Connecticut Department of
ENERGY &
ENVIRONMENTAL
PROTECTION

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IN THE MATTER OF	**:**	***APPLICATION #201410755-KZ*** ***ORDER #LIS-2012-3443-V***
NUSSBAUM, BERNARD W.	**:**	***FEBRUARY 6, 2018***

FINAL DECISION

I

SUMMARY

On October 30, 2014, Bernard W. Nussbaum ("Mr. Nussbaum" or "Applicant") applied for an after-the-fact permit to retain two unauthorized post and wire fences located waterward of a seawall in front of his property at 100 and 104 Sea Beach Drive in Stamford ("Application"). On December 4, 2015, the Department of Energy and Environmental Protection ("Department") issued a Notice of Tentative Determination to deny the Application. Before filing the Application, the Applicant had installed the post and wire fences without authorization. On July 16, 2012, Mr. Nussbaum was issued a Notice of Violation instructing him to remove the fences. On November 30, 2015, the Department of Energy and Environmental Protection Deputy Commissioner Michael J. Sullivan issued a Removal Order ("Order") to Mr. Nussbaum. Hearings were requested on both the Application and the Order.

Hearing Officer Brendan Schain held a hearing to receive public comment on August 4, 2016, in Stamford and then he held an evidentiary hearing on October 6, 2016, at the Department's headquarters in Hartford.

Although the proceedings on the Application and Order were consolidated for the purpose of creating an evidentiary record, the Proposed Final Decision issued by Hearing Officer Schain on April 21, 2017, concerns only the Application.[1]

Hearing Officer Schain concluded his Proposed Final Decision by recommending that "the Commissioner deny the Application because the retention of the post and wire fences cannot satisfy either policies contained in the Coastal Management Act or the criteria found in the statutes concerning structures, dredging and fill."[2]

On May 8, 2017, Mr. Nussbaum filed exceptions to the Proposed Final Decision regarding his application for a special permit to be issued in the above reference matter. As provided by Regulations of Connecticut State Agencies § 22a-3a-6(y)(3)(B), an opportunity for the parties to file briefs was provided. Briefs were filed by both the Applicant and Department staff on or before June 30, 2017.

For the reasons detailed herein, I reject the Applicant's exceptions and affirm the findings of the Proposed Final Decision, which I adopt as my Final Decision.

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[1] According to the Proposed Final Decision at p. 1 - FN#1, "After some discussion, the procedure for adjudicating the Application and the Order was agreed upon. After the issuance of this proposed final decision and the opportunity to file exceptions, a final decision on the Application will be reached first. Then, after an opportunity to file additional briefs if requested, a final decision on the Order will be issued. The Final Decision on the Order will rely on the same evidentiary record, but additional facts may be found if necessary. An appeal of the final decision on the Application will not stay a final decision on the Order."

[2] Proposed Final Decision at p. 14.

II

EXCEPTIONS

After a thorough review of the administrative record, the Proposed Final Decision, exceptions, arguments raised in the briefs and arguments made at oral argument by the parties, I find that the Applicant has not met his burden of persuasion on any of the exceptions. I adopt the Proposed Final Decision as supplemented herein as my Final Decision. Thus, Hearing Officer Schain should move forward on a final decision on the Order.

Quiet Enjoyment:

In his Post Hearing Brief dated January 27, 2017, the Applicant sets forth his legal argument with regard to quiet enjoyment. On page 10 of that brief under the heading "Applicant's Common Law Property Rights" the Applicant states:

> All property owners retain the common law right to quiet enjoyment of property. This includes the right to be free from private nuisance. *Brainard v. West Hartford*, 140 Conn. 631, 633, 103 A.2d 135 (1954) (holding that proposed town dump would cause nuisance to neighboring properties due to litter, odors, and vermin); *Reichenbach v. Kraska Enters, LLC*, 105 Conn. App. 461, 469 (2008) (holding that newly constructed marina interfered with quiet enjoyment of neighboring property owners by causing increased use, traffic, and noise*); Yario v Town of S. Windsor*, No. HHDCV116021042, 2012 Conn. Super, LEXIS 314, at *2-3 (Super. Jan. 20, 2012) (allegation that noise and air pollution from nearby dog part was sufficient to support a claim of nuisance).
>
> These rights have been recognized by the Legislature, in that the very first goal and policy in the Coastal Management Act begins (["]To ensure that the development, preservation or use of the land and water resources of the coastal area proceeds ***in a manner consistent with the right of private property owners***...." Conn. Gen. Stat. §22a-92(a)(1) (emphasis added).

> Thus, it is clear that Mr. Nussbaum's private right of quiet enjoyment and his right to use land for any purpose that does not interfere with navigation must be considered—but was not considered—and balanced against the public's right to access the shoreline.

The main thrust of Mr. Nussbaum's exceptions to the Proposed Final Decision is that the Hearing Officer erred in his interpretation of Connecticut's Coastal Management Act when he refused to properly recognize all of Mr. Nussbaum's common law property rights, and incorporate those rights into the Coastal Management Act. Specifically, Mr. Nussbaum argues that he is an owner of residential property that borders the public trust area; he has a common law property right to "quiet enjoyment" of his real property; that common law right should be reflected in the application of the Coastal Management Act – including regarding the construction of physical structures in the public trust area adjacent to his property; and therefore on the present record I should simply authorize the post and wire fence he has already constructed in the public trust area.

I do not dispute that Mr. Nussbaum is entitled to the quiet enjoyment of his property – a common law right of all property owners, which is appropriately covered by common law theories of nuisance. However, Mr. Nussbaum has neither here, nor in the proceedings in front of the Hearing Officer, met his burden of demonstrating that this right to quiet enjoyment of his property is one of the property rights recognized under the Coastal Management Act that would support a permit for a coastal property owner to build structures in the public trust area. He cites no case – from Connecticut or any other jurisdiction – to support this assertion, nor could the Hearing Officer find one. As the Hearing Officer appropriately wrote in his Proposed Final Decision at page 9:

In this matter, the fences erected by the Applicant are intended to be a deterrent to public access to the public trust, and the record indicates that they have been effective. To determine if this constraint on the ability of the public to access the public trust is reasonable, it must be balanced against the littoral property owner's rights. General Statutes § 22a-92(a)(1) requires the Department to "ensure that the development, preservation or use of the land and water resources of the coastal area proceeds in a manner consistent with the rights of private property owners . . . ." The Applicant has certain property rights, some of which are unique to littoral property owners. The critical question in this matter, then, is whether, on balance, those rights permit him to erect structures to deter or constrain the rights of the public to access the public trust.[3]

The Applicant has identified several rights he believes tip this balance in favor of permitting the fences. These include: the right to quiet enjoyment of property; the right to be free from private nuisance; the right to be free from trespass; and, the right to be free from potential liability from individuals who may sue him after becoming injured on the dangerous shoreline. (See Applicant's Post-Hearing Filing, p. 10). While, for example, members of the public may access the public trust area waterward of mean high water, they may not trespass on the Property above mean high water to reach that area. Each of these rights, however, may be exercised without the need to deter or constrain access to the public trust. A fence at, or just above, mean high water posted with no trespassing signs would prevent the public from accessing the Property, while still preserving access to the public trust. A call to local law enforcement is the first step to abating a potential private nuisance such as excessive noise or littering. While it is true that none of these remedies would keep members of the public from accessing the boulders or groin in front of the seawall, members of the public accessing those public trust areas are neither trespassing on the Property nor engaging in conduct rising to a private nuisance. While it is true that someone may be injured on the rocks, it is hard to comprehend, from the evidence in this record, what claim they would have against the Applicant for an injury that did not occur on the Property. The rights identified by the Applicant are not littoral rights and therefore do not convey the right to use the area below mean high water. While, for example, the Applicant has the right to be free from trespass on his Property, he does not have the right to use the intertidal area held in the public trust to safeguard his upland property.

Because the private property rights identified by the Applicant concern his upland property and not his use of the intertidal area, and because there are mechanisms available which would safeguard his upland property without using the inertial area, any restriction on access to the public trust outweighs the private property rights claimed by the Applicant. When balanced against the rights claimed by the

[3] The statutes concerning structures, dredging and fill also require consideration of "recreational use of public water and management of coastal resources, with proper regard for the rights and interests of all persons concerned." § 22a-359(a). This criteria is similar to the various policies of the Coastal Management Act at issue here, and no separate analysis is required.

Applicant, any interference with the public's right to access the public trust is unreasonable and in violation of the policies of the Coastal Management Act.

In addition to the private property rights claimed in his post-hearing filing, the Applicant, as an owner of waterfront property, does have certain littoral rights which authorize him to use the intertidal area for certain purposes. These include the right to access the water, most often exercised through the construction of a wharf, pier or dock. *Lane v. Commissioner of Envtl. Prot.*, 136 Conn. App. 135, 157 (2012), aff'd, 314 Conn. 1 (2014). The littoral property owner may also have the right to the exclusive occupation of the area between mean high water and mean low water. *Town of Orange v. Resnick*, 94 Conn. 573 (1920). Although many of these rights are ancient common law rights which at one time may have been extensive, the exercise of any of these littoral rights are now subject to general rules and regulations as the legislature may prescribe. *Lane*, supra, 136 Conn. App. at 157. Those rules and regulations prescribed by the legislature to limit the rights of the littoral property owner are found in the policies of the Coastal Management Act and criteria in the Structures, Dredging and Fill Act.

Even in the context of an application for a pier, ramp and floating dock, where the littoral property owner is exercising his clearly defined right to access navigable water by wharfing out, that right is balanced against the rights of the public to determine if such an intrusion into the public trust is reasonable.

The Applicant argues that, in this matter, a similar balance has been reached because the fences only deter access to the public trust and limit the area where the public may pass around the fence to an area waterward of the fences but still above mean low water. This argument is unavailing, however, because the Applicant has failed to establish any property right to the installation of the fences similar to the right to access navigable water which often provides for the construction of a pier. Any restriction by the fences on the right of the public to access the public trust fails a balancing test because there is no private property right held by the Applicant to serve as a counterweight.

Exception #2:

Exception # 2 states: "The Hearing Officer was incorrect when he concluded that Mr. Nussbaum acquired no property rights when, in 2002, he placed rip rap waterward of the then existing Mean High Water line pursuant to a Certificate of Permission issued by the Department." Again, I find that the Applicant has not met his burden of persuasion and I adopt the Proposed Final Decision. The language of the Certificate of Permission and the substantial

evidence in the record support the conclusion that Mr. Nussbaum acquired no new property rights when he placed rip rap waterward of the then existing Mean High Water line.

In his brief the Applicant relies upon the case of *Lockwood v. New York & New Haven R. Co.,* 37 Conn. 387 (1870) for the following concept:

> [O]wners of land bounded on a harbor own only to [the] mean high water mark, and that whatever rights of such owners have on reclaiming the shore are mere franchises. When however such reclamations are made by reclaimed portions in general become integral parts of the owners' adjoining lands. ***By means of such reclamations the line of the high water mark is changed and carried into the harbor ...*** (Emphasis in the Applicant's brief.)

Id. at 391.

It is unclear from the recitation of the facts of the *Lockwood* case what the tidal reclamation actually entailed other than reference to a "structure." According to *Lockwood:*

> Petition for an injunction against the removal by the respondents of certain structures erected by the petitioner upon certain mud flats which had been reclaimed, which structures were claimed by the respondents to be an obstruction of their right of way; brought to the Superior Court in Fairfield County. The shore land adjacent to the reclaimed flats was formerly owned by Birdsey G. Noble, who on the 13th of November, 1847, conveyed a right of way across the same to the respondents, the important part of the deed being as follows: ...

Id. at 388.

It is important to note footnote 3 of this opinion:

> Owners of upland bordering upon the sea are owners of the adjoining shore, ***subject only to the paramount rights of the public.*** *East Haven v. Hemingway*, 7 Conn., 202; *Chapman v. Kimball*, 9 Id., 41; *Nichols v. Lewis*, 15 Id., 143.

Id. at 390.

Thus, the Hearing Officer's conclusion that the rip rap did not extend the Applicant's property is legally and factually correct. The authorization for the placement of the riprap in the Certificate of Permission includes the following provision, under the heading "GENERAL TERMS AND CONDITIONS":

> Paragraph 21. "This Certificate 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 herby."

During the evidentiary hearing, Hearing Officer Schain asked the Applicant's expert witness Raymond Redniss, a State of Connecticut licensed land surveyor, whether the placement of rip rap above mean high water would extend the existing boundary of the property. Mr. Redniss confirmed that the activity authorized by the Certificate of Permission would not expand one's title. (Tr. October 6, 2016, afternoon, pages 47 - 48). The Department's witness, Brian Florek, also a State of Connecticut licensed land surveyor, was asked a similar question and gave a similar answer, citing the language of Certificate of Permission condition #21. (Tr. October 6, 2016, afternoon, page 56).

Hearing Officer Schain found that the placement of the riprap did not create the type of "reclamation" that could result in a permanent accession to Mr. Nussbaum's property, because water continues to flow over and around the riprap to the base of the seawall. (PFD pages 7-8; Exhibit DEEP-23; Staff Brief Proposed Findings of Fact pages 15-18).[4]

[4] Brief on Exceptions of Land and Water Resources Division Staff at p. 3.

The Applicant's own expert witness conceded that the placement of the riprap did not alter property boundaries. In fact, Mr. Redness replied "no" when asked if the placement of the riprap waterward of the seawall by the property owner changes the property boundary (Tr. October 6, 2016, afternoon, page 35). Mr. Redness further testified that "if you get a permit to bulkhead a piece of property and fill behind it, does it change your property boundary? And technically, if you read the law, it does not." (Tr. October 6, 2016, afternoon, page 38.)

The Department's witness Brian Florek, a State of Connecticut licensed land surveyor, testified that he agreed with Mr. Redness that when something is placed by man it does not change the fee title of the owner (Tr. October 6, 2016, afternoon, page 56).

Thus, two experts in surveying within the State of Connecticut both agree that the placement of riprap waterward of the seawall did not alter existing boundaries and the Certificate of Permission did not convey any property rights.[5]

[5] Brief on Exceptions of Land and Water Resources Division Staff at p. 3

III

CONCLUSION

There is substantial evidence in the record to affirm the conclusion of the Proposed Final Decision that the fences installed by Mr. Nussbaum cannot satisfy the applicable policies of the Coastal Management Act, General Statutes §§22a-90 through 22a-112, or the criteria found in the statutes governing structures, dredging and fill, General Statutes §§22a-359 through 22a-361. I adopt the Proposed Final Decision as my Final Decision denying Mr. Nussbaum's permit application and direct the Hearing Officer to proceed to a final decision on the Order.[6]

Robert J. Klee, Commissioner

2/6/2018
Date

[6] See Footnote 1, supra.

SERVICE LIST

In the matter of Nussbaum
Order No.: LIS-2012-3443-V – Application No.: 201210755-KZ

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