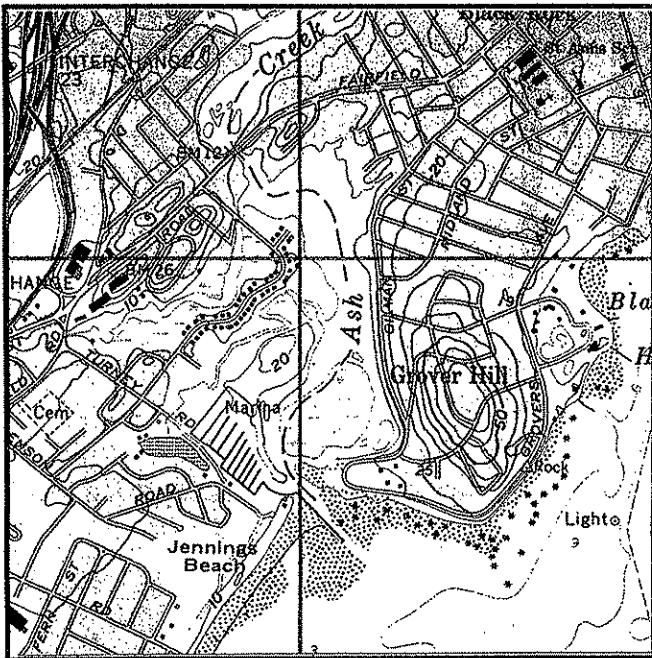
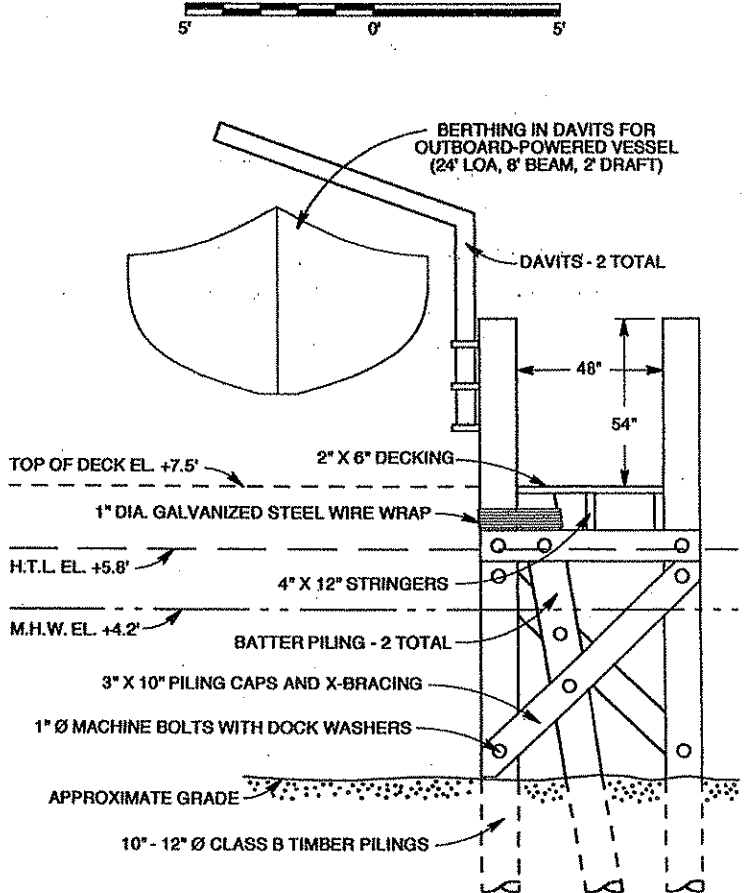
RETAINING WALL SECTION

SCALE: 1" = 5'



PIER SECTION @ DAVITS

SCALE: 1" = 5'



VICINITY MAP

FROM U.S.G.S BRIDGEPORT QUADRANGLE MAP

SCALE: 1:24000

PURPOSE: PRIVATE RECREATIONAL SMALL-BOAT DOCK
ALL DATUM: NGVD OF 1929
ADJACENT PROPERTY OWNERS:
 MICHAEL & CLAUDIA MEARS, JOHN & LEE PASSIOS
APPLICATION PREPARED BY: JOHN HILTS P.O. BOX 47, ROWAYTON, CT 06853

PROPOSED TIMBER PIER, RAMP AND FLOATING DOCK
IN: ASH CREEK, OFF LONG ISLAND SOUND
AT: 223 RIVERSIDE DRIVE, FAIRFIELD, FAIRFIELD COUNTY, CONNECTICUT
APPLICATION BY: MR. STEPHEN B. TONER
DATE: 19 OCTOBER 2004 **SHEET 2 OF 2** **REVISION NUMBER:** 4 **DATE:** 4/07/08

P A R T Y L I S T

Proposed Final Decision In the Matter of Stephen B. Toner
Application No. 200402741

PARTY

REPRESENTED BY

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