



STATE OF DELAWARE
**DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL**
89 KINGS HIGHWAY
DOVER, DELAWARE 19901

Office of the
Secretary

Phone: (302) 739-9000
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Secretary's Order No. 2013-W-0018

Re: APPLICATIONS OF DEWEY BEACH ENTERPRISES, INC. FOR AUTHORITY UNDER THE SUBAQUEOUS LANDS ACT, SECTION 401 OF THE CLEAN WATER ACT, AND THE COASTAL ZONE MANAGEMENT ACT FOR CONSTRUCTION OF A PUBLIC BAYWALK, A PUBLIC DOCK, A PUBLIC MARINA, A STONE GROIN, A STORMWATER OUTFALL EXTENSION, AND BEACH NOURISHMENT FOR THE RUDDERTOWNE REDEVELOPMENT PROJECT LOCATED ALONG THE REHOBOTH BAY AT 124 DICKINSON STREET, DEWEY BEACH, SUSSEX COUNTY

Date of Issuance: May 23, 2013

Effective Date: May 23, 2013

Background

This Order considers the record developed on Dewey Beach Enterprises, Inc.'s (Applicant) applications submitted to the Delaware Department of Natural Resources and Environmental Protection (Department) Division of Water, Wetlands and Subaqueous Lands Section (WSLS) and to the Coastal Program for authority under the Subaqueous Lands Act (SLA)¹, the federal Clean Water Act, and the federal Coastal Zone Management Act. Applicant seeks approval to construct in public subaqueous lands a public walkway, a public dock, a public marina, a stone groin, an extension of a stormwater outfall and to nourish a public beach (Project). The Project is part of the redevelopment of the Ruddertowne commercial complex located along the Rehoboth Bay at 124 Dickinson Street in the Town of Dewey Beach, Sussex County.

¹ 7 Del. C. Chap. 72 (SLA), and the Department's SLA Regulations, 7 DE Admin. 7504,

The applications were the subject of a public hearing, and the Department's presiding hearing officer prepared that attached Hearing Officer's Report, which recommends approval to the Project consistent with the recommendations of the experts in WSLs and Coastal.

Findings and Reasons

The Department adopts the Report to the extent it is consistent with this Order. The Department determines that the Project represents a unique redevelopment of an existing commercial restaurant and bar into a mixed use commercial and condominium/hotel complex that is intended to be used by the Town and subject to a Mutual Agreement and Release (MAR) between the Town and the Applicant. While the MAR is not binding on the Department's review, it nevertheless should be considered. The MAR reflects the Town's agreement and plans for its future use of the redeveloped area as a central part of the Town's government and a public place along Rehoboth Bay to be used by visitors and residents in an Americans with Disabilities compliant facility that will allow all to use of Rehoboth Bay for fishing and crabbing and extend the public beach.

The Report relies on WSLs' and Coastal's review of the applications. WSLs' analysis found that the Project, particularly without the marina and associated pier and dock, satisfies the regulatory requirements administered by WSLs. Similarly, Coastal also determines that the Project should receive a federal consistency determination as drafted.

Conclusions

The Department, based upon the record and the findings and reasons set forth above, concludes as follows:

- 1) The Department has jurisdiction under its statutory authority to make a determination in this proceeding;

- 2) The Report is adopted and its finding and that the record supports granting the authority consistent with the draft lease prepared by WSLS, which includes reasonable conditions, and the draft letter prepared by Coastal;
- 3) The authority granted by this Order shall allow the construction and use of a 16' wide by 432' foot long public baywalk based upon plans in the record as of the date of this Order, denies construction of the public marina and associated public dock and pier facilities, requires the installation of a vinyl sheeting along the Rehoboth Bay Marina's wall, and modifies the beach nourishment;
- 4) The Department provided adequate public notice of the applications and the public hearing, as required by the law and the Department regulations;
- 5) The Department held a public hearing and has considered all timely and relevant public comments in making its determination; and that
- 6) The Department shall publish this Order on its public web site and provide such other service and notice as required by law and Department regulation or otherwise determines necessary and appropriate.



Collin P. O'Mara
Secretary

HEARING OFFICER'S REPORT

TO: The Honorable Collin P. O'Mara
Secretary, Department of Natural Resources and Environmental Control

FROM: Robert P. Haynes, Esquire
Senior Hearing Officer, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: APPLICATIONS OF DEWEY BEACH ENTERPRISES, INC FOR AUTHORITY UNDER THE SUBAQUEOUS LANDS ACT, SECTION 401 OF THE CLEAN WATER ACT, AND THE COASTAL ZONE MANAGEMENT ACT FOR CONSTRUCTION OF A PUBLIC BAYWALK, A PUBLIC DOCK, A PUBLIC MARINA, A STONE GROIN, A STORMWATER OUTFALL EXTENSION, AND BEACH NOURISHMENT FOR THE RUDDERTOWNE REDEVELOPMENT PROJECT LOCATED ALONG THE REHOBOTH BAY AT 124 DICKINSON STREET, DEWEY BEACH, SUSSEX COUNTY

DATE: May 15, 2013

I. PROCEDURAL HISTORY

This Report considers for the Secretary of the Department of Natural Resources and Environmental Control (Department) Dewey Beach Enterprises, Inc.'s (Applicant) request submitted November 5, 2012 to the Department's Division of Water, Wetlands and Subaqueous Lands Section (WSLS) for authority under the Subaqueous Lands Act¹ (SLA) and water quality certification under Section 404 of the federal Clean Water Act. Applicant also sought from the Department's Coastal Zone Management Program (Coastal) a federal consistency determination under the federal Coastal Zone Management Act as activity requiring a permit from a federal entity, the United States Army Corps of Engineers. DNREC Ex. 2. Applicant seek to construct and use facilities (Project) as part of Applicant's 'Ruddertowne,' redevelopment, which will be a commercial and condominium/hotel complex to replace and renovate the existing commercial

¹ 7 Del. C. Chap. 72.

complex located at 124 Dickinson Street, within the Town of Dewey Beach, Sussex County.
DNREC Ex. 1.

On November 21, 2012, the Department published public notice of the applications.
DNREC Ex. 3. The Department received written comments, including requests for a public hearing. DNREC Ex. 5.

On January 15, 2013, Applicant submitted additional information for consideration in response to 'local feedback,' and to reflect the February 2011 Mutual Agreement and Release (MAR) between the Applicant and the Town of Dewey Beach (Town). The Applicant information indicated that it would support a proposed public baywalk 16' wide. The Applicant also indicated it would support eliminating the proposed two crabbing and fishing platforms on the baywalk, which would reduce the use of public subaqueous lands by 640 square feet (sf). The Applicant also indicated that it would withdraw the proposed marina, which would further reduce the use of public subaqueous lands by 2,128 sf. The Applicant indicated that the alternative would result in a net decreased use of 128 sf in public subaqueous lands.

On January 16, 2013, the Department published public notice of a public hearing on the application, which was held February 8, 2013 at 124 Dickson Street, Dewey Beach. DNREC Ex. 4. I presided over the public hearing. The public comment period closed at the conclusion of the hearing.

On February 19, 2013, Applicant submitted a letter to clarify that it did not intend to build the proposed marina, and that 5,413 sf of public subaqueous lands would be used by the 16' wide by 358' long baywalk, as measured by the outer perimeter and not the centerline. The letter indicated that it was the final application.

WSLS requested Applicant submit revised plans to consider and Applicant provided changes dated April 1, 15, and May 8, 2013.

I requested the technical assistance of experts in WSLS and Coastal. WSLS' expert, Scott Figurski, prepared the attached technical response memorandum (TRM), which recommends revisions consistent with the alternative and the WSLS requested plans. The WSLS sheeting to the existing wall along the south area of the beach nourishment area along the wall for the Rehoboth Beach marina. Coastal's expert, Tricia Arndt, prepared Coastal's attached TRM that recommends approval. Both programs provided drafts of the recommended approvals. I consider the record, as reviewed below, complete for a final decision.

II. SUMMARY OF THE RECORD

The Department's record contains the following: 1) the verbatim transcript of the public hearing; 2) the documents identified as exhibits and introduced at the hearing; and 3) this Report, including the post-hearing documents referenced in this Report. The following summarizes the record.²

Attending the public hearing from the Department were Virgil Holmes, WSLS' Program Manager II, Scott Figurski, Environmental Scientist in WSLS, and Trisha Arendt, an Environmental Scientist in Coastal. The Department provided the documents³ for the record. The procedural documents were identified in the above procedural history.

² This summary recites public comments and other information in the record that may not be factually accurate or relevant, but this Report's recommendation relies on information determined independently to be factually correct.

³ The Department provides documents at the hearing solely to assist the public in making public comments. The Department may rely on other information identified in this Report or the Secretary's Order to support the Department's final decision.

The written comments received in response to the public notice of the public hearing were in DNREC Ex. 6. These comments were from the following: 1) the Mayor of Dewey Beach and Town Councilmembers Howell, Legates, Mauler and Riordan, who requested that the Project be consistent with the MAR; 2) Dave and Rish Davis, who wrote in opposition based upon the application not being consistent with the MAR; 3) Kenneth and Susan Lodge, who wrote in opposition based upon the 'newly revealed plans' and concerns with the impact on stormwater; 4). Lisa Gordon, who wrote seeking delay on the Project to investigate it further; 5) Steven Sylvester, who wrote to oppose the Project and particularly the marina and losing public access to the beach; 6). Brian and Lisa Gore, who wrote in opposition to the proposed use of rip rap and piers along the bay and wanted there to be public access to the beach, 7) Helene Bruhl, who wrote to oppose the marina and also expressed concern with the flooding the Project may cause, 8) James Tyler, who wrote to express his support for public beach access; 9) an unidentified person, who wrote in opposition to any construction that would hurt the bay; 10) Donald Gritti, who wrote to support a baywalk that allows public access for nature viewing without looking at a pier; 11) Marcia Schieck and Rich Henewinkel, who wrote to oppose the Project insofar as it violates the MAR; 12). Anne Duffin, who wrote to complain about the changes to the plans and the lack of adequate notice of them; 13). Gene SirLouis, who wrote to oppose the Project and complained about the lack of notice; 14) Citizens to Preserve Dewey representative, who wrote to oppose the Project as inconsistent with the MAR and complained about the lack of proper notice and requested that no decision should be made until the Delaware Supreme Court makes a decision on the challenge to Project; 15) John Jankowski, who wrote as the President of the Cove Owners Association. Rehoboth Bay Marina to oppose the proposed marina, the beach nourishment and the rip-rap groin; 16) an unidentifiable person who lives at

104 Hayden Road wrote to oppose the Project; 17) Daphne Byron, who opposed the Project because of the lack of environmental documentation of the Project's impact; 18). James Tyler, who wrote to oppose the private use of the public beach at Van Dyke Street; 19). Town Commissioner Joy Howell, who wrote in support of a 12' wide baywalk and an addition of a 500 square foot gazebo; 20) Jeremy Rogers, who wrote to oppose the Project and the change to an Ocean City type bar on Rehoboth Bay; 21). Susan Slye, who expressed her concern with the Project based upon the private use of public property, the stormwater change before the approval of the stormwater management plan, the beach nourishment that may harm terrapins laying eggs in the beach, that the migration of sand may be harmful, that the construction of docks and piers would be harmful, and the structures would be contrary to the MAR; 22). Marty Sietz, who opposed the Project for not complying with the MAR, but sought permit conditions for the facilities and their maintenance, and who opposed the construction of a marina larger than 24 slips; 23) Betsy Damos, who opposed the Project and commented on the restaurant, Que Pasa, and its use of the public beach for its business and expressed her concern with possible flooding from no adequate stormwater management, with the proposed marina, with the need for public restrooms, and with the need for waste disposal bins for trash; 24). Jennifer Taylor, who wrote in to express her concern with the need to maintain public access; 25). Marty Sietz, who wrote again to oppose the fishing areas, the lack of a baywalk 12' wide, and the need to have stormwater managed, including placement of the outfall under the proposed groin; 26) Henry and Lynne McVay, who wrote to express concern with flooding; and 27) Eileen and Barry Guerke, who wrote in support of the Project.

Additional written comments were received in response to the public hearing notice. DNREC Ex. 6. These comments were from: 28) Carol Everhart on behalf of the Rehoboth

Beach-Dewey Beach Chamber of Commerce, who supports the Project as a way to bring families to Dewey Beach; 29) JV Przygocki, who wrote to support the Project and to provide his experience as sitting Town commissioner when the MAR was signed, which he indicated was opposed by the current sitting Town commissioners; 30). Graham Smith, who wrote to support the Project's fishing pier and stormwater outfall extension; 31). Jim Laird, who wrote as former Dewey Beach Town commissioner in support of the 16' wide baywalk and indicated that without the MAR the redevelopment would have been a gated townhouse community that would not have provided any public access to the bay; 32). Maggie Mesinger, who wrote to support the 16' wide baywalk and noted that it was consistent with the planning approval; 33). Joe and Katie McAvoy, who wrote in with a comprehensive history of the Project and in support of the 16' wide baywalk; 34) Mark Allen and Denise Campbell, who wrote in with a letter similar to the McAvoy's; and 35). Bill Moyer, who wrote to oppose the Project based upon the existing use of public subaqueous lands that occurred despite of a prior Department warning not to construct the existing structure. He noted that the construction of the existing deck and its use is contrary to the law and the Public Trust doctrine and he requested a review of the Department's files to confirm that the existing facilities were to be open to the public and that in the past there was an attempt to make Dickinson Street a private street failed, but that a circular driveway was constructed and that the beach was used for volleyball court exclusively by Ruddertowne patrons. He considered that the new deck would limit water access and that the Project should be denied.

The Applicant's representatives in attendance at the hearing were David Sills, one of Applicant's owners, and Evelyn Maurmeyer, Ph.D., Applicant's consultant from Coastal & Estuarine Research. Mr. Sills indicated that the Project went through the Town's process and

mentioned the MAR was signed on February 26, 2011. Dr. Maurmeyer spoke on the Project's process beginning with a joint permit processing meeting with the Department. She discussed the initial 16' wide boardwalk, the beach nourishment, stormwater plans, and marina plans. She indicated that following a meeting with the Department that modifications were made to provide 8' wide boardwalk with two 8' bump outs for crabbing and fishing. She indicated that in response to the public comments received, Applicant submitted an alternative in January 2013 that would withdraw the proposed marina and increase the width of the boardwalk to 16'. Dr. Maurmeyer recounted the history in which Applicant purchased the property in October 2007, the MAR was executed with the Town in February 2011 and the planning and zoning approved 16' wide boardwalk and the Town approved this in June 2011, subject to Department approval. The presentation included slides showing aerial photographs. Applicant Ex. 1.

The first member of the public to speak was Betsy Damos, who questioned whether the existing walkway was open to the public. Mr. Holmes stated that it was to be open to the public. Ms. Damos indicated that it was used for Ruddertowne's patrons, and she was alarmed to observe plastic drink straws in the water that was from having the patron service area so close to the water. She commented that the location is not a good place to swim and how the Project advertises the use of the beach for its prospective customers.

The second person to speak was Elissa Feldman who indicated she was speaking on behalf of Citizens to Preserve Dewey, which she indicated was formed in 2007 because of concerns with commercial development. She indicated that the commercial redevelopment of Ruddertowne included a proposed 46' height for a building, which she indicated violated the 35' building ordinance and this proposed height became a source of controversy because property owners felt it would destroy the integrity of the small 2 block by 22 block Town. She indicated

that after six years of public controversy and a public referendum that resulted in 86% opposed to the redevelopment, the Town entered into the MAR by adopting a resolution and not an ordinance. She requested that the Project be moved ahead and that it should comply with all rules and regulations. She wants the baywalk to be 16' wide and not the originally proposed 8' wide baywalk. She expressed her opposition to the proposed marina, which was not part of the MAR. She expressed concern with flooding from stormwater and whether the outfall extension will cure the problem. She also requested no decision be made on the outfall extension until the Town completes its stormwater master plan, which is anticipated to occur in the summer of 2013. She spoke about the need to maintain the baywalk as a public space and not be used to serve patrons. She also questioned why there was no 500 square foot gazebo proposed in the original or alternative plans, but which the MAR required. Finally, she complained about the lack of personal notice of the application by the Applicant and noted that Delaware Supreme Court argument on the redevelopment. Her written statement was marked as CPD Ex. 1.

The third person to speak was Diane Hanson, the current Mayor of Dewey Beach. Mayor Hanson spoke in support of the MAR and the construction of a 16' wide walkway, which she indicated is similar to other structures that the Department has approved.

The fourth person to speak was Joy Howell, a Dewey Beach Town Commissioner. She spoke in support of a 16' wide baywalk. She also wanted signage posted to ensure public access.

The fifth person to speak was Anna Legates, who also is a Dewey Beach Town Commissioner. She spoke in favor of the baywalk and raised overall environmental concerns with the planning aspects of the redevelopment such as a traffic study and environmental review by DNREC. She criticized the Applicant for not participating in the PLUS process. She expressed concern with the proposed approximately 200 new housing units with the hotel and

condominiums and the impact the units would have on traffic and the environment, particularly flooding.

The sixth person to speak was Graham Smith, who noted the comprehensive plan approved for Dewey Beach. He noted that there was a desire to move from a college town to a larger town with the redevelopment of Ruddertowne and better public access to the bay. He considered that the existing walkway was private property and that the proposed will extend beyond the private property. He voiced support for the beach expansion and also for a pier. He said there was a lack of public pier space for boats. He ended his comments by supporting a 16' wide walkway.

The seventh person to speak was Chris Redefer, who is the owner/manager of the Rehoboth Bay marina located to the south of the Project. He expressed confusion over the proposal and its changes, but spoke in favor of the walkway and the condition that it would be open to the public. He noted that there were 8 blocks along the bay between the Project and Bellevue and only 4 of the blocks had public access to the bay. He complimented the on maintaining the beach to keep it clean.

The eighth person to speak was Marty Seitz, who wanted the Project to have public access to the water.

The ninth person to speak was Donald Gritti, who expressed his objection to the existing structure that prevented viewing the beach such as exist on the park beaches at Van Dyke and Dickinson. He considered the construction of a man-made structure as inhibiting the use of the beach between Van Dyke and Dickinson.

The tenth person to speak was Carol Everhart who represents the Rehoboth Beach and Dewey Beach Chamber of Commerce. She spoke in support of the Project as a way to encourage more families to visit and stay longer.

The eleventh person to speak was Bill Zolper, who supported the Project but was concerned with the parking.

Pat Wright was the next person to speak and supported the Project.

David Thomas was the next person to speak and indicated he supported the marina pier.

Claire Walsh spoke next and indicated she has a boat docked a Pier Point and asked questions about the stormwater pipe extension and similar stormwater projects in Dewey Beach. She supported the Project. She also supported the pier, which she considered would reduce automobile traffic.

Dale Cooke spoke in favor of the 16' wide baywalk and how the Project has been processed by the Town in the public. He also expressed disappointment that the pier had been dropped.

Steve Spence spoke in favor of the Project as a representative of Rusty Rudder located on the north side of the Project on the other side of Dickinson Street. He was particularly happy with the proposed beach nourishment.

Sonia Koplwicz and Steve Cardano spoke in support of the Project s representatives of the Cape Water Taxi and they supported the pier for boat docking.

Marcia Schieck spoke and indicated that the developer had sued the Town into submission. She also indicated her support for a 16' wide walkway and an open public beach, as opposed to being used by patrons of a restaurant.

Gary Mauler spoke and disputed that the Town's review of the Project was not open and he expressed his support for the Project.

WLSL prepared the attached TRM that supports approval of a 16' wide walkway and no construction of a marina. WLSL prepared a draft lease provided and relied upon Applicant's revised plans prepared at WLSL's direction. Coastal's attached TRM and draft consistency letter also supports the Project based upon the WLSL recommended changes.

III. DISCUSSION OF FINDINGS AND REASONS

Applicant's seeks authority for the following construction and uses: 1) an 8' x 330' public access walkway with a 8' wide bump outs 44to allow use for fishing/crabbing (bay walk), 2) an 8' x 44' fishing pier off the walkway for crabbing/fishing, 3) a 6' x 90' pier with ten 2' x 20' finger piers, 4) a 6' x 48' boat dock, 5) a 50' extension of an existing stormwater outfall at Van Dyke Street, 6) a 6' x 90' stone rip-rap stone groin to be located under the bay walk along the south side of the Lighthouse restaurant, and 7) an 80' extension of the beach by adding 2,000 cubic feet of sand. The boat dock was for a proposed 24 slip marina, which would be used for short term boating docking that would not require the associated marina parking and other facilities found at marinas used for longer term boat mooring.

On January 15, 2013, Applicant on submitted an alternative plan, which reflected changes made in response to 'local feedback' to the original proposal. This alternative would 1) increase the baywalk's width from 8' to 16'; 2) remove the boat docking facilities; and 3) remove the fishing/crabbing bump outs on the bay walk.

WLSL recommends that the alternative be adopted and WLSL directed the Applicant to submit revised plans consistent with WLSL's recommendation, which Applicant provided. I find that the record supports adopting WLSL's recommended position, which is to approve a 16' wide

by 432' long bay walk and to deny the proposed marina and the related pier. I find that the WSLS' recommended approval and denial is supported by the record and consistent with the unique nature of the proposed bay walk as part of the redevelopment of Ruddertowne, which will be a mixed use quasi town center that will have municipal office space as the result of the MAR.

Most of the public comments supported the bay walk based upon the alternative that was submitted consistent with the MAR. Some of the public comments raised an issue with the existing deck/walkway, which the comments considered was being used not as a public walkway but as private property for the exclusive benefit of the Ruddertowne complex in general and the Lighthouse restaurant in particular. The application refers to a 6' wide existing walkway to allow ingress and egress to the restaurant, but the current lease requires a public access walkway. Thus, I find that the current use may not have been consistent with the Department's requirement that public use be provided for the walkway. I find that public access should be an essential requirement of any approval. This finding is consistent with the lease prepared by WSLS. If the lease terms are not followed, then the issue is a matter to be brought to the Department's attention as an enforcement matter so that appropriate action may be taken for any violation of the lease.

Many of the public comments raise an issue with compliance with the MAR, which the Applicant provided in the application. I find nothing in the MAR that binds the Department to do anything. Instead, the MAR allows for the possibility that the Department may not approve anything. The MAR expressly requires the Applicant to comply with its requirements even if the Department does not approve anything based upon the following: "[i]n the event the required approvals cannot be obtained in whole or in part, DBE shall complete construction of the bay walk in the area closest to the Bay not requiring approval." If the Department were to deny the

application for the baywalk, DBE would still have to build it but use its own land and not public subaqueous lands. Thus, the Department's decision on the pending application does nothing to change the MAR, which is a contract between DBE and the Town.

Nevertheless, I find that the MAR represents what the Town wants, or at least did want when signed. The record shows a considerable turnover in the Town's elected officials. For purposes of this Report, I determine that the MAR remains in effect and supports the Town's position that is consistent with the bay walk WSLs recommends. The Town's position as set forth in the MAR should be afforded considerable weight in the Department's deliberations because the MAR makes the proposed redeveloped commercial complex more than just a commercial and residential development, but instead it may be used by the Town as part of its municipal facilities. The municipal use makes the Project different and justifies the bay walk as recommended by WSLs that would be larger than the guidance documents because the bay walk will be heavily used as a public walkway and part of a new town center. The MAR's bay walk is described as a "continuous exterior walkway from Van Dyke Avenue to Dickinson Avenue along the Rehoboth Bay that may be publicly accessed without restriction at all times (this may include space currently, or in the future, licensed for use by the restaurants as well)." The MAR described that the "bay walk shall be 12 feet or more in width, and shall be compliant with the Americans with Disabilities Act." The MAR's bay walk includes the existing beach frontage along Que Pasa and the jet ski rental location. The bay walk would go between Dickinson Avenue to Van Dyke Avenue, which would eliminate any beach access to the public beach along its entire length. The plans show the existing 6' wide deck as remaining in place, but WSLs recommends instead a 16' wide bay walk to allow for the anticipated use as part of the renovated Ruddertowne complex. The bay walk required by the MAR will allow more ready access to

observing Rehoboth Bay by walkers, particularly those with physical disabilities that require wheelchairs. More importantly, the WSLs recommended bay walk is made along with the denial of the marina, and consequently the net impact on subaqueous lands is less than in the original application. While the Applicant agreed to this change in the face of considerable opposition, the record also contains public support for a marina. I agree that the environment would be improved by not allowing the marina to be built. I consider that the construct of the marina would defeat the purpose of the bay walk, which was stated to allow public access to views of Rehoboth Bay in its natural setting, namely, a view of water without a pier and dock, even if this view will be flanked by marinas on both sides.

The importance of public access was stressed in the public comments and WSLs has included conditions in the draft lease in terms. First, the lease in special condition 2 require that the 16' wide by 432 ' long bay walk shall be open to the public 24 hours a day year-round, except when such access is determined to be unsafe for pedestrian access due to storms or other damage. This condition also prohibits Applicant from limiting public use by placement of chairs and tables. Special Condition 3 also requires that the 70' wide by 195' long beach be kept open for public access and prohibits any tables, chairs, benches, umbrellas, signs, kayaks or watercraft etc. from being placed on the beach by any commercial enterprise in a manner that restricts use of or public access to the beach. Special Condition 4 will require Applicant to install signs announcing the public access to the bay walk and the beach area. Special Condition 8 requires that the Passive Conservation Easement shall continue to be in effect as finalized in the August 20, 1998 Consent Order. Special condition 10 provides protection for horseshoe crabs during the time period April 15-August 30 without the on-site observation by Department personnel.

The WSLs lease also confirms the mandated lease payments for use of 6,912 sf by the baywalk and the use of 13,650 sf for the beach nourishment area, and refers to the existing lease in SL/075/08 for the 1,250 sf of existing floor space and the 968 sf of existing decking.

The Department's prior grant of SLA authority required public access to the 6' wide walkway. The record as a result of this public hearing process supports the need to ensure that public access occurs. I recommend that the Department delegated to the Town the Department authority to ensure that the lease provisions are followed. The Department will still be able to enforce its authority but the Town will be in a better position to take action because of its proximity to the Project. The prior subaqueous lands lease dated April 2, 2009 received approval of the existing deck and restaurant floor space. This approval remains in effect until January 31, 2019. This lease superseded the original lease date June 14, 1993. The Consent Order also remains in place that resolves the past enforcement issues. Condition 11 requires that the 968 square feet of open walkway (decking) over subaqueous lands shall be for public ingress and egress. The remaining 1,250 square feet of leased public subaqueous lands were allowed to be enclosed and used as a restaurant and for no other purpose. The lease requires permanent visible signs to be posted at the Van Dyke Avenue side of Ruddertowne indicating the right of "Public Access" along the waterfront of Ruddertowne and in the "Passive Conservation Easement Area."

WSLS recommends the expansion of the public walkway to 16' wide along the entire length of the bay. This would be consistent with the MAR, which requires a public walkway of at least 12' wide. There is no support in the record on the reasons for the width other than the reference to the MAR, which is not controlling. In addition, the Department regulations also apply and require a water dependent activity, which I find that the expansion allows because the 8' wide fishing and crabbing areas essentially have been expanded to the entire length of the

baywalk that is over the water. The Department has guidance documents that were used to cause the Applicant to reduce the originally proposed size from 16' wide to 8' wide with two fishing/crabbing bump outs that added 8' wide portions along a 48' and 32' sections. Thus, the fishing bump outs had a total width of 16' for portions. I find that the WSLS recommended changes are reasonably within a change that is consistent with the original Project. Changes made at the direction of the Department to a pending application do not require public notice, but do require support in the record and WSLS has provided ample support in its TRM for its recommended position to approve a 16' wide bay walk and not to approve the proposed marina facilities..

I find that the public comments on a gazebo do not apply to anything to be built in the subaqueous lands. Indeed, Department SLA Regulation 7504 Section 2.6.2 expressly prohibits gazebos. Again, the MAR does not control anything in the subaqueous lands if it is not otherwise consistent with protecting the environment so the gazebo must be constructed on uplands to comply with the MAR.

On the issue of the beach nourishment, I agree with WSLS and Coastal recommendations that beach nourishment should occur. Applicant proposes to use sand from the Ruddertowne site and I find such use appropriate. The record supports that the sand has been tested to determine its suitability. The possibility of sand migrating, including to adjoining properties, does not pose any undue risk to the environment, particularly insofar as sand is a natural element while the marina use is not. In addition, WSLS recommends the installation of vinyl sheeting and this may reduce the migration of sand that may interfere with the marina's use. The marina's recourse for any sand movement remains obtaining authority to remove sand by dredging.

On the issue of the groin raised by the public comments, I find that the WSLs recommendation should be adopted. The groin will allow the beach sand to be managed and will protect the bay walk from damage from storms.

Public comments also questioned the extension of the outfall. I agree with WSLs' recommendation and find that the Department should not delay its decision on the speculation of what may be in a revised stormwater plan. The comments noted that a new stormwater master plan may be finished by the summer of 2013. I agree that if and when a new stormwater plan is completed, then that information would be useful for this decision, but since it is not available now I find that there no support in the record that the proposed outfall extension is not consistent with the current approved stormwater plan. I do not see any conflict in acting on what is known now. Should the grant of the authority in the current decision of the SLA application be subsequently determined to be inconsistent with the revised stormwater plan, then I recommend that the Department reserves the right to reconsider its decision based upon new information, which would have to justify that a change is needed to protect the environment.

If the revised stormwater plan makes a determination that conflicts with Applicant's proposed outfall extension, then that may justify the Department from acting to reconcile the differences, if possible. Absent a revised plan, there is no good reason to not grant the extension that will allow the Project to go forward based upon the current plan. I note that some of the Project's work on the beach area will not be allowed during certain times of the year, which may allow time to complete the stormwater plan and allow it to be considered if there is a conflict with the proposed extension.

IV. CONCLUSION

I recommend that the Department issue Applicant the authority based upon the WSLs and Coastal recommendations and not based upon the applications.



Robert P. Haynes, Esquire
Senior Hearing Officer