IN THE MATTER OF	:	***APPLICATION No.: 201502692***
MARACHE	:	***OCTOBER 31, 2019***

FINAL DECISION

This matter concerns an application submitted by Mark and Marti Marche ("the "Applicants") for a permit under Conn. Gen. Stat. § 22a-361, the statutes concerning structures, dredging and fill, and Conn. Gen. Stat. § 22a-32, the Tidal Wetlands Act, including its implementing regulations, R.C.S.A. § 22a-30-1 et seq., which permit also implicates the applicable portions of the Connecticut Costal Management Act, Conn. Gen. Stat. §§ 22a-90 through 22a-112. The Applicants seek to construct a residential dock at 15 Perkley Lane, Greenwich, Connecticut. The proposed structure, which is located waterward of Mean High Water, is comprised of a fixed pier, a ramp, a floating dock, and a boatlift. The parties to this proceeding are the Applicants, staff of the Department of Energy and Environmental Protection, and Susan Cohen, a party who intervened pursuant to Conn. Gen. Stat. § 22a-19 ("the Intervening Party").

On February 22, 2019, after a hearing, the Hearing Officer issued a Proposed Final Decision ("PFD"). The procedural history of this matter is set out in the PFD and is not repeated here. The Hearing Officer recommended issuance of the permit sought by the Applicants with certain modifications. On March 8, 2019, the Intervening Party filed exceptions to the PFD and requested oral argument. After briefs were filed, I heard oral arguments on July 24, 2019.

In issuing this Final Decision, I hereby incorporate the Findings of Fact and Conclusions of Law in the PFD. I concur with the Hearing Officer's thorough and well-reasoned PFD,

including the recommendation that the permit be modified as noted in the PFD. I add only the following brief discussion.

A. **Intervention**: The Intervening Party sought to intervene under both Conn. Gen. Stat. § 22a-19 and the Department's Rules of Practice, specifically R.C.S.A. § 22a-3a-6(k)(1)(B)(i). The Intervening Party takes exception to the Hearing Officer's July 9, 2018 ruling denying the request for intervening party status under the Department's Rules of Practice.

While R.C.S.A. § 22a-3a-6(k)(1)(B) identifies standards under which a request for intervening party status could be considered, the Intervening Party claims only that it had "legal rights, duties or privileges which will or may reasonably be expected to be affected by the decision in the proceeding . . . ." The Intervening Party does not make any other claims under R.C.S.A. § 22a-3a-6(k)(1)(B).

I agree with the rationale in the Hearing Officer's July 9, 2018 ruling rejecting the three grounds proffered by the Intervening Party in support of its claims for intervening party status under the Department's Rules of Practice. I note here only that with respect to one of the grounds, the claim regarding the potential impact of the proposed dock on the "visual character and value of [the Intervening Party's] home," the Hearing Officer made clear that this allegation

> [l]acks specific facts to demonstrate how that damage will occur. *It is possible that additional facts, if alleged,* may have identified a peculiar annoyance which would, or could, reasonably be expected, to impact Ms. Cohen's legal rights, duties or privileges....

(Emphasis added.) July 9, 2018 ruling, p. 3. In short, the Hearing Officer made clear that if additional facts, as opposed to the vague and conclusory allegations in the Intervening Party's June 6, 2018 "Verified Petition and Notice of Intervention" were asserted, it is possible that the Intervening Party's request for intervening party status under the Department Rules of Practice may have been granted. The Intervening Party, however, took no action.

This lack of action stands in sharp contrast to the action taken by the Intervening Party regarding the July 9, 2018 ruling concerning the request to intervene under Conn. Gen. Stat. § 22a-19. In the July 9, 2018 ruling the Intervening Party's right to intervene under Conn. Gen. Stat. § 22a-19 was limited to the claim that the proposed dock structure will degrade visual quality through a significant alteration of the natural features of tidal wetlands. In response to this ruling, the Intervening Party submitted a Motion for Reconsideration asserting new facts supported by an affidavit from an expert witness. This resulted in the Hearing Officer issuing a September 17, 2018 ruling allowing the Intervening Party to assert additional claims under Conn. Gen. Stat. § 22a-19.

The Intervening Party then, took prompt corrective action regarding her request for intervening status pursuant to General Statutes § 22a-19, but took no action regarding that portion of the July 9, 2018 ruling to which she now takes exception, despite the Hearing Officer noting that additional facts, if alleged, may have made a difference. Having chosen to take no action the Intervening Party cannot now be heard to complain, at least with respect to its claim regarding the alleged visual character and value of the Intervening Party's home.[1]

For the reasons set forth above as well as those set forth in the Hearing Officer's July 9, 2018 ruling, I reject the Intervening Party's exception regarding intervention under the Department's Rules of Practice.

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[1] The Intervening Party's citation to *Glendenning v. Conservation Commission of Fairfield*, 12 Conn. App. 47, *cert. denied*, 205 Conn. 802 (1987) to support its claim for standing regarding the alleged impact on her view or the value of her home is not persuasive. The issue in that case was quite different and involved the trial court's failure to consider the express findings of the wetlands commission regarding a "significant loss of view" and the intensity of the proposed development when considering the plaintiffs' claim of aggrievement. *Glendenning,* at 55-56. None of what was at issue in *Glendenning* is present here; no trial court considering aggreivement has failed to take into account specific findings made at an administrative level. *Glendenning* simply does not, as asserted by the Intervening Party, stand for the proposition that any person who makes an allegation regarding a loss of view or diminution in property value should automatically be granted standing. It is readily distinguishable from this matter.

B. The Greenwich Harbor Management Commission - The Intervening Party asserts that the Hearing Officer misconstrued the role of the Greenwich Harbor Management Commission ("GHMC").[1] The Intervening Party first argues that under Conn. Gen. Stat. §§ 22a-113n[2] the Hearing Officer failed to consider as binding, the recommendations contained in a September 18, 2018 letter to the Hearing Officer from the GHMC. To the extent that GHMC's recommendations

[1] There is certainly a substantial question about whether the issues raised by the Intervening Party regarding the GHMC go outside the scope of the Intervening Party's standing under Conn. Gen. Stat. § 22a-19. Since, however, the Intervening Party's arguments were considered in the PFD, I consider them here as well.

[2] Conn. Gen. Stat. § 22a-113m states that a Harbor Management Commission may prepare a management plan and specifies a process for the Commissioner to approve the plan. Conn. Gen. Stat. § 22a-113n concerns the content of the plan and states that:

(a) The plan shall identify existing and potential harbor problems, establish goals and make recommendations for the use, development and preservation of the harbor. Such recommendations shall identify officials responsible for enforcement of the plan and propose ordinances to implement the plan. The plan shall include, but not be limited to, provisions for the orderly, safe and efficient allocation of the harbor for boating by establishing (1) the location and distribution of seasonal moorings and anchorages, (2) unobstructed access to and around federal navigation channels, anchorage areas and harbor facilities, and (3) space for moorings and anchorages for transient vessels.

(b) The plan may recommend: (1) Boundaries for development areas to be approved and established by the Commissioner of Energy and Environmental Protection in accordance with the provisions of section 22a-360; (2) designations for channels and boat basins for approval and adoption by the Commissioner of Energy and Environmental Protection in accordance with the provisions of section 22a-340; (3) lines designating the limits of areas for the location of vessels with persons living aboard to be approved and adopted by the director of health in accordance with section 19a-227; (4) pump-out facilities, including the designation of no discharge zones in accordance with Section 312 of the federal Clean Water Act; and (5) regulations for the operation of vessels on the harbor pursuant to the provisions of section 15-136. Upon adoption of the plan, any recommendation made pursuant to this section shall be binding on any official of the state, municipality or any other political subdivision when making regulatory decisions or undertaking or sponsoring development affecting the area within the commission's jurisdiction, unless such official shows cause why a different action should be taken.

are applicable to this matter,[3] I agree with the Hearing Officer that in this case the GHMC's "recommendations" were not binding.[4]

A harbor management plan approved by the Commissioner of Energy and Environmental Protection pursuant to Conn. Gen. Stat. § 22a-113m may contain recommendations that, unless cause is shown, are binding, but it is the approved management plan that must contain or provide such recommendations. In this case, the recommendations made in the GHMC's September 18, 2018 letter - that the Department provide a certain policy statement and that the Department consider the policies in GHMC's management plan[5] – were not required by, and it is not clear even originated in, the GHMC's approved management plan. Moreover, the GHMC's statement that it was unable to "make a favorable recommendation" on the Applicants' application not only fails to qualify as a recommendation, but more significantly suffers from the same problem previously noted; the recommendation is simply not contained in the GHMC's approved management plan.

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[3] The Intervening Party's argument that whatever recommendation the GHMC may have made was binding upon the Department assumes that the GHMC's recommendation were applicable in this case. That assumption may be incorrect especially since the GHMC did not have an approved plan under Conn. Gen. Stat. § 22a-113m at the time the Applicants' application was submitted to the Department. Indeed, the GHMC's management plan did not take effect until three years after the submission of this application. The Intervening Party's assertion that the Hearing Officer refused to determine if the GHMC management plan applies to the instant matter and that by doing so supported those advocating that the plan did not apply is incorrect. While obviously no analysis of the GHMC's comments would be necessary if the plan was not applicable, in fact, the Hearing Officer evaluated the GHMC's comments assuming *arguendo* that the plan did apply. In addition, while in the context of this case, I understand the PFD noted that the GHMC's comments were public comments. I take seriously such comments, but in this case, any such consideration would not change the outcome of this matter.

[4] There were two parts of the GHMC's September letter that contained recommendations. One part was titled "Findings and Recommendations," while the second part was titled "Additional Comments and Recommendations." The arguments above focus exclusively on the "Findings and Recommendations" part of the GHMC's September 18, 2018 letter. The Additional Comments and Recommendations" part of the letter, while discussing various issues did not contain any specific recommendations.

[5] The recommendation that the Department consider the policies of the GHMC's plan was and remains difficult to understand since that is what the GHMC was doing.

The Intervening Party also asserts that the Hearing Officer misapplied Conn. Gen. Stat. § 22a-361(h) which prohibits the Commissioner from issuing a permit "to authorize any dock or other structure in an area that was designated as inappropriate or unsuitable for such dock or other structure in a harbor management plan approved and adopted pursuant to section 22a-113m." While the Intervening Party cites portions of the GHMC's management plan that mention the presence of certain natural resources, the mere mention and presence of such resources does not, in and of itself, make the Applicant's proposed dock "inappropriate or unsuitable." For Conn. Gen. Stat. § 22a-361(h) to apply, the plain language of the statute requires that an approved harbor management plan designate an area where docks or other structures are inappropriate or unsuitable. As the Hearing Officer noted, that was not the case here regarding the Applicants' proposed dock.

I also do not see any support for the Intervening Party's claim that the Hearing Officer ignored the comments of the GHMC simply because the Hearing Officer did not find anything in the GHMC management plan that designated the location of the Applicant's proposed dock as "inappropriate or unsuitable." To the contrary, the Hearing Officer made clear that comments of the GHMC helped guide his decision-making. PFD, p. 16.

C. **Remaining Issues** – The Intervening Party raises a number of additional issues including that the PFD failed to properly consider the limitations on the Applicants' littoral rights; that the Findings and Conclusions in the PFD were not supported by, or conflict with, the evidence; that the PDF improperly dismisses the visual impact of the dock proposed by the Applicants; and that the PFD incorrectly rejected a feasible and prudent alternative proposed by the Intervening Party.

In response to these assertions I note that neither I nor the Hearing Officer is tasked with finding every possible fact contained in every document or piece of testimony admitted to the administrative record. Instead, the facts found must be sufficient to support the necessary

conclusions of law. See, e.g. *In the Matter of Recycling Inc.*, Final Decision, February 5, 2015, pp. 11-12 (Exceptions urging additional findings of fact rejected, even where proposed facts are supported by citations to the record); *In the Matter of 16 Highgate Road, LLC*, Final Decision, June 23, 2015, p. 3 ("The Intervenors allege . . .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 . . . A failure to find facts favorable to the Intervenor's position is not error.) Upon review of the facts found by the Hearing Officer, I find that no additional facts are necessary to support the conclusions of law in the PFD.

In addition, the Hearing Officer's proposed conclusions are well supported by the evidence in the record, including testimony from experts offered by the Applicant and Department staff. Questions of impacts to tidal wetlands are technically complex, and in matters such as these, administrative agencies typically rely on experts. See, e.g. *River Bend Associates, Inc. v. Conservation & Inland Wetlands Commission*, 269 Conn. 57, 78 (2004) (determination of impacts on an inland wetland is a technically complex matter for which inland wetlands commissions typically rely on evidence provided by experts). While the Intervening Party retained an expert who provided testimony about possible tidal wetlands impacts, that testimony was in conflict with the expert testimony offered by the Applicants and Department staff. Where there is conflicting expert testimony,

> [e]vidence is sufficient to sustain an agency finding if it affords a substantial basis in fact from which the fact in issue can be reasonably inferred. . . . [T]he possibility of drawing two inconsistent conclusions from evidence does not prevent [a determination] from being supported by substantial evidence. . . .

(Citations omitted; internal quotation marks omitted.) *Samperi v. Inland Wetlands Agency*, 226 Conn. 579, 587-588 (1993). With respect to the testimony of Susan Jacobson, a member of

Department staff, "[a]n agency composed of [experts] is entitled . . . to rely on its own expertise within the area of its professional competence." *Connecticut Building and Wrecking Co. v. Carothers*, 218 Conn. 580, 593 (1991).

Finally, I note that to prevail on her claims under Conn. Gen. Stat. § 22a-19, the Intervening Party bears the burden of proving that the proposed structure is reasonably likely to unreasonably pollute, impair or destroy the public trust in a natural resource. As the Connecticut Supreme Court determined, to prevail under Conn. Gen. Stat. § 22a-19,

> [a]n intervening party must . . . produc[e] evidence that the pollution, impairment or destruction of the public trust it complains of is *reasonably likely* to occur and that if the pollution, impairment or destruction does occur, it will be '*unreasonable*.' If, and only if, an intervening party is able to make such a showing, the burden shifts to the entity proposing the regulated activities to demonstrate that the activities should be permitted anyways because there are no feasible and prudent alternatives to the proposed activities.

(Emphasis added). *City of Waterbury v. Town of Washington*, 260 Conn. 506, 550 (2002).

In this case the record is devoid of any evidence to support the conclusion necessary for the Intervening Party to satisfy this burden. The record reveals that the location of the Applicant's proposed dock is a developed area, with many residential homes and more than a dozen docks in the immediate vicinity of the proposed dock. PFD, p. 6. I agree with the Hearing Officer that the proposed dock, even with the proposed boatlift, will not be out of character in this area or unreasonably impact tidal wetlands and that the Intervening Party has simply not met its burden under Conn. Gen. Stat. § 22a-19.

D. Conclusion

As noted above, I reject the exceptions filed by the Intervening Party and instead affirm the decision of the Hearing Officer in the PFD, including the modification to the permit to be issued noted in that decision.

Susan K. Whalen

Susan K. Whalen
Deputy Commissioner
Department of Energy and Environmental Protection

SERVICE LIST

In the matter of Marache
Application No.: 201502692

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