Connecticut Department of
ENERGY &
ENVIRONMENTAL
PROTECTION

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IN THE MATTER OF	***:***	***APPLICATION NO. 201207495-TS***
16 HIGHGATE ROAD, LLC	***:***	***JUNE 23, 2015***

FINAL DECISION

I

SUMMARY

The Applicant, 16 Highgate Road, LLC, has applied to the Department of Energy and Environmental Protection (Department or DEEP) and its Office of Long Island Sound Programs (OLISP) for a permit to construct a residential dock and pier to serve the property located at 16 Highgate Road in Greenwich. In an October 30, 2014 Proposed Final Decision (PFD), the hearing officer found that the draft permit would comply with all of the applicable standards, goals and policies of the Tidal Wetlands Act, General Statutes (CGS) §§ 22a-28 through 22a-35, and its implementing regulations, Regs. Conn. State Agencies (RCSA) §§ 22a-30-1 through 22a-30-17. The draft permit was also found to comply with the relevant sections of the Structures, Dredging and Fill Act, CGS §§ 22a-359 through 22a-363, and the applicable portions of the Coastal Management Act, CGS §§ 22a-90 through 22a-112. The hearing officer recommended issuance of the permit subject to a seasonal removal condition.

The Intervenors[1] filed twenty-six exceptions[2] to the PFD on November 14, 2014, and requested oral argument. On January 9, 2015, the Intervenors filed a brief in support of their

[1]The Intervenors are: Robert Lawrence, Jr., Sara Keller, Penelope Low, Ralph DeNunzio and Eric Lecoq, individually and as managing member of 5 BPL LLC. (Collectively, Intervenors). All filed individual petitions to intervene and were granted party status under CGS § 22a-19 based on allegations that the proposed project was reasonably likely to pollute, impair or destroy the public trust in the air, water or other natural resources of the state. Lawrence, DeNunzio and Lecoq were also granted leave to intervene pursuant to the DEEP Rules of Practice, RCSA § 22a-3a-6(k) (2), because their participation in the hearing was found to be in the interest of justice.

[2] Lecoq did not join Intervenors in the exceptions to the PFD individually or on behalf of 5 BPL LLC.

exceptions, while the Applicant and DEEP Staff each filed briefs in support of the PFD. Oral argument was held on January 20, 2015.

I have assessed the Intervenors' exceptions and arguments raised in the briefs and oral argument and find them unpersuasive. After consideration of the administrative record, the draft permit, and the PFD and its recommendations, I find that the proposed activity will comply with all applicable state statutory and regulatory criteria, and will not unreasonably pollute, impair or destroy the public trust in the air, water or other natural resources of the state. Accordingly, this Final Decision rejects the exceptions filed by the Intervenors and affirms the findings of fact and conclusions of law reached in the PFD and authorizes issuance of the proposed draft permit as a final permit to construct a residential dock and pier, subject to the seasonal removal condition specified in the PFD.

II

EXCEPTIONS

A

EVIDENTIARY RULINGS ON INTERVENTION

In two of their twenty-six exceptions to the PFD, the Intervenors reiterate their challenge to the hearing officer's rulings on intervention.[3] Specifically, the Intervenors argue that the hearing officer erred in his December 19, 2013 ruling when he held that the intervening parties Lawrence, DeNunzio, Lecoq and 5 BPL LLC, all members of the Harbor Point Association, Inc. (Association), did not have the right to enforce the restrictive covenants of the Association to which the property at 16 Highgate Road is subject.[4] Likewise, the Intervenors take exception to the hearing officer's February 6, 2014 ruling because it "fail[ed] to hold that the right to enforce the Restrictive Covenants satisfies the requirements of standing." Exceptions, p. 2.

The Department's Rules of Practice make clear that exceptions "shall state with particularity the party's or intervenor's *objections to the proposed final decision.*" RCSA § 22a-3a-6(y)(3)(A) (emphasis added). The Intervenors' continued challenges to the hearing officer's prior rulings do not

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[3] Request for Oral Argument and Exceptions to Rulings and Proposed final Decision (Exceptions).

[4] This characterization of the hearing officer's ruling reflects the language used by the Intervenors in their exceptions. Exceptions, p. 1.However, a closer examination of the rulings on this issue reveals that the hearing officer expressly refused to rule on whether the Intervenors have rights to enforce the restriction held by the Association. The hearing officer ruled that even if the individual rights did exist, the decision in this matter would not impact those rights and therefore any such rights do not, on their own, provide a right to intervene as a party.

constitute objections to the proposed final decision. Thus, they are not valid exceptions under the Rules of Practice and will not be revisited. The administrative record clearly demonstrates that the Intervenors were allowed to fully and fairly participate in the hearing process, including the presentation of witness testimony, the submittal of exhibits, and the opportunity to conduct cross examination of witnesses. As such, the Intervenors have had ample opportunity to express and explain their views in connection with the subject application and have suffered no prejudice.

B

FINDINGS OF FACT

The Intervenors allege in eleven of their exceptions that the hearing officer erred in failing to find certain facts proposed by the Intervenors, which they claim are admitted or undisputed in the record. These exceptions do nothing more, however, than voice the Intervenors' disagreement with the hearing officer's findings and reiterate the Intervenors' position with regard to the Applicant and its application. The findings of fact set forth in the PFD are based on substantial evidence found in the record. Although the Intervenors assert that their proposed facts are supported by record evidence, they have failed to demonstrate any error on the part of the hearing officer, because even "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. . . ." *Sams v. Dept. of Environmental Protection*, 308 Conn. 359, 374 (2013) (quoting *Shanahan v. Dept. of Environmental Protection*, 305 Conn. 681, 700 (2012)). A failure to find facts favorable to the Intervenors' position is not error.

1

Visual Quality: Vistas and Viewpoints

The Intervenors claim that the proposed structures will obscure a ledge outcrop, "which is a magnificent, beautiful and defining navigation landmark." Exceptions, p. 2. They also note that the proposed structures will clearly be visible from two areas visited by many people, Greenwich Point, a 147-acre park, beach and marina facility owned and maintained by the Town of Greenwich, and the Elias Point picnic area. According to the Intervenors, the visibility of the proposed structures from Greenwich Point explains why there is an "unusually large number of persons objecting to the Application." Exceptions, p. 2. The Intervenors claim that the Applicant's consultants should have considered the visual impact of the dock structure in light of CGS § 22a-93(15), which defines

"adverse impacts on coastal resources" to include "...degrading visual quality through significant alteration of the natural features of vistas and viewpoints."

Substantial evidence exists in the record that the proposed structures will not degrade visual quality. The area of the proposed dock structure is already developed and includes seawalls, docks, ramps and floats, in addition to a portion of a mooring field consisting of approximately 300 moorings in the main body of Greenwich Cove, east of Elias Point. Many of the existing structures, including the densely populated mooring field, are already visible from Elias Point and Greenwich Point. A ramp and float from a nearby property are also visible from Greenwich Point, from the waters of Greenwich Cove and from the Lawrence and Lecoq properties.

I concur with DEEP Staff who argued in their brief that the "mere fact that a dock or other waterfront structure can be seen," does not in and of itself result in an unacceptable adverse impact under the Coastal Management Act. This is particularly true when the objections of those individuals impacted by the view are subjective, and as pointed out by the hearing officer in the PFD, are of a "highly personal and private nature and unconvincing." Staff provides further support in referencing another permit proceeding in which the following was found:

> The presence of this new residential dock in a developed residential area and its alteration of the view from private residences alone do not represent an impact on coastal resources warranting the proposed structure's denial. Personal preferences or matters of taste also do not control the Department's determination on a waterfront property owner's right to seek permission to build a structure that provides reasonable access to the water. The fact that other individuals in the area would not pursue such a course of action if left the choice is not grounds for denial.

Proposed Final Decision in the Matter of Daniel McLeod, Application No. 200801981-KB, May 15, 2014, p. 15, *aff'd in full,* Final Decision, June 5, 2014.

Intervenors also allege that the proposed structures will degrade the visual quality of the area as defined in CGS § 22a-93(15)(F). In support of their allegations regarding degradation, Intervenors assert that the dock would impact the visual quality of Greenwich Cove from private residences as well as public viewpoints. That the dock will be visible from other places in the area, however, does not support a finding of a significant impact on the visual quality of the area. When reviewing the visual impacts of a proposal, the overall character of the area must be considered. *Coen v. Ledyard Zoning Comm'n*, No. HHBCV106007515S, 2011 WL 5307400, *3-*4 (Conn. Super. Ct. Oct. 19, 2011). As the hearing officer noted and the record confirms, Greenwich Cove is a highly developed, highly trafficked area. The Applicant's dock is not the first of its kind in this area and the dock will only minimally obscure the view of the rock

outcropping surrounding the cove. Considering the project in this context, the record testimony from the Intervenors and their witnesses is inadequate to establish that the Applicant's dock and pier will have a significant adverse impact on the visual quality of the Cove.

I do not find compelling the Intervenors' argument that the proposed dock structure would degrade the visual quality through significant alteration of the natural features of vistas and viewpoints in light of the structures and mooring field that already exist in the area. I agree with the hearing officer that the addition of the structures proposed by the Applicant will not result in a "significant alteration of natural features of vistas or viewpoints."

2

Use of Existing Facilities at Harbor Point Association

The Intervenors claim that the Applicant should be required to use the existing facilities of the Association, "which provide safe, full-time access to paddle craft for its members, are far superior to the unsafe, part-time access proposed by the Applicant." Exceptions, p. 3. The Intervenors assert that the existing kayaking and paddleboard facility maintained by the Association already provides the Applicant with suitable access to tidal waters for its kayaks and paddleboards, and is superior to the Applicant's proposed dock. They argue that the existing off-site facilities offer a more useful and environmentally preferable alternative for the Applicant to exercise its riparian right of access.

As DEEP Staff correctly notes, in the absence of dock standards of general applicability, there is no legal basis for the Department to impose such a requirement. A conclusion that use of an existing facility is an equivalent alternative to a dock structure proposed for a residential property would equate to a failure to recognize a legitimate property interest. *See Final Decision in the Matter of Arthur & Judith Schaller, Application No. 200103104-SJ,* June 26, 2003, pp. 6-7. Although the record reveals that the Applicant does have access to these shared facilities, the existence of such facilities does not, by itself, abrogate the right of the Applicant to access the water from its upland.

The Intervenors allege in another exception that the DEEP erroneously found CGS § 22a-92(b)(1)(H)[5] to be irrelevant and therefore gave no regard to the Coastal Management Act's policy

[5] CGS § 22a-92(b)(1)(H) provides: Policies concerning development, facilities and uses within the coastal boundary are … to protect coastal resources by requiring, where feasible, that *such boating uses and facilities* (i) minimize disruption or degradation of natural coastal resources, (ii) utilize existing altered, developed or redevelopment areas, (iii) are located to assure optimal distribution of state-owned facilities to the state-wide boating public, and (iv) utilize ramps and dry storage rather than slips in environmentally sensitive areas. (Emphasis added.)

favoring the utilization of existing facilities. In addition, the Intervenors claim that other property owners utilize the existing facilities rather than access tidal waters from their own waterfront properties and question why the Applicant cannot do the same.

I agree with DEEP Staff that, given the statutory context, the reference to "such boating uses and facilities" in CGS § 22a-92(b)(1)(H) refers to commercial or public boating facilities such as marinas or state-owned launch ramps, and not to individual private docks. Staff correctly notes that a state, municipal or commercial facility has greater flexibility in determining location while an individual residential dock is limited to the site of the residential property. In addition, accessing the water from another facility is not the same as accessing the water from one's own property especially here, where there are no significant adverse coastal resource impacts and other waterfront property owners have dock structures of their own.

The requirement of CGS § 22a-92(b)(1)(H) to "utilize existing altered, developed or redevelopment areas," where feasible, is aimed at encouraging the smart development of coastal uses, particularly facilities like marinas or state boat launches that are not necessarily limited to one particular upland parcel. DEEP has never interpreted CGS § 22a-92(b)(1)(H) as imposing an absolute requirement that an owner of coastal upland utilize an existing facility in lieu of building a private residential dock. To hold that the statute requires denial where an existing off-site facility is present would have required DEEP to reject previous dock applications of other Association members, and would be inconsistent with the Coastal Management Act's stated goal of "ensur[ing] 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*." CGS § 22a-92(a)(1) (*emphasis added*). Furthermore, Intervenors' interpretation is not faithful to the plain language of the statute. Nothing in the text of CGS § 22a-92(b)(1)(H) expressly prohibits a littoral property owner from wharfing out where an off-site alternative is available. It is unlikely that the legislature would have intended to vitiate private property rights to this degree without expressly providing so by statute, and to read such a requirement into the statute at this point would raise substantial Fifth Amendment concerns. Section 22a-92(b)(1)(H) plainly does not preclude a littoral property owner from wharfing out so long as disruption or degradation of natural coastal resources is minimized. The record in this case demonstrates that the impact of the proposed project to tidal wetlands, the intertidal flat, wildlife and other natural resources in the area is minimal. Accordingly, there is no legal or factual basis for DEEP to require that the Applicant exclusively rely on the Association's facilities, or any other off-site alternative, for access to tidal waters.

The Applicant is a waterfront property owner and therefore possesses littoral rights that are balanced in accordance with the Coastal Management Act. Further, the applicable language of RCSA § 22a-30-10(b), which provides criteria for preservation of wetlands, speaks in terms of impact minimization rather than avoidance. There is substantial evidence on the record to support the hearing officer's finding that the impacts of the Applicant's proposed activity have been minimized to the fullest extent possible.

3

Restrictive Covenants

The Intervenors also claim that the hearing officer should have found that construction of the proposed dock structure would violate certain restrictive covenants that run with the property at 16 Highgate Road. Intervenors argue that the hearing officer failed to take these covenants into account and thus failed to give proper regard to the rights and interests of all persons concerned and required by CGS § 22a-359(a) of the Structures, Dredging and Fill Act. While the Applicant requested and received approval from the Board of Directors of the Association to demolish the residential structure and construct a new one, the Applicant did not seek approval from the Board of Directors to construct a dock structure. Intervenors assert that the Applicant was required to seek approval from the Association prior to applying to for a DEEP permit, and that failure to do so precludes issuance of the permit at this time.

The restrictive covenants recorded in the deed to the 16 Highgate Road property provide in relevant part:

> No building or structure shall be erected or maintained upon the premises . . . except with the written consent of the grantor or its successors or assigns. Such building or structure shall be used for no purpose other than a strictly private residence and such appropriate uses usually incidental thereto.

Absent an express bar to construction, the mere existence of restrictive covenants that may impact a proposed project or require third-party approvals does not preclude DEEP from issuing a permit. As the hearing officer found and record testimony supports, the language of the restrictive covenants does not specifically refer to dock structures, and it does not expressly prohibit the construction of a dock, or any other structure, on the subject property. The language of the restrictive covenants also does not dictate at what point a property owner is obliged to seek written consent to erect a building or structure. PFD, pp. 18-19. Securing a DEEP permit does not excuse the Applicant

from securing other necessary approvals, and the language of the permit issued in conjunction with this decision makes clear that the permittee remains obligated to obtain any other approvals required by federal, state and local law, including any approval required through a deed restriction. The hearing officer properly found:

> [A]ny rights the Association has to approve the proposed structure or rights held by individual members to enforce the restriction are governed by a different body of law over which the department and I have no jurisdiction to determine and which remain unaffected by the proposed permit.

PFD, p. 19. An administrative agency, like DEEP, "is not a court of law[;] its authority is stringently limited. It can only apply its regulations to the proposals which appear before it." *Gagnon v. Municipal Planning Commission*, 10 Conn. App. 54, 57 (1987), *cert. denied*, 203 Conn. 807 (1987). Any question as to who can enforce the covenants at issue is a matter best left to the courts. Although securing an approval from the Association prior to submitting an application to the DEEP may have avoided neighborhood conflict, Intervenors have not demonstrated that the Applicant was in any way required to do so.

4

Access to Tidal Waters and Safety of Site Conditions

The Intervenors allege that the proposed dock structure provides only limited access to tidal waters and poses a significant safety risk because of the muddy nature of the seabed in the vicinity of the proposed dock. The Intervenors characterize the seabed east and south of the proposed dock site as "quicksand." Exceptions, p. 3. The Intervenors argue that it would be imprudent to construct a dock structure at this site given the nature of the soil, the distance of the structure from mean low water, the significant variations in tidal conditions, and the limited utility of the structure. In contrast, the Applicant favors construction of a dock structure to provide a stable and secure launching area for the safety of persons accessing the water from the Applicant's property and to avoid sustaining injuries as a result of traversing the wetlands and rocks when accessing the water from the upland property, while also taking into account that changing tidal conditions may impact the utility of the dock structure. DEEP Staff supports the Applicant's position. I, too, concur with the Applicant's position.

The area of the proposed dock structure is shallow, is subject to significant tidal variations and will not always provide full tide cycle access for the Applicant's paddleboard activities. Nevertheless, there are no requirements that a residential dock achieve a certain depth and not exceed a particular distance from mean high water, or that a dock structure must provide the upland property owner with unlimited access to the water. Both the Applicant and DEEP Staff cite another recent permit decision in support of their position that a dock structure need not provide a waterfront property owner with water access at all times and under all tidal conditions. This decision concludes in pertinent part, as follows:

> Despite the concern expressed by the intervening parties, there is no legal requirement that access to the water from structures be approved under the department's authority be available at all times and tides. As a result, there may be a limitation on whatever water access associated with a given coastal property....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 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.

Final Decision in the Matter of Ronald B. Harvey, Application No. 200802576-KB, September 24, 2014, p. 3.

"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 the right of access by water to and from his upland." *Rochester v. Barney*, 117 Conn. 462, 468 (1933). 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, and the Applicant alone assumes the risk that its dock structure may provide less than complete water access because of conditions and tides at any given time.

5

Impacts of Proposed Structures

The Intervenors claim in another exception that the evidence offered by the Applicant did not adequately address the concerns of one of their experts, who testified that, in his opinion, "the proposed structures will probably have an adverse impact upon the environment and ecology in the area of the [Greenwich] Cove and the evidence that horseshoe crabs are present in the area of

the proposed dock." Exceptions, p. 5. This expert did not provide any specific research or studies on the area to support his assertion that the project would result in adverse environmental impact and mere speculation does not amount to substantial evidence. See *River Bend Associates v. Conservation & Inland Wetlands Commission,* 269 Conn. 57, 71 (2004). While it is true the dock will be built and be located in an area that supports a variety of wildlife, no credible evidence has been presented to demonstrate that the proposed structures will result in an adverse environmental impact to the project area.

In fact, the record reflects that the dock is likely to have a positive impact on the vegetation in the tidal wetlands, due in part to the planned removal of stone debris in the area as required by the permit terms, which will create an additional 600 to 700 square feet of wetlands and allow tidal vegetation to repopulate the area. In addition, the dock will provide a way of accessing the water without walking through the tidal wetlands and thus will curb the physical breakage, uprooting and trampling of vegetation in the wetlands that is currently occurring.

Substantial evidence in the record demonstrates that the proposed structure will not have a significant impact on coastal sedimentation, erosion, and water circulation patterns and that the installation of piles to support the proposed structure is not expected to have a permanent impact on the horseshoe crabs. In fact, at the oral argument of January 20, 2015, the Intervenors were specifically asked about the existence of horseshoe crabs in the area. Intervenors responded that concave surfaces of mud are depicted in photos which may be "quite close" to the area of the proposed structure. Other than this information, the Intervenors provided very little insight on the impacts alleged and the nexus between the project's footprint and the horseshoe crabs' nesting area. The evidence provided throughout the proceeding supports the hearing officer's determination that the horseshoe crabs will not be adversely impacted. PFD, pp. 4-5.

The Intervenors also argue that the Applicant's own experts believe that the 72-foot pier agreed to by DEEP Staff poses a greater potential risk to the environment than the 100-foot pier initially proposed by the Applicant. In support of their position, the Intervenors refer to the statement of the Applicant's engineer that the shorter pier will " 'increase the potential risk' that a dynamic shoal located within 100 feet south of the proposed structure 'will migrate and impact the safe use of the dock.' " Intervenors Brief, p. 4.[6] This is a mischaracterization of the testimony provided by the Applicant's expert. The Applicant's expert testified that during the pre-application review, he was of

[6] Intervening Parties' Brief to Commissioner, January 9, 2015.

the opinion that the 100-foot proposal was reasonable because of concerns that potential migration of a dynamic sand shoal proximate to the proposed project area could impact the utility of a shorter dock. He also clarified that, upon further review, there was no unreasonable safety risk associated with the 72-foot proposal. Although the Intervenors claim that these statements suggest that the shorter pier would present a greater risk to the environment than the longer pier, these statements pertain to the shorter pier's utility rather than its impact on the environment. In fact, the Applicant's expert determined that the proposed dock and accessory structures would result in minimal impact to the ecology of the system. Consequently, the Intervenors' argument that the shorter pier may present a greater risk to the environment than the original pier that was proposed is unpersuasive and unsupported by substantial evidence.

One of the many responsibilities of DEEP permit analysts within the Office of Long Island Sound Programs is to balance adverse impacts to coastal resources and uses with an applicant's right to riparian access. DEEP Staff have performed the requisite balancing test here. I cannot agree with the Intervenors that the use of an existing, off-site facility to access the water affords the Applicant equivalent access to the water as would be provided from the Applicant's own property. The Intervenors' proposition fails to take into account the Applicant's legitimate property interest to riparian access.

6

Avoidance Prior to Minimization or Mitigation

Intervenors argue that the DEEP maintains a regulatory policy requiring the consideration of avoidance of impact before minimizing or mitigating impacts, and that the hearing officer erred in failing to consider whether coastal impacts could be avoided by utilizing the Association's existing facilities. As an example of avoidance, Intervenors note that DEEP policy favors sharing docks where appropriate. Rather than a DEEP regulation, Intervenors rely on information contained in a 2007 PowerPoint presentation available on the DEEP website. This presentation is neither a statutory requirement nor a regulation of the Department. It is a recommendation. Even if this presentation were a guidance document, the Department cannot enforce guidance or policy statements as law. See *Hospital of St. Raphael v. Commission on Hospitals and Health Care*, 182 Conn. 314, 322 (1980) (Informal guidelines, promulgated outside the rulemaking framework of the Uniform Administrative Procedure Act may not be applied as substantive rules.) (*citing Salmon Brook Convalescent Home v. Commission on Hospitals & Health Care*, 177 Conn. 356, 368, 417 A.2d 358 (1979)).

7

Protection of Life and Property

The Intervenors further allege that the hearing officer erred by concluding that the proposed structure satisfies the requirements of RCSA §22a-30-10(g), which requires that the proposed activity be consistent with the protection of life and property from hurricanes or other natural disasters, including flooding. Specifically, Intervenors assert that the permit must be rejected because the gangway and floating dock are not designed to withstand severe storm conditions, and therefore has the potential to damage people or property in the area. The hearing officer concluded the presence of the dock will not increase the risk of coastal flooding, hurricane or wave damage or erosion. The hearing officer also required that where a significant storm event is forecast, the Applicant must exercise prudent discretion in removing detachable portions of the structure so as to minimize potential for harm. The draft permit makes it the Applicant's responsibility to ensure that the structure is constructed and maintained in a way that will minimize the potential for damage. Nothing in the record indicates that the Applicant will fail to follow the requirements in the draft permit except Intervenors' belief that the Applicant is unreliable. Therefore, I agree with the hearing officer's conclusions and inclusion of specific safety provisions in the permit.

8

Miscellaneous Claims of Error

a

Testimony of DEEP Permit Analyst

The Intervenors claim that the hearing officer should have found as a fact the testimony of the DEEP permit analyst who reviewed the application that she "has never denied or recommended denial of any of the 400 applications she has reviewed in her nine years" at DEEP and that this is the first time DEEP would authorize construction of a new, non-shared residential pier for the purpose of providing access to paddle craft. Exceptions, p. 2. When reviewing a permit application, the function of agency staff is to determine whether or not the proposed activity meets the applicable statutory and regulatory requirements. Here, DEEP staff responsible for assessing the application found that the proposed activity met the requisite legal requirements. There was no error on the part of the hearing officer in failing to make a finding unrelated to whether the proposed activity comported with the applicable statutes and regulations.

b

No Findings of Fact Regarding the Applicant's Reliability and Motivation

The Intervenors claim that the hearing officer erred in failing to find "admitted and undisputed facts" which cast doubt on the Applicant's reliability and ability to comply with the permit condition that the dock ramp be removed seasonally and which cast a negative light on the Applicant's desire to construct the dock to increase the value of his property. Exceptions, p. 4. In their Brief, the Intervenors elaborate on these allegations. Intervenors' Brief, pp. 12-16.

The Intervenors apparent attempt to create another issue to deny this Application is without merit. Their allegations that these "facts" not found by the hearing officer are admitted and undisputed is based on their own proposed findings of fact.[7] A review of these proposed facts shows that many are the Intervenors' own characterizations of conversations or statements between the Applicant and others. Without further evidence, these proposed facts are not substantial evidence of the Applicant's inability to comply with the terms of the permit or a reason why the dock should not be built. These "facts" offered by the Intervenors do not need to be addressed further in this decision.

The Intervenors' argument also mischaracterizes the role of the hearing officer as the finder of facts. The hearing officer has the responsibility to find credible and relevant facts and apply these facts to the law that governs a particular permit application. The fact that the hearing officer did not find the facts put forth by the Intervenors means he did not find them to be pertinent to this Application. A hearing officer is under no obligation to find every fact alleged by every party to a proceeding. A decision must only be based on "each issue of fact or law necessary to the decision…." CGS §4-179(b). The hearing officer found facts that established substantial evidence that the subject permit application meets the requisite legal requirements for issuance. The facts he did not find were not necessary to this conclusion. I am not persuaded of the need to find any additional facts beyond those found by the hearing officer.

9

Unreasonable Pollution

The Intervenors assert that the hearing officer erred in his application of CGS §22a-19 when he concluded that the proposed structures will not cause or be reasonably likely to cause

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[7] Intervening Parties' Proposed Findings of Fact, Nos. 93 – 123, pp. 21-28.

unreasonable impairment, destruction or pollution of the water or natural resources of the state. The entirety of the record here, however, supports the hearing officer's conclusion that the Applicant's dock and accessory structures will not unreasonably pollute, impair or destroy the public trust in the air, water or natural resources of the state, consistent with the Connecticut Environmental Policy Act (CEPA). Intervenors' environmental expert did not provide credible evidence to support a finding that the proposed activity would result in unreasonable pollution or impairment, and any testimony to that effect was controverted by the testimony of Applicant's environmental expert and DEEP's permit analyst. "When there is an environmental legislative and regulatory scheme in place that specifically governs the conduct that the plaintiff claims constitutes an unreasonable impairment under CEPA, whether the conduct is unreasonable under CEPA will depend on whether it complies with that scheme." *Waterbury v. Washington*, 260 Conn. 506, 558 (2002). The record in this case, taken as a whole, and the analysis of the hearing officer set out in the PFD demonstrate that the Applicant's proposed activity will comply with all applicable statutory provisions and regulations of the Tidal Wetlands Act, the Structures, Dredging and Fill Act and the Coastal Management Act. Intervenors have not provided substantial evidence on which to conclude that the proposed dock will unreasonably pollute, impair or destroy the public trust, and have therefore failed to make out a cognizable CEPA claim.

C

CONCLUSIONS OF LAW

The Intervenors claim that the hearing officer erred in his conclusions of law in five aspects: (1) limitations on common law littoral rights; (2) declaration of policy stated in CGS § 22a-28; (3) criteria for preservation of tidal wetlands and prevention of their despoliation and destruction as provided in RCSA § 22a-30-10; (4) goals and policies of the Coastal Management Act as set forth in CGS §§ 22a-92(b0(1)(H) and 22a-98; and (5) adverse impacts on coastal resources as provided in CGS § 22-93(15). The hearing officer is under no duty to accept the conclusions of law proposed by the Intervenors. For all the reasons more specifically addressed above, the hearing officer's conclusions of law were proper.

D

ANALYSIS

Eight exceptions are claimed by the Intervenors in regard to the hearing officer's application of the law to the facts. These exceptions address items that have already been discussed in this decision. Consistent with my previous analysis, I disagree with the Intervenors' contention that the hearing officer's application of the law to the facts was faulty. The hearing officer correctly applied the relevant law to the facts presented.

E

CONCLUSION

There is substantial evidence in the record that the permit application complies with the applicable standards, goals and policies of the Tidal Wetlands Act and its implementing regulations, the Structures, Dredging and Fill Act and the applicable portions of the Coastal Management Act. I hereby adopt the PFD as the final decision of DEEP and authorize issuance of the proposed permit as a final permit in accordance with that decision.

Robert J. Klee, Commissioner

6/23/15
Date

Service List

In re
16 Highgate Road LLC Application No. 201207495-TS

PARTY	**REPRESENTED BY**
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