



IN THE MATTER OF : ***APPLICATION NO.***
MAURICE, ANDRE : ***201501172-MG***
May 11, 2017

FINAL DECISION

***I
SUMMARY***

The Applicant, Andre Maurice,¹ has applied for a permit from the Department of Energy and Environmental Protection (the Department or DEEP) and its Land & Water Resources Division formerly known as the Office of Long Island Sound Programs (OLISP)² to install a fixed pier, ramp, floating dock, and boatlift at his property at 36 Riverbend Drive in Stonington to provide recreational access to the Mystic River and the waters of Long Island Sound. The Mystic Harbor Management Commission for the Town of Stonington (Intervenor) filed a petition for a hearing after the issuance of a Notice of Tentative Determination to approve the application. General Statutes §22a-361(b). The parties to this proceeding are the Applicant, DEEP staff and intervening parties Kenneth and Jayne Scott. In the January 31, 2017 Proposed Final Decision (PFD), the hearing officer found that the dock as conditioned by the proposed draft permit would comply with the applicable statutory standards and would not impede navigation in the littoral area of the Applicant's property or unreasonably conflict with the Scotts' rights. The hearing officer recommended issuance of the permit incorporating the terms and conditions of the draft permit (PFD, Attachment A).

¹ Andre Maurice is also identified as J. Andre Maurice in various documents.

² Due to a reorganization, OLISP is now part of the Land and Water Resources Division of the Bureau of Water Protection and Land Reuse.

The Intervenor filed fourteen exceptions to the PFD on February 15, 2017, and did not request oral argument. On February 15, 2017, DEEP Staff filed a brief in support of the PFD. On April 3, 2017, the Intervenor filed a Memorandum of Law in support of their exceptions to the PFD. On April 3, 2017, the Applicant filed a Brief in Response to the Intervenor's Exceptions.

I have carefully assessed the exceptions and weighed them against documents supplied by the parties and intervenors. After a thorough review of the administrative record, the draft permit, the PFD, exceptions, and arguments raised in the briefs by the Intervenor and the parties, I find that the dock as conditioned by the proposed draft permit would comply with the applicable statutory standards and would not impede navigation in the littoral area of the Applicant's property or unreasonably conflict with the Scotts' rights. Accordingly, this Final Decision rejects the exceptions filed by the Intervenor and affirms the PFD and authorizes issuance of the proposed draft permit as a final permit to construct including a fixed pier, ramp, floating dock and boat lift at the residence at 36 Riverbend Drive, Stonington, Connecticut.

II

EXCEPTIONS

A

In four of the fourteen exceptions to the PFD, the Intervenor alleges that the hearing officer erred in failing to consider the evidence submitted by the Intervenor. Specifically, the Intervenor argues that the PFD rejects the survey submitted by Resource Mapping and Management, and instead improperly designates the DEEP witness as providing expert testimony. Exception, paragraph 2. The Intervenor also argues that the PFD fails to consider the testimony of the Mystic Harbor Management Commission members Carreau and Allard, who presented evidence that the proposed dock will impede navigation in the Upper Mystic River at all times. Exceptions, paragraphs 7 & 11. I have found that the hearing officer's PFD does not rely on the DEEP witness as providing expert testimony but rather that the individual (an expert in coastal navigation) conducted a comprehensive physical inspection of the area confirming the results from the survey conducted by the Applicant's consultant. I have found that the hearing officer considered the submissions from Carreau and Allard but disagreed with their conclusions based upon other submissions and testimony provided to the hearing officer.

In addition, the Intervenor argues that the video submitted in evidence does not truly depict the ability of boats to pass each other, because the video only features small boats. Exception, paragraph 6. I have found that the video demonstrates that those particular boats could pass each other. It does not mean that larger boats could not pass. Nor does the possibility that there will be times at low tide when two large boats could not pass one another make the video inadmissible or irrelevant.

B

MHC's CHANNEL REQUIREMENTS

The Intervenor has indicated the location of the project and its vicinity to the channel are worthy of a compromise. Exceptions, paragraph 10. I do not disagree. However, compromise does not mean that one party must subjugate all their rights in favor of another. It is clear to me that the Applicant has in fact reduced the length of the pier from its original design, thereby reducing the encroachment into public trust waters. The dock is centered on the property shoreline; the boat lift is located away from the neighboring Scott property. And, none of the alternative designs offered by the Intervenor were found to be preferable to the current dock design for a wide range of reasons.

Additionally, the Intervenor indicated that the PFD's rejection of alternatives proposed by the Intervenor fails to properly weigh the interests of the public and the littoral rights of the owner. Exceptions, paragraph 13. I find that the hearing officer, weighing all the evidence, correctly concluded that the dock design strikes an appropriate balance between the littoral rights of the Applicant, coastal resources, navigation, and the public trust.

Finally, the Intervenor argues that the proposed dock will encroach into public trust waters. Exceptions, paragraph 14. Based upon the design changes made to the dock, and the rejection of numerous alternative designs as stated, I believe the hearing officer has correctly weighed the Applicant's littoral rights against the public trust doctrine. "The proposed dock structure will provide the Applicant with reasonable access while minimizing its encroachment into public trust waters." PFD, Conclusions of Law, page 12.

It is my conclusion that reasonable concessions have been made by the Applicant which are compatible with the Applicant's littoral rights, and the rights of the neighbors, while allowing for navigation, coastal resource protection and public trust considerations.

C

NAVIGATION

The Intervenor claims that the proposed dock will impede navigation in the Upper Mystic River. Exceptions, paragraphs 1, 3, 5 & 11. The proximity of the channel to the shore requires boaters to transit the area at Slow No Wake speed, and to navigate existing obstacles including docks, piers, manmade and natural features in the River. The evidence in the record indicates this is a lightly travelled stretch of river which requires particular knowledge to transit at low tide. "Boats that typically traverse the upper Mystic River are small crafts with minimal drafts and the usual volume of traffic is sparse, often only one boat is in the channel at any given time." PFD Navigation, paragraph 26.

The Intervenor alleges that the proposed facts submitted by the Applicant regarding navigation are not supported by the record evidence, or that the analysis of the evidence is incomplete. Exceptions, paragraphs 3 & 5. I have found there is sufficient evidence in the record to support the ability to navigate this stretch of the Upper Mystic River and that the analysis of the evidence, while reaching a conclusion the Intervenor does not support, does not make that analysis incomplete.

The Intervenor alleges that the PFD incorrectly finds that the proposed dock will only impact navigation during low tide. Exceptions, paragraph 11. The Intervenor argues that the proposed dock will impact navigation in the Upper Mystic River at all times. Exceptions, paragraph 11. The evidence in the record shows that the channel waterward of the proposed dock is at least three feet wide and thirty five feet wide at low tide, and that boats are able to pass at that time. "As shown in a video demonstration, two boats of average size and type that are typically in the area at low tide during typical conditions when boats would be in the River were able to pass the area and each other." PFD, Navigation, paragraph 24. At low tide, boats transiting from the south would be constrained by an earlier choke point, and boats transiting from the north would encounter several existing docks before reaching the Applicant's dock. "Even if a vessel were tied to the south side of the floating dock at low tide, vessels navigating in the area at that time

using the three foot contour would be able to transit past the dock.” PFD, Navigation, paragraph 24. As the tide rises, the Upper Mystic River widens, thereby increasing the navigable area by a wide margin. “Larger work boats that might travel in the area would still be able to navigate in the River. They would likely transit the area during periods of high tide, and given the size of their vessels, would use the open water towards the middle of the River.” PFD, Navigation, paragraph 26.

D

HARVEY DECISION

The Intervenors argue that the Harvey decision is more consistent with the alternative proposals by still providing access to the Applicant with only a minor inconvenience, Exception, paragraph 9. Further, the Intervenor states that the Harvey decision is not a basis for providing a structure that encroaches into the public waterway, Exception, paragraph 12. Since the facts of the Harvey case rest upon a different condition, namely limited access, I have found that the hearing officer did not rely on the Harvey decision in this manner but rather as a way to balance the applicant’s littoral rights, navigation and public trust. I have found that the proposed permit is no less valid in light of possible alternatives.

III

CONCLUSION

There is substantial evidence in the record that the PFD and the proposed draft are consistent with the Public Trust Doctrine, the Structures Dredging and Fill statutes (General Statutes §§ 22a-359 through 22a-363) and the applicable portions of the Coastal Management Act (General Statutes §§ 22a-90 through 22a-112). 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.

Susan Whalen
Susan Whalen, Deputy Commissioner

May 11, 2017
Date

SERVICE LIST

Maurice, Andre, Stonington (Old Mystic)

App. # 201501172-MG

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