Office of Adjudications

IN THE MATTER OF	***:***	***APPLICATION #201410755-KZ*** ***ORDER #LIS-2012-3443-V***
NUSSBAUM, BERNARD W.	***:***	***APRIL 21, 2017***

I
SUMMARY

On October 30, 2014, Bernard W. Nussbaum ("Applicant") applied for an after-the-fact permit to retain two post and wire fences located waterward of the seawall in front of his property at 100 and 104 Sea Beach Drive in Stamford ("Application"). On December 4, 2015, Department staff 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 and, on July 16, 2012, was issued a Notice of Violation, instructing him to remove the fences. On November 30, 2015, Department staff issued a Removal Order ("Order"). Hearings were requested on both the Application and the Order on December 17, 2015 and this proceeding commenced.

A hearing to receive public comment was held on August 4, 2016 in Stamford and an evidentiary hearing was held on October 6, 2016 at Department headquarters in Hartford. At the evidentiary hearing, the Applicant introduced fact testimony from himself and Robert Cruz, caretaker for his property, as well as expert testimony from James J. Bajek and Raymond L. Redniss. Kevin Zawoy and Brian D. Florek were called as expert witnesses by Department staff. Applicant's exhibits APP-1 through APP-14D and Department staff exhibits DEEP-1 through

DEEP-9, DEEP-11 through DEEP-13, DEEP 15 and DEEP-19 through DEEP-23 were admitted to the evidentiary record as full exhibits.

Although the proceedings on the Application and Order were consolidated for the purpose of creating an evidentiary record, this Proposed Final Decision concerns only the Application.[1] To be granted the requested permit, the proposed activities must comply with the relevant statutes, specifically the statutes concerning Structures, Dredging and Fill (General Statutes §§ 22a-359 through 22a-363) and the applicable portions of the Coastal Management Act (General Statutes §§ 22a-90 through 22a-112). I have reviewed the record in this matter, including the documentary evidence and public comment. Based on this review, I recommend that the Commissioner deny the Application because the activity proposed cannot be conducted in compliance with the relevant statuary policies and criteria.

II
FINDINGS OF FACT

1. Bernard W. Nussbaum, or a trust in his control, has owned property known as 100 and 104 Sea Beach Drive in Stamford, Connecticut ("Property") since 1999. (Exs. APP-1, 8.)
2. The Property borders Long Island Sound to the east. A seawall runs along the eastern edge of the Property, separating a lawn, patio and swimming pool landward of the seawall from the rocky shorefront of Long Island Sound waterward of the seawall. The shoreline to the east of the Property is characterized by large boulders and other rocks, and a significant groin extends from the seawall into Long Island Sound. The groin is composed of rocks

[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.

that are largely exposed during low tide but become partially submerged as the tide rises so that nearly all of the rocks are submerged at high tide. (Exs. APP-1, 3, 4, 9, 11.)

3. The intersection of Hobson Street and Sea Beach Drive is southwest of the Property. Sea Beach drive forms the western boundary of the Property. Although the paved portion of Hobson Street ends at its intersection with Sea Beach Drive, the Hobson Street right-of-way continues to the seawall and forms the southern boundary of the Property. The shoreline to the east of the right-of-way is similar to the shoreline in front of the property, characterized by large boulders and other rocks which extend into Long Island Sound. (Exs. APP-1, 3, 4, 9, 11.)
4. Many of the rocks and boulders in front of the seawall are covered in algae and seaweed which can make the rocks slippery and difficult to traverse. (Test., 10-6-16, B. Nussbaum, v. 1, p. 21, B. Florek, v. 2, p. 63, K. Zawoy, v. 2, pp. 74-76.[2])
5. Mr. Nussbaum and Robert Cruz, a caretaker who lives on the Property, frequently observe fishermen and other members of the public use the Hobson Street right-of way to access the rocky shoreline along the seawall. Many of these fishermen use the groin in front of the Nussbaum property to reach deeper water. Both Mr. Nussbaum and Mr. Cruz have observed fishermen who misjudged the incoming tide and had difficulty reaching, or needed assistance to reach, safer ground. Mr. Nussbaum and Mr. Cruz indicated that they have occasionally called local police to assist stranded fishermen. (Test. B. Nussbaum, v. 1, pp. 16, 19, 55, R. Cruz, 67, 80.)
6. Mr. Nussbaum and Mr. Cruz have frequently observed trespassing by fishermen, fishing from, or traversing, rocks which make up a portion of the groin, lie landward of mean high water and are part of the Property, identified by their white color. (Ex. App-8; Test., B. Nussbaum, v. 1, pp. 14, 32, R. Cruz, v. 1, pp. 66, 77, R. Redniss, v. 2, p. 39.)
7. Mr. Nussbaum has installed a series of fences in the area waterward of the seawall. There are two fences that are the subject of this matter. Each fence consists of metal fence posts with attached wire fencing. The northernmost fence is approximately twenty four and one

[2] All testimony in this matter was received on October 6, 2016. The transcript of the evidentiary hearing was prepared in two volumes identified here as "v. 1" and "v. 2."

half feet long, the southernmost fence is approximately twenty seven and one half feet long. Each extends waterward from the concrete seawall. The fences do not extend all the way to mean low water. In the Application, the Applicant states that the purpose of the fences is to "deter the general public from using the immediate area around a rock strewn jetty which becomes [covered] by high tide waters. . . . The fences do not completely prohibit public access, but provide a visible barrier and warning that [in the opinion of the Applicant the area] is unsafe and not monitored. There are other more safer (*sic*) areas nearby that the public could use for fishing." Each of the fences is within the Department's permitting jurisdiction because they are waterward of the coastal jurisdiction line which runs along the waterward face of the seawall. (Exs. DEEP-4, 7.)

8. On July 16, 2012, the Department issued a Notice of Violation, indicating the fences, installed without a permit, were unauthorized and must be removed. On October 30, 2014, the Application was filed, seeking after-the-fact authorization to retain the fences. On November 30, 2015, the Department issued a Removal Order ("Order") requiring the removal of the fences. (Exs. DEEP-3, 4, 13.)
9. The location of mean high water in the area of the fences is disputed by the parties. The focus of this dispute is the installation of riprap waterward of the seawall in front of the Property in 2002 and its impact on the location of mean high water. Plans submitted in the application for a Certificate of Permission ("2002 COP") to install the riprap indicate that, before the placement of the riprap, mean high water was coincident with the seawall in the area of the fences. The 2002 COP states that the authorization to place riprap "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 . . . ." Although Mr. Nussbaum acquired no property rights by placing riprap, there is significant disagreement among experts retained by the parties as to whether the placement of the riprap caused the mean high water line to move waterward so that it no longer runs along the face of the seawall. (Exs. APP-10, DEEP-1, 19; test., J. Bajek, v. 2, pp. 8-11.)
10. Raymond L. Redniss, a professional land surveyor and expert in that field retained by the Applicant, evaluated several surveys of the property prepared by his firm, Redniss & Mead, both before and after the placement of the riprap. Mr. Redniss testified that for the purposes

of determining property ownership, mean high water is coincident with the seawall. However, Mr. Redniss testified that for "permitting purposes" the location of mean high water changed with the installation of the riprap. Using Mr. Redniss' approach, a single rock sticking out of the water above the elevation of mean high water would not adjust the mean high water line, but "field surveyors would take a number of elevations across the rocks and connect that string, and if [it] is generally the contour as it flows through the surface, that's where they would take the shots and depict it." He indicates that a survey conducted in 2004, after the placement of the riprap, "resulted in the [mean high water] line moving waterward from the face of the seawall to the corresponding elevation (4.3 NGVD-29) along the surface of the stone rip-rap." A subsequent Redniss & Mead survey, in 2014, also depicted mean high water on the face of the stone riprap, but adjusted the location of mean high water to account for shifting of the riprap that Mr. Redniss believed was caused by severe storm events. The 2014 survey depicts mean high water approximately fifteen feet waterward of the seawall in the area of the fences. (Exs. APP-5, 10; test. R. Redniss, v. 2, pp. 22-24, 28-30.)

11. Brian D. Florek, a licensed land surveyor and expert in that field, currently employed as the Supervisor of Surveys and Mapping for the Department, reviewed surveys prepared by Redniss & Mead, the 2002 COP, visited the Property on multiple occasions, and ultimately performed a survey of the Property on September 7, 2016. Mr. Florek's survey "shows the location of MHW within the vicinity of the unauthorized fences, along the waterward face of the seawall . . . ." This conclusion is based on Mr. Florek's observation that tidal water inundates the riprap and reaches the waterward face of the seawall, which Mr. Redniss also observed. The principle difference between Mr. Florek's approach and Mr. Redniss' approach to locating mean high water is that Mr. Florek does not consider riprap to be a solid surface, the placement of which that moves the location of mean high water waterward. (Exs. DEEP-21, 23; test., R. Redniss, v. 2, p. 35., B. Florek, v. 2, pp. 55-56.)
12. North of the location of the fences in question, mean high water moves waterward from its course approximately tracking the seawall onto the rocks that make up the groin that extends from the seawall. Many of the rocks above mean high water are characterized by their white color. (Exs. DEEP-23, APP-5; test. B. Nussbaum, v. 1, pp. 12-14, 20.)

III
CONCLUSIONS OF LAW

To determine whether the Applicant should be granted an after-the-fact permit to retain the two post and wire fences constructed waterward of the seawall on his property requires the resolution of two questions of law. It is first necessary to determine how the placement of riprap impacts the delineation of the mean high water which, in turn, defines the boundaries of the public trust. It is then necessary to determine if a littoral property owner such as the Applicant has the right – pursuant to the common law, the Coastal Management Act, and the statutes concerning structures, dredging and filling – to erect fences running roughly perpendicular to mean high water to deter the public from accessing areas within the public trust. I recommend that the Commissioner determine that the placement of riprap has not impacted the location of mean high water and that the entire length of each fence is within the public trust. I further recommend that the Commissioner determine that the fences cannot satisfy the requirements of the Coastal Management Act or the statutes concerning structures, dredging and filing and, therefore, that the Application should be denied.

A
MEAN HIGH WATER AND THE PUBLIC TRUST

A "public beach" is defined, in relevant part, as "that portion of the shoreline below the mean high tide elevation that is held in public trust by the state." General Statutes § 22a-93(6). "Under the public trust doctrine, members of the public have the right to access the portion of any beach extending from the mean high tide line to the water, although it does not also give a member of the public the right to gain access to that portion of the beach by crossing the beach landward

of the mean high tide line." *Leydon v. Town of Greenwich*, 257 Conn. 318, 332, (2001) It is therefore necessary to determine where the public trust area waterward of the Property begins before evaluating the lawfulness of the fences on the basis of the rights of the public to access the public trust and the Applicant's own private property rights.

There is no dispute that, prior to the placement of riprap in 2002, mean high water was coincident with the seawall. Instead, the question raised by the expert testimony in this matter is whether the placement of the riprap has caused mean high water to move waterward in the area of the fences. As recently as 2011, our Supreme Court reiterated that "[t]his court stated in 1870 that in Connecticut the owners of land bounded on a harbor own only to [the] high water mark, and that whatever rights such owners have of reclaiming the shore are mere franchises. When however such reclamations are made the 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." (Internal quotation marks omitted.) *Rapoport v. Zoning Bd. of Appeals of City of Stamford*, 301 Conn. 22, 49, 19 A.3d 622, 639 (2011).

Neither party argues that the placement of the riprap resulted in the adjustment of the boundaries of the Property. In fact, the 2002 COP specifically indicates that it conveys no property right. Instead, the Applicant's experts argue that the location of mean high water as a *property boundary* has remained unchanged, but for *permitting purposes* mean high water has moved nearly fifteen feet. While it is clear that portions of the riprap do reach elevations above mean high water, to consider mean high water to have moved as a result of the placement of the riprap would lead to an unworkable result.

First, both parties' experts agree that tidal waters inundate the riprap and reach the face of the seawall. To characterize the riprap, which contains myriad gaps and voids, as reclaimed land would stretch the common meaning of the term.[3] This approach would also result in rocks that are surrounded by tidal waters at mean high tide being classified as above mean high water, which seems contrary to the intent of the standard. Finally, this approach would result in an area that is considered to be in the public trust for property ownership purposes but considered below mean high water for permitting purposes, a result that is both confusing and unnecessary here. For these reasons, I recommend the Commissioner determine that the placement of riprap in front of the seawall did not adjust the location of mean high water in the area of the fences and determine that the entire length of each fence lies within the public trust.

B
COASTAL MANAGEMENT ACT, STRUCTURES, DREDGING AND FILL STATUTES AND PRIVATE PROPERTY RIGHTS

The parties have stipulated that only certain policies of the Coastal Management Act and the statutes concerning structures dredging and fill are at issue in this matter. Those policies at issue are found in General Statutes §§ 22a-92(a)(1), 22a-92(a)(6), 22a-92(b)(1)(A), 22a-92(c)(1)(K) and also include certain criteria found in § 22a-359(a).[4] An evaluation of these

[3] To determine whether other types of work, such as the placement of a new seawall, which presented a solid surface and a uniform elevation, would constitute a "reclamation" that would relocate mean high water would require a different analysis based on the factual circumstances.

[4] On August 11, 2016, the parties filed a "Joint Stipulation" that reads, in part, "[t]he Department of Energy and Environmental Protection, [Land and Water Resources Division], and the Applicant, Bernard W. Nussbaum hereby stipulate that the above proceeding be limited solely to whether the Applicant's fences are consistent with the Coastal Management Act policies set forth in Conn. Gen. Stat. §§ 22a-92(a)(1), 22a-92(a)(6), 22a-92(b)(1)(A), and 22a-92(c)(1)(K) and some of the factors for consideration set forth in § 22a-359(a)." Those factors from § 22a-359(a) identified as disputed are the use and development of adjoining uplands[,] the use and development of adjacent lands and properties and the interests of the state, including . . . recreational use of public water and management of coastal resources, with proper regard for the rights and interests of all persons concerned." The conclusions of law set out in this Proposed Final Decision respect the stipulations reached by the parties.

policies and criteria typically requires a balancing of the rights of the littoral property owner and the public's interest in land held in the public trust. *E.g., In the Matter of Graham Bluff Realty, LLC*, Proposed Final Decision, p. 8 (February 25, 2005), aff'd, Final Decision (March 2, 2005); *In the Matter of Flaster*, Proposed Final Decision, p. 14 (November 4, 2009), aff'd, Final Decision (November 12, 2009); *In the Matter of Harvey*, Proposed Final Decision, pp. 12-14 (June 17, 2014), aff'd, Final Decision (September 24, 2014).

It is well settled that members of the public have a right to access the public beach, which includes the area in front of the Property waterward of mean high water. In fact, one of the stated policies of the Coastal Management Act is that, "as a condition in permitting new coastal structures . . . access to, or along, the public beach below mean high water must not be unreasonably impaired by such structures and to encourage the removal of illegal structures below mean high water which unreasonably obstruct passage along the public beach." § 22a-92(c)(1)(K).

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.[5]

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

[5] 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.

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 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. "Such a balance is the only way to respect a waterfront owner's "right" to wharf out while also requiring that impact to coastal resources and areas held in the public trust be minimized pursuant to applicable statutes, regulations and policies." *In the Matter of McLeod*, Proposed Final Decision, p. 16 (May 15, 2014), aff'd, Final Decision (June 5, 2014); See *Bloom v. Water Resources Commission*, 157 Conn. 528, 533 (1969). When a pier is permitted, it necessarily constricts public access to portions of the public trust. A review of the Department's final decisions permitting piers indicates that an effort is consistently made to ensure that the public is able to pass under a portion of the pier waterward of mean high water. E.g., *In the Matter of Harvey*, Proposed Final Decision, p. 12 (June 17, 2014), aff'd, Final Decision (September 24, 14); *In the Matter of Megrue-Cliff Place, LLC*, pp. 6-7 (June 11, 2015) aff'd, Final Decision, (December 22, 2015). In this way, the two rights are balanced; the littoral owner is permitted to exercise his right to wharf out while the public's rights to access the public trust are preserved. 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. For this reason, I recommend that the Application be denied.

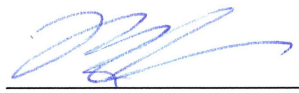
The Applicant's final justification for installing the fences is that the public beach in front of the Property is rocky shorefront which is dangerous, and that he acted to protect the safety of the public. There was a great deal of conflicting testimony regarding the ability of members of the public to safely traverse the area in question. It is not necessary to reach any conclusion as to which testimony was more credible or persuasive because the Applicant's concerns are misplaced.[6] The duty to protect the safety of the public – sometimes referred to in the law as the "police power" – is borne by the state and its municipalities, not private citizens. See, e.g., *Farmington River Co. v. Town Plan & Zoning Comm'n of Town of Farmington*, 25 Conn. Supp. 125, 134, (Super. Ct. 1963)("The regulations were adopted under the so-called authority to provide for the safety, health and good order of society so that the citizens are protected, otherwise referred to in our jurisprudence as the police power. Sometimes this power encompasses all legislation and practically every exercise of authority by government.") The Applicant has identified no authority which would allow him to declare that an area held in the public trust is unsafe and to receive an individual permit to erect structures which will occupy the intertidal area for the purpose of denying other citizens access to that area as a result of his determination. If the Applicant believes

[6] A significant portion of Department staff's post-hearing filing is spent characterizing Mr. Nussbaum's testimony and his motives. In his reply brief, Mr. Nussbaum objects to Department staff's characterizations as inappropriate "character attacks" and "demands" that I "strike – or at a minimum, refuse to consider – all sections of DEEP's brief concerning racial bias and discrimination . . . ." I was present for Mr. Nussbaum's testimony, which has been transcribed and made a part of the evidentiary record. Department staff's characterization of Mr. Nussbaum's testimony and motives is just that – a characterization. I have reviewed the transcripts of Mr. Nussbaum's testimony, which speak for themselves. My decision in this matter is based on that review, and not on any characterization by any party.

the area to be unsafe, his best course of action is to advocate for the State or the Town of Stamford to take reasonable safety measures in exercise of their police power, including, perhaps, a fence on the Town of Stamford property at the intersection of the Hobson Street right-of-way and the seawall.

IV
RECOMMENDATION

For the foregoing reasons, I recommend 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.



Brendan Schain, Hearing Officer

SERVICE LIST

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

PARTY	REPRESENTED BY
The Respondent	
Bernard Nussbaum 100 Sea Beach Dr. Stamford, CT 06901	John P. Casey, Esq. 88 Howard St., Suite C-1 New London, CT 06320 Ph: (860) 275-8299 jcasey@rc.com
Department of Energy and Environmental Protection Land and Water Resources Division Bureau of Water Protection and Land Reuse	David Blatt david.blatt@ct.gov Kevin Zawoy kevin.zawoy@ct.gov

Courtesy Copies

Dr. Damian Ortelli, Chairman
Stamford Harbor Management Commission
dortelli@stamfordct.gov