

Secretary's Order No.: 2009-W-0010

RE: WSLs Permit Application of DEVA Development, Inc., to construct a kayak/canoe launch consisting of an access ramp and a floating pier in the Montego Bay at Lot #1, Old Lighthouse Road, Selbyville, Sussex County, Delaware

Date of Issuance: March 26, 2009

Effective Date: March 26, 2009

I. Background:

On Tuesday, October 28, 2008, the Department of Natural Resources and Environmental Control, the Wetlands and Subaqueous Lands Section, held a public hearing at the Fenwick Town Hall, 800 Coastal Highway, Fenwick Island, Delaware, in order to receive public comment concerning a subaqueous lands permit application for a proposed kayak/canoe launch, consisting of a 4 foot by 15 foot access ramp, and a 4 foot by 20 foot floating pier, in Montego Bay at Lot #1, Old Lighthouse Road, Selbyville, in Sussex County, Delaware. The access ramp and floating pier are subject to the requirements of the Subaqueous Lands Act, 7 Del.C., Chapter 72, and the *State of Delaware's Regulations Governing the Use of Subaqueous Lands*.

The proposed structure is somewhat unusual, in that it is located approximately 0.35 miles from the community it is intended to serve. As originally designed, it would extend channelward approximately thirty-five feet beyond the mean high waterline. An alternative design for the project was proposed by the Applicant at the public hearing, which reduced this encroachment to approximately fifteen feet. This alternative design also changed the launch platform from a floating to a fixed structure.

This hearing was conducted pursuant to the Subaqueous Lands Act, 7 Del.C., Chapter 72, the *State of Delaware's Regulations Governing the Use of Subaqueous Lands*, and Chapter 60 of the Delaware Code. Proper notice of the hearing was provided, as required by law.

After the hearing, the Hearing Officer performed an evaluation of the administrative record in this matter. Thereafter, the Hearing Officer prepared her report and recommendation in the form of a Hearing Officer's Report to the Secretary dated March 9, 2009, and that Report, with its exhibits attached thereto, is expressly incorporated herein by reference.

II. Findings and Conclusions:

1. Proper notice of the hearing was provided as required by law.
2. Structures located in public subaqueous lands are subject to the Subaqueous Lands Act (Title 7, Del.C., Chapter 72) and the *Regulations Governing the Use of Subaqueous Lands*. Section 3 of said *Regulations* requires that applications be evaluated based on their public use impacts, as well as environmental considerations.
3. The Applicant's proposed project, as currently designed, would adversely affect the ability of the adjacent property owner to safely navigate his vessel onto and off of his existing boat lift. Even with the revised design presented at the time of the hearing, the fifteen feet of channelward encroachment would block the path needed for the adjacent property owner to safely and properly maneuver the vessel onto and off of the existing boatlift.

4. The Department's aforementioned *Regulations* further require consideration to be given to "...*the extent to which the Applicant's primary objectives and purposes can be realized without the use of such [subaqueous] lands (avoidance).*" To that end, the Applicant should investigate the possibility of establishing an agreement with Cape Windsor, which would authorize the residents of Verandah Bay to use their boat ramp for vessel launching, as this scenario would have less impact to subaqueous lands than the Applicant's project as currently proposed.
5. The proposed pier design does not seem well suited to the stated project purpose, which is the launching of canoes and kayaks. However, the shallow water and gently sloping sandy nearshore area in front of the Applicant's property seems to be very well suited to this purpose.
6. Although the Department cannot support the proposed project as currently designed, the WSLs remains willing, ready and able to assist the Applicant with revising his plans for possible future projects which would be well suited for that property. Should the Applicant wish to pursue an alternative plan to the proposal and request currently before the Secretary, a new application and notice (thus affording the public the opportunity to provide comment to the Department regarding same) would have to be filed by the Applicant for future consideration by the Department

III. Order:

In view of the above findings, it is hereby ordered that the Wetlands and Subaqueous Lands Section Permit Application of DEVA Development, Inc., to construct a kayak/canoe launch consisting of an access ramp and a floating pier in the Montego Bay at Lot #1, Old Lighthouse Road, Selbyville, Sussex County, Delaware, be *denied*.

IV. Reasons:

The record does not warrant, nor has the Applicant reasonably justified to the Department, his request for the WSLS permit noted above. Moreover, a review of this request in light of the State of Delaware's *Regulations Governing Wetlands and Subaqueous Lands* reveals that the proposed project, as currently designed, does not meet the regulatory criteria contained therein.

In an attempt to balance the protection of Delaware's natural resources with the right of a landowner to enjoy and use his own property, the Department has suggested more suitable alternatives to the Applicant for the launching of canoes and kayaks at this project site than what is presently being proposed in DEVA's current application. For example, the Department could support the use of this site for the homeowners at Verandah Bay by the creation of a small ramp over the existing rip-rap for kayakers to safely gain access to the water. This would avoid the placement of structures in subaqueous lands which pose navigational concerns and which may not be well suited to the stated project purpose.

Should the Applicant wish to pursue any of these alternatives, the Department would certainly assist him in doing so. At this juncture, however, the Department cannot grant the pending application of DEVA Development, Inc., as doing so could adversely affect and/or fail to protect the public's interest in public lands held in trust by the State

of Delaware for its citizens, and thus fail to assure that the disposal and use of these lands are, in fact, in the public interest.

/s/David S. Small

David S. Small
Acting Secretary

HEARING OFFICER'S REPORT

Regarding: WSLS Permit Application of DEVA Development, Inc., to construct a kayak/canoe launch consisting of an access ramp and a floating pier in the Montego Bay at Lot #1, Old Lighthouse Road, Selbyville, Sussex County, Delaware

Lisa A. Vest
Hearing Officer

March 9, 2009

I. Background Findings:

On Tuesday, October 28, 2008, the Department of Natural Resources and Environmental Control, the Wetlands and Subaqueous Lands Section, held a public hearing at the Fenwick Town Hall, 800 Coastal Highway, Fenwick Island, Delaware, in order to receive public comment concerning a subaqueous lands permit application for a proposed kayak/canoe launch, consisting of a 4 foot by 15 foot access ramp, and a 4 foot by 20 foot floating pier, in Montego Bay at Lot #1, Old Lighthouse Road, Selbyville, in Sussex County, Delaware. The access ramp and floating pier are subject to the requirements of the Subaqueous Lands Act, 7 Del.C., Chapter 72, and the *State of Delaware's Regulations Governing the Use of Subaqueous Lands*.

The proposed structure is somewhat unusual, in that it is located approximately 0.35 miles from the community it is intended to serve. As originally designed, it would extend channelward approximately thirty-five feet beyond the mean high waterline. An alternative design for this project was proposed at the public hearing, which reduced this encroachment to approximately fifteen feet. This alternative design also changed the launch platform from a floating to a fixed structure.

Numerous members of the public attended this hearing, and their comments regarding this matter are addressed in detail below. This hearing was conducted pursuant to the Subaqueous Lands Act, 7 Del.C., Chapter 72, the *State of Delaware's Regulations Governing the Use of Subaqueous Lands*, and Chapter 60 of the Delaware Code. Proper notice of the hearing was provided, as required by law.

II. Summary of Record:

A. Department Presentation:

Scott Figurski, Environmental Scientist with DNREC's Wetlands and Subaqueous Lands Section (WSLS), and Laura Herr, Section Manager for WSLS, represented the Department at this public hearing. Introductory remarks from Ms. Herr were made at the beginning of this hearing, to ensure that the public fully understood (1) the Department's neutrality at that time with regard to the Applicant's pending permit application; and (2) the importance of the Department receiving public input concerning the same. Following those introductory remarks by Ms. Herr, Mr. Figurski introduced nine (9) exhibits to be submitted into the formal hearing record regarding this permitting hearing.

B. Applicant Presentation:

Subsequent to the Department entering its exhibits into the record, Jeremy Homer, Esquire, counsel for the Applicant, offered two witnesses to present a brief presentation on behalf of Applicant in this matter. First, Thomas Ford, President of DEVA Development, Inc., offered a brief description of where the Verandah Bay development is in Sussex County, and, specifically, where the proposed structure would be located. Mr.

Ford used aerial photography to explain to those in attendance at the hearing exactly where the proposed structure, if approved by the Department, would be located.

According to the Applicant, Verandah Bay has been approved for twelve detached homes, an amenity area, and a pool. Everything with regard to the necessary infrastructure for this development, such as sewer, water, roads, etc., has already been put in place, and construction is ready to begin on the individual homes.

The Applicant provided to this Hearing Officer a packet of information concerning this proposed project and DEVA's pending application with the Department (marked at the time of the hearing as "Applicant #1). The same is attached hereto as Attachment "A", and is expressly incorporated into this Hearing Officer's report at this time. Through questioning by Mr. Homer, Mr. Ford stated that the Applicant is willing to have its permit or lease bound to various conditions (i.e., length of the pier, parking spaces on the site's location, fencing with gates, no over-night docking, etc.) with regard to use and particular purpose of the site, and those items are found specifically under Tab #3 of Attachment "A".

In his presentation, Mr. Ford noted that the Applicant had gathered 26 signatures from residents of the Cape Windsor community (which is located directly behind the Verandah Bay community), all of whom were in favor of this project. Reasons for voicing support of this project, according to Mr. Ford, were that (1) the particular lot for which the Applicant seeks application approval had otherwise been an "eyesore"; (2) that the proposed project was a practical use for the piece of land; and that (3) it would be a nice amenity for future Verandah Bay homeowners. When members of the Cape Windsor community voiced concern that members of the newer community would

trespass on their private property (such as their private boat ramps and pools), the Applicant installed seven-foot high fences to prevent such activities from occurring. Mr. Ford further noted that, in addition to the installation of the fencing, DEVA has kept people informed in the area of what is going on, and if a problem would occur (i.e., trash, trespassing, etc.), all concerned have his cell phone number, and he would be available to take care of it.

When questioned by Mr. Homer about whether the Applicant had considered alternatives regarding this proposed project, Mr. Ford advised that he had done so. For example, Mr. Ford advised that he could remove the rip-rap and actually create a path to the water without needing a fence, or parking spaces, or even a permit from Sussex County to do so. In essence, such actions would create a boat ramp, and motorized boats would be able to utilize it. However, it is the Applicant's desire to promote a quality development that provides "passive recreation", i.e., a site where people could come enjoy nature, even as an ornithological area, given the number of geese in the area. The Applicant believes that noise from this proposed project would be fairly minimal, as the structure would be promoting "inherently quiet activities". Alternatively, if a boat ramp were to be put in place, it would be much more difficult to control the noise, and so the Applicant believes the project, as proposed, would be most appropriate to the neighborhood as it exists today.

In follow-up to Mr. Ford's presentation, Laura Herr of the Department asked some clarifying questions of the Applicant, specifically, pertaining to the full range of potential uses of this structure for the residents of Verandah Bay. Mr. Ford responded that he believes that people will go down to the pier to crab, fish, and possibly kayak.

When questioned about the potential for someone to approach the structure with their power boat from the water side, tie up, and come ashore, Mr. Ford replied that this is one reason why the Applicant was willing to condition the permit to deter that kind of activity from becoming prevalent at the site location.

With regard to enforcement mechanism(s) that the Applicant was envisioning to ensure that such undesirable activities are prevented (in addition to the fence limiting it to a certain degree), Mr. Homer confirmed that DEVA would be willing to have some sort of deed restriction on record with the Recorder of Deeds that would restrict certain usage of the property by homeowners of that community.

In further support of this project, Dr. Evelyn Maurmeyer, consultant for the Applicant in this matter, provided some additional input with regard to the potential environmental impacts associated with this project. Dr. Maurmeyer advised that the impacts are anticipated to be minor, as the dimensions for the project are within WSLs guidelines for such structures, and the impact from the small number of pilings that come in contact with the water and with the bottom should be minimal. Additionally, impacts from activity from the kayaks and canoes should be minimal, as the stated use of the proposed structure is for fishing, crabbing and launching of non-motorized vessels, and such vessels would introduce no petroleum products into the environment. Noise would also be at a minimum, and there would be minimal impact to the bottom due to the shallow draft of the vessels (as compared to the impact that motorized vessels would have in this environment, should a boat ramp be constructed in its place).

Dr. Maurmeyer also commented on her review of various permits and/or leases that were granted by the Department for nearby structures, noting that many were larger

than what is being proposed by DEVA at this time. Those structures, according to her, range from 20 feet to 40 feet in length. Several of them have boat lifts, and are used almost exclusively for motorized vessels.

C. Public Comment:

Following the conclusion of Dr. Maurmeyer's comments offered on behalf of the Applicant, the public hearing was then opened up to comment from members of the public. For brevity's sake, the public concerns offered by those who spoke at the hearing will be discussed herein one by one, rather than discussing each and every comment raised by each person who spoke, as many of the comments from citizens in attendance that evening were similar.

Pam Tully started the evening by providing this Hearing Officer with a folder full of photographs, maps, and various documents pertaining to the proposed project. Those documents were entered into the record as "Tully #1", and became part of the hearing record in this matter. Ms. Tully was adamantly opposed to this project, and her concerns can be summarized as follows:

1. The 26 signatures of support for this project provided by the Applicant were from residents of the Cape Windsor Community, and not from anyone who lives on Verandah Bay.
2. Mr. Ford's proposed project was denied by the Board of Adjustments, according to Ms. Tully, because they believed it to be "inappropriate", that it would "alter the essential character of the neighborhood", and that there would be "enforcement issues". Ms. Tully shares those concerns as well.

3. She believes the property values will go down, and that her privacy will be compromised.
4. She voiced concern that boats would get their engines caught in crab pots, should this construction be allowed.

Following Ms. Tully, Jackie Wright voiced her concerns about this project as well. She, too, is passionately opposed to this application, namely, because she believes it to be a matter of the Applicant creating a recreational facility in the middle of a residential area. Concerns of enforcement and monitoring of the structure were also voiced, with regard to the increased traffic, garbage, noise and loitering associated with the same. She also did not believe that the two parking spaces at the location would be sufficient for the number of persons that such a facility would attract. Moreover, concerns were voiced about people potentially tying up their kayaks to a fence overnight, and the hazards associated with such actions, as well as the need (or lack thereof) of bathroom facilities for the number of people that would be potentially attracted by the structure.

One by one, numerous members of the public voiced their concerns about this project as proposed by the Applicant. Additional concerns included navigable impediment for other boaters (in motorized vessels) arising from the placement of this structure (and from kayaks and canoes potentially utilizing the site); obstruction and/or interference with the emergency turnaround area (used by emergency vehicles such as fire trucks, ambulances, etc., needing access to the area); parking and street congestion; the distance between Verandah Bay Development and the project site; the twenty-five

foot width of the lot; and (as stated initially by Ms. Wright) the overall “commercial” use of the facility.

Of particular note was a comment that suggested an alternative to the Applicant’s proposed project. Specifically, it was noted that the Cape Windsor community, which is located directly behind the Verandah Bay community, has an existing boat ramp that is much closer and would be more easily accessible to the residents of Verandah Bay. One commenter suggested that Mr. Ford look into establishing an agreement with Cape Windsor that would permit the residents of Verandah Bay to use *that* existing boat ramp for their vessel launching.

Given the amount of public comment, and as a result of the original application plans being modified by the Applicant prior to the time of the hearing, this Hearing Officer allowed the record for public comment to remain open through close of business December 1, 2008, in order to give the public additional time to review not only the original plans for the proposed structure, but the modified plans presented to the Department at the time of the hearing as well.

On December 1, 2008, counsel for the Applicant provided written responses to the public comments received at the hearing. That correspondence from Mr. Homer is attached hereto as Attachment “B”, and is expressly incorporated into this Report at this time.

III. Findings:

Subsequent to the close of the record for public comment, the Department’s WSLS of the Division of Water Resources reviewed this permit application in detail, and provided this Hearing Officer with a detailed and comprehensive Response Document,

dated December 23, 2008. For the Secretary's review and complete understanding, this Response Document is attached hereto as Attachment "C", and is expressly incorporated into this Hearing Officer's Report at this time.

The Department's review of the DEVA Application was performed in the light of current WSLs Regulations and Delaware law. During said review, the site was again inspected by the Department, and was considered in light of the regulatory issues and comments made at the public hearing surrounding this project. The Department's aforementioned Response Document details the concerns of the aforementioned potential negative impacts associated with this project, as well as whether the proposed pier design is well suited to the stated project purpose. After a thorough review of the same, it is my view that the WSLs has done an excellent job of identifying all of the relevant issues surrounding this application, and has discussed them in a thorough and balanced manner which accurately reflects the information contained in the public hearing record for this matter. Therefore, rather than repeat that information here within this Hearing Officer's Report, I will simply refer to the same and recommend that the Secretary may obtain an in-depth understanding of this record by reading Mr. Figurski's Response Document, which, again, is expressly incorporated into this report and attached for that purpose.

IV. Conclusions and Recommendations:

Based on the administrative record developed in the course of this hearing, it is my opinion that the record does *not* warrant, nor has the Applicant reasonably justified, the pending request for a WSLs permit application for DEVA Development, Inc., to construct a kayak/canoe launch consisting of an access ramp and a floating pier in the Montego Bay at Lot #1, Old Lighthouse Road, Selbyville, Sussex County, Delaware.

Based upon the Department's review of this application, the WSLS finds that the proposed project does not meet the regulatory criteria contained in the State of Delaware's *Regulations Governing the Use of Subaqueous Lands*. Moreover, the Department cannot support the Applicant's proposed project without knowing whether the Cape Windsor alternative, which is judged to have less impact on the community, is feasible. However, as stated in the attached Response Document, even if the Cape Windsor alternative is not workable, there are, in the Department's opinion, more suitable alternatives for the launching of canoes and kayaks at this project site than what is presently being proposed in DEVA's current application. For example, the WSLS could support the use of this site for the homeowners at Verandah Bay by the creation of a small ramp over the existing rip-rap for kayakers to safely gain access to the water. This would avoid the placement of structures in subaqueous lands which pose navigational concerns and which may not be well suited to the stated project purpose.

For the reasons stated above, I hereby recommend that the Subaqueous Permit Application of DEVA Development, Inc., to construct a kayak/canoe launch consisting of an access ramp and a floating pier in the Montego Bay at Lot #1, Old Lighthouse Road, Selbyville, Sussex County, Delaware, be *denied*, as set forth both herein this present report and in the Department's Response Document of December 23, 2008. I also recommend that the following findings be made with regard to this matter:

1. Proper notice of the hearing was provided, as required by law.
2. Structures located in public subaqueous lands are subject to the Subaqueous Lands Act (Title 7, Del.C., Chapter 72) and the *Regulations*

Governing the Use of Subaqueous Lands. Section 3 of said *Regulations* requires that applications be evaluated based on their public use impacts, as well as environmental considerations.

3. The Applicant's proposed project, as currently designed, would adversely affect the ability of the adjacent property owner to safely navigate his vessel onto and off of his existing boat lift. Even with the alternative design presented at the time of the hearing, the fifteen feet of channelward encroachment would block the path needed for the adjacent property owner to safely and properly maneuver the vessel onto and off of the existing boatlift.
4. The Department's aforementioned *Regulations* further require consideration to be given to "...*the extent to which the Applicant's primary objectives and purposes can be realized without the use of such [subaqueous] lands (avoidance)*." To that end, the Applicant should investigate the possibility of establishing an agreement with Cape Windsor, which would authorize the residents of Verandah Bay to use their boat ramp for vessel launching, as this scenario would have less impact to subaqueous lands than the Applicant's project as proposed.
5. The proposed pier design does not seem well suited to the stated project purpose, which is the launching of canoes and kayaks. However, the shallow water and gently sloping sandy nearshore area in front of the Applicant's property seems to be very well suited to this purpose.

6. Although the Department cannot support the proposed project as currently designed, the WSLs remains willing, ready and able to assist the Applicant with revising his plans for possible future projects which would be well suited for that property, as set forth in the Department's Response Document attached hereto as Attachment "C". Should the Applicant wish to pursue an alternative plan to the proposal and request currently before the Secretary, a new application and notice (thus affording the public the opportunity to provide comment to the Department regarding same) would have to be filed by the Applicant for future consideration by the Department

In addition, I recommend issuing the attached Secretary's Order to effectuate this purpose and adopting the Hearing Officer's findings and conclusions as expressed hereinabove.

/s/ Lisa A. Vest

LISA A. VEST,
Hearing Officer