

IN THE MATTER OF : ***APPLICATION NO.***
200802576-KB

RONALD B. HARVEY : ***SEPTEMBER 23, 2014***

FINAL DECISION

I have reviewed the Proposed Final Decision (PFD) issued by the hearing officer on June 17, 2014 and the exceptions to the PFD filed by Christopher Buckley and adopted by Wallacks Point Association, Inc.¹ The parties also filed briefs regarding the issues identified in the exceptions. I have reviewed those briefs and other relevant documents in the record regarding the proposed structure, the proposed draft permit, and the particular issues discussed in the exceptions. Based on the materials available in the record, I affirm the decision of the hearing officer and authorize issuance of the proposed draft permit with the adjustments to the draft permit stipulated to by the applicant and the Department of Energy and Environmental Protection (DEEP/department) and adopted by the hearing officer.

The exceptions to the PFD focus on the extent the structure encroaches into the public trust area and the proximity of the proposed structure to the littoral boundary line between the Harvey and Buckley properties. In general, the exceptions filed by the intervening parties question the necessity of the proposed structure given that it will not provide complete access to navigable water because of the shallow water depths in this area of Long Island Sound near Wallacks Point. Whether it is the preference of Mr. Harvey's neighbors or my own personal preference that no structure is built, the basis of this decision cannot fall outside of long-standing tenets of administrative law. My determination whether to issue a permit for the proposed structure must be based on current law and the facts in the record as required by the Uniform Administrative Procedure Act and the department's Rules of Practice.

The Connecticut courts clearly confirm that waterfront property owners hold littoral rights that include a right to erect structures to reach navigable waters. "The owner of the adjoining upland has certain 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

¹ The applicant argues that Mr. Buckley may have abandoned rights to make certain arguments. However, Wallacks Point Association previously briefed the issues raised in the exceptions. Therefore, the issues raised in the exceptions will be addressed in full.

piers over and upon such soil and of using it for any purpose which does not interfere with navigation, and he may convey these privileges separately from the adjoining land. He also has the right of accretion, and generally of reclamation, and the right of access by water to and from his upland.” *Rochester v. Barney*, 117 Conn. 462, 468 (1933). While these rights are qualified, the qualifications are formulated in statute and administrative regulations that govern applications for structures waterward of the state’s coastal jurisdiction line. The governing statutory scheme focuses on minimizing impacts to navigation, coastal resources, water circulation and sedimentation, public access in the intertidal area, and conflicts with adjacent riparian landowners. General Statutes § 22a-92(b)(1)(D).

Given the ample area of accessible water and the location of the available channel into Cove Island Marina, the hearing officer correctly concluded that the proposed structure would not interfere with navigation. Even in the immediate area of the structure, the elevated pier and pile-supported design would allow, in certain tide conditions, a paddle craft to go under the fixed pier and a portion of the ramp. The department attempts to focus applicants on structures of reasonable length through its guidelines. The guidelines reference a fixed, pile-supported pier to mean low water and an extension forty feet beyond mean low water; this extension equates roughly to the length of a typical ramp (32 feet) plus the typical floating dock (8 feet). Here, the intrusion into the public trust area has been sufficiently minimized even though it surpasses the department’s guidelines. The proposal does not upset the necessary balance between the littoral property owner’s right to a structure as a means to access navigable waters and the structure’s impact on coastal resources, including the public’s rights to navigate through the area. The record is clear that coastal resources present in the vicinity of the proposed structure, including wildlife species, will not be significantly impacted by the proposal. The lack of evidence to the contrary is notable.

Although the proposed structure surpasses the department’s guidelines by approximately 20.5 feet², the length of the structure was adequately justified by the applicant. The longer floating dock was supported by the applicant’s wave study and provides more stability for its users given the conditions at the property. The boat lift addresses any concerns about impacts to the bottom from a berthed vessel. Although the lift intrudes further into nearshore waters, it respects the balance between permitting these structures while minimizing their impacts. Given that littoral waterfront owners have a right to wharf out, the only choice is to find an appropriate balance. Staff presented several options throughout the application review process and the applicant was asked to analyze these options as alternatives. While some of the alternatives were incorporated into the final design, others did not support reasonable access and provided minimal relief from the project’s impacts.

² This is represented by the 7.5 feet added to the floating dock and approximately 13 feet of additional encroachment associated with the boat lift and its supporting piles. Proposed Final Decision, Finding of Fact, No. 9.

Despite the concern expressed by the intervening parties, there is no legal requirement that access to the water from structures approved under the department's authority be available at all times and tides. As a result, there may be a limitation on available water access associated with a given coastal property. In this matter, the limitations associated with this property are not determinative of whether the applicant may exercise his littoral rights. Instead, these limitations demonstrate that the applicant's rights of access are not unfettered. The department is under no obligation to permit a structure that provides the applicant with deep water access at all times and tides for all types of vessels. Because of the property's limitations, the applicant was required to accept less than complete water access with the understanding that he may need to read a tide chart and exercise discretion, as necessary, to delay navigating to and from his property given available conditions. Absent truly unusual circumstances, this remains a proper exercise of his littoral rights and respects the balance to be struck between littoral rights of access to coastal areas by upland property owners and the public's interests in coastal resources, navigation, and access to public trust areas.

I also recognize that the proposed structure does not strictly conform to the U.S. Army Corps of Engineers' guideline that a structure should be at least 25 feet from the adjacent littoral boundary. However, this guideline is just that, a guideline; moreover, it is not the department's guideline to enforce. The record is clear that the Army Corps approved this project and gave due regard to the project's proximity to the apparent littoral boundary and determined the structure's proximity to the approximate littoral line did not warrant a denial or unique permit conditions. Even with those guidelines in place, the Army Corps issued an approval which focused more on potential impact to coastal resources, e.g. requiring float stops eighteen inches from the bottom.

The department cannot enforce its guidelines as law without first adopting them as regulations. Neither the department's guidelines nor the Army Corps' setback are adopted as regulations by the department. As noted by the applicant's brief, "[i]t is clear that informal guidelines, promulgated outside the rulemaking framework of the Uniform Administrative Procedure Act; General Statutes §§ 4-166 through 4-189; may not be applied as substantive rules." *Hospital of St. Raphael v. Commission on Hospitals and Health Care*, 182 Conn. 314, 322 (1980) (citing *Salmon Brook Convalescent Home v. Commission on Hospitals & Health Care*, 177 Conn. 356, 368 (1979)). The guidelines serve as a useful tool for minimizing impact but cannot be imposed as a requirement. With the demonstrated need to achieve a balance between littoral rights, coastal resources, navigation, and the public trust, it is important that the department maintain a level of flexibility during the application review process. Ultimately, the Commissioner of Energy and Environmental Protection is empowered by the legislature to determine that the appropriate balance is struck. General Statutes §§ 22a-97(b) and 22a-359(a). DEEP staff understood and took the time to achieve this balance throughout a lengthy and diligent application review process. The guidelines are only part of the process and cannot dictate the final outcome.

Given the numerous man-made structures that line this area of shoreline in the form of groins, it is not surprising that OLISP staff focused on reusing an existing structure as the foundation for any waterward encroachment as a means to minimize further impact to the coastal resources and public trust areas. OLISP expresses clearly on the record that the benefit of using the existing structure outweighed any concern over the proximity to the littoral boundary. Proposed Final Decision, Findings of Fact Nos. 12 and 28. This is the department's prerogative given the lack of evidence that an actual conflict exists. Mr. Buckley is concerned that this consideration was based on a line drawn by Mr. Harvey's surveyor and that this may be an interpretation more favorable to Mr. Harvey at the expense of Buckley's littoral rights. Even when asked about a littoral line drawn using a method more favorable to Mr. Buckley, Mr. Buckley's expert conceded that the structure would not encroach beyond that representation of the littoral boundary either. "I have seen an interpretation that at least the structure would not go beyond -- beyond that -- that littoral boundary." (Test. G. Kreuzkamp, 9/10/13, p. 213.) The apparent lack of actual encroachment makes it clear that Mr. Buckley or any future owner of his property could place a structure in similar fashion on the Buckley property and have the ability to freely navigate to or from the property without interference from the proposed structure. The statute requires that Mr. Buckley's rights be considered and the record demonstrates that they were. Any independent action in court to have the line drawn remains within Mr. Buckley's rights and nothing in the permit would interfere with any court granted property right.

Mr. Harvey is solely responsible under the permit and must meticulously exercise the necessary care to ensure the proposed structure is built in accordance with the design plans. As shown in the record, the structure does not encroach on the reasonable depiction of the littoral boundary. However, it is certainly close to the depiction of the boundary line and the permit neither grants any rights in real estate nor alters Mr. Buckley's right to protect his littoral rights. Mr. Harvey will submit as-built plans as required by the permit terms. These plans must demonstrate that the structure has been constructed and located spatially as designed. Again, nothing in the permit to be issued by DEEP relieves the applicant of his responsibility or impinges on any other legal rights held by others, including real property rights and any private standing to enforce those rights. Any judicial decision that draws the littoral boundary differently than anticipated and requires modification of the current proposal may require further review by the Office of Long Island Sound Programs.

I also agree that Mr. Harvey should exercise prudent discretion in selecting a vessel to be berthed at the proposed structure. The limited depths and potential for depths to shift from one tide cycle to the next warrant selection of a vessel that can operate within the range of available depths. Also, the potential proximity to the littoral boundary warrants selection of a vessel modest in length, it being unknown whether a vessel itself would be considered an encroachment beyond a judicially determined littoral boundary if one were determined. Finally, Mr. Harvey should closely follow any guidance from professionals in his hire regarding seasonal removal of

the ramp and floating dock or removal of those elements of the structure in preparation for storm events.

Without commenting on the proposed structure positively or negatively, coastal landowners living in areas where residential docks are uncommon can only expect that as neighboring properties change ownership, newer owners may elect to exercise their littoral rights differently than prior owners and long-standing area residents. These changes may be seen as offensive to some or part and parcel of coastal living to others. Applicants should recognize the potential resistance to change and make a conscientious effort to understand and address neighborly concerns preferably far in advance of filing an application with this agency. Although the level of effort on that front employed by Mr. Harvey in this matter is unclear, DEEP's review must remain within its authority. Requirements to minimize impacts associated with structures proposed in its jurisdiction must be balanced against the rights to build these structures that long-standing legal precedent clearly indicates is included within the bundle of property rights held by owners of waterfront property. Ultimately, on a case-by-case basis, the question is whether the proposal was approved in accordance with applicable statutes and regulations with the support of substantial evidence. I agree that it has and that an appropriate balance has been struck among the applicant's littoral rights and the numerous and sometimes competing interests protected by the statutes and regulations governing the placement of structures in coastal waters.

I adopt the hearing officer's proposed final decision as the final decision of the Department of Energy and Environmental Protection and authorize issuance of the proposed permit in accordance with that decision.



Susan Whalen
Deputy Commissioner

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In re
Ronald B. Harvey Application No. 200802576-KB

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