HEARING OFFICER'S REPORT

Regarding: Request of Swann Cove, LLC, to construct a
4-foot by 100-foot pier, a 5-foot by 60-foot dock, with
Two 4-foot wide by 20-foot long finger piers, and
Six stand-alone pilings, mooring 4 vessels in Dirickson Creek
And Huntington Way North in Swann Cove

Lisa A. Vest
Hearing Officer

March 6, 2007

I. Background Findings:

On Tuesday, September 5, 2006, the Department of Natural Resources and Environmental Control, the Wetlands and Subaqueous Lands Section, held a public hearing at the Villion Hall, 800 Coastal Highway, Fenwick Island, Delaware, in order to receive comment concerning a subaqueous lands application for the Swann Cove development (previously noticed under Jack Owens) to construct a 4-foot by 100-foot pier, a 5-foot by 60-foot dock, with two 4-foot wide by 20-foot long finger piers, and six stand-alone pilings, mooring four vessels in Dirickson Creek and Huntington Way North in Swann Cove. Swann Cove is a development which, at the time of this hearing, had approximately 184 residents. The applicant's proposed dock and crabbing pier would serve as an amenity to all residents who live in the Swann Cove development, if approved by the Department.

This hearing was conducted pursuant to the Subaqueous Lands Act, 7 Del.C., Chapter 72, as well as Chapter 60 of the Delaware Code. Proper notice of the hearing was provided, as required by law.

II. Summary of Record:

A. Department Presentation:

Andrew Whitman, Project Scientist with the Wetlands and Subaqueous Lands Section (WSLS) of the Department introduced 12 exhibits to be submitted into the formal record regarding this hearing. Mr. Whitman also noted that Mr. Craig Lednum had a document that he

requested be read into the record on his behalf, should he not make it to the hearing that evening. Laura Herr, Section Manager of the WSLS, also made a brief statement at that time to ensure that the public fully understood the Department's neutrality with regard to the Applicant's pending permit application, as well as the importance of receiving public input concerning the same.

B. <u>Applicant Presentation:</u>

After the Department entered its exhibits into the record, counsel for Swann Cove, LLC (Tim Willard, Esquire), provided a brief discussion for the record concerning the Applicant's pending permit applications. The proposal of Swann Cove was to build a crabbing dock, as described in the preceding section of this report, with slots for four boats at the end of the pier. Mr. Willard then clarified for the record that this Applicant previously noticed under the name, "Jack Owens", however, the application's proposal is specifically for an amenity to service all those residents living in Swann Cove, whose numbers were still growing at the time of this hearing. Mr. Willard's firm, Fuqua & Yori, also represented the original Applicant in this matter, which was originally known under the application of "Trout, Siegle and Doyle" in the Estate of Gladys Swann back in 2002. The initial proposal was approved by the County Council in the summer of 2002, and the County Ordinance on the property (submitted by counsel into the record at the hearing) indicated that recreational facilities would include such amenities as walking

trails, swimming pools, and club houses. The only provision addressing boat docks states that no individual boat dock or boat launching facility for motorized boats shall be permitted. Mr. Willard took that opportunity to clarify for the record that they are only proposing a crabbing dock and boating facility for the community at this time. Mr. Willard further clarified that Swann Cove was not proposing individual docks, and that the community did not want a situation where "everybody can put out a boat dock". At that time, the Hearing Officer accepted Mr. Willard's copy of Ordinance Number 1555 with conditions, specifically, Item 14-8 (highlighted by Applicant) and entered it into the record as Applicant Exhibit #1.

At that point, Kelly Pierson offered statements for the record on behalf of the Applicant. Mr. Pierson is with EnviroTech Environmental Consultants, Inc., and was retained by the Applicant to manage this proposed project. This application was initially submitted under another consultant previously, and Mandarin Homes brought Mr. Pierson's company on board to begin handling the same.

With regard to specifics concerning this proposal, Mr. Pierson began by explaining that the application was submitted as a 4-foot by 100-foot pier, and a 5-foot by 60-foot dock to moor four boats at the end. As the public became aware of this proposed project, however, there were public comments wondering why the proposed construction was so long, and how there is nothing currently in existence in that area similar to it.

Mr. Pierson noted that the immediate pier structure to the left of Swann Cove is 100-foot long and 5-foot wide, and the other one adjacent to it is approximately 75-foot by 4-foot. Multiple other structures were quoted by Mr. Pierson as being 77-foot, 64-foot, 75-foot, and 60-foot along that shoreline. Mr. Pierson further noted that Mandarin Homes was advised by their original consultant that there were similar structures in that area, so their own proposal made sure not to exceed those limits.

Another concern addressed by Mr. Pierson during this discourse was the potential of this proposed dock housing multiple boats. He clarified that there are only slips proposed for 4 boats, with no other tie-ups, cleats, etc., allowing boats to be moored there. Additionally, Mr. Pierson drafted rules and regulations for the homeowners association which will not allow any other boats to be tied up at this proposed dock, nor will there be boats allowed to be tied there overnight. Furthermore, no one will be permitted to use the proposed structure unless they are actually with the development, and they will have to go through the homeowners association in order to be registered as a permitted user. The homeowners association, according to Mr. Pierson, does have the authority to enforce these rules and regulations by fines or by limitation of homeowner privileges. Moreover, Mr. Pierson noted that he has, in the past, worked with the Department's Fish & Wildlife Enforcement Section concerning the issue of wakes and boat speeds, and represented to everyone at the hearing that Enforcement staff would be willing to go to

the homeowners' association and talk to everyone about boater safety, help establish the rules and regulations, provide appropriate signage (i.e., "no wake zone" within 100 foot of the pier), etc., and work with the Applicant with regard to addressing concerns that anyone might have with this proposed project.

C. <u>Public Comment:</u>

At that point, the Hearing Officer opened the hearing up for public questions and comments regarding this proposed project by Swann Cove. The first speaker was Brice Cropper, an adjacent property owner, who was opposed to this application for several reasons:

(1) The developer stated during the County Council approval process that no dock or pier would be requested. A walkway along the whole length of the waterfront was proposed, but no pier. The Hearing Officer accepted the artist's rendition of that site into the record as Cropper Exhibit #1.

(2) It is Mr. Cropper's belief that any dock or pier introduced into this community would immediately create a marina. There are, according to Cropper, approximately 180 homes at Swann Cove, with potential expansion to over 300 if adjacent property is acquired. Mr. Cropper stated that he went out and measured along the entire bulkhead on March 29, 2006, and the same measured 35 inches long through that length of the property. If the Applicant were to put a walkway, Cropper believes they would have more than ample space to temporarily moor

boats and personal watercraft, thus allowing for crabbing and fishing. Mr. Cropper further notes that the specific section of the property (very close to/in front of Hummingbird Way) was 44 inches at that point, and that water depth exceeds the depth at the end of his dock and others. Thus, it is his opinion that the Applicant's argument of needing a long dock protruding into the creek in order to get to deep water is not merited.

(3) Water safety becomes an increased consideration and concern, given the expected development along the creek. Should the Department grant this proposal to Swann Cove, Mr. Cropper wonders how similar benefits could be denied to other developers in the future.

Mr. Cropper then offered his second exhibit (which the Hearing Officer accepted and entered into the record as Cropper Exhibit #2), an aerial color photograph depicting the Swann Cove community, where Mr. Cropper had indicated in black ink the location of the proposed pier on the point of the shoreline. Mr. Cropper pointed out that the proposed pier would sit on the point which already protrudes farthest out into the creek than the 100-foot structure to which Mr. Pierson compared it. Mr. Cropper also considers the Applicant's proposed project to be, in reality, 125 foot in length (and not 100 as stated), when one considers that the project calls for a 100-foot pier, with another 5 feet on the end, and then 20 foot finger piers.

In conclusion, for all reasons previously stated, Mr. Cropper respectfully urged the Department to deny the Applicant's request for this proposed project.

In response to Mr. Cropper's comments, both the Department (by Ms. Herr) and the Applicant (by Mr. Pierson) questioned his statements and measurements taken at the property; nevertheless, Mr. Cropper remained steadfastly opposed to the granting of this application. With regard to Mr. Cropper's concerns about the project, upon completion, becoming a marina, Mr. Pierson specifically retorted that it would be "deed locked", so that there cannot be any additional slips on the pier, regardless of how large the Swann Cove community becomes in the future. When asked who would enforce that issue, Mr. Pierson replied that the homeowners association would be responsible for that. Ms. Herr also offered that such a condition could be placed on the permit (i.e., not allowing for future expansion), should the Secretary ultimately grant this application.

The Department also requested clarification with regard to the Applicant's Appendix "A", specifically, Page A-2, #8, where it references 4 small 20-foot plus or minus vessels, and then "…pontoon boats/power boats". Ms. Herr asked whether this is a modification that is being made, because what was being represented at the hearing was that it would be non-motorized crafts, and thus it seemed to be in conflict with the application. The applicant replied that there is no launch facility

being proposed or allowed in the present application. However, the Applicant did acknowledge that there is the possibility that people could launch elsewhere, as the current application does not preclude someone from mooring a motorized vessel.

The next speaker was Gerald Pepper, also an adjacent property owner. Mr. Pepper agreed with everything that Mr. Cropper said, but did offer some additional comments into the record. Although he stated that he has no opposition to the dock and crabbing pier, he was opposed to the length of the Applicant's proposed pier.

Mike Chance was next to offer his comments into the record at the hearing. As a U.S. Coast Guard licensed Captain, Mr. Chance opined that the proposed structure would be a hazard to navigation, either in the day or at night. Furthermore, Mr. Chance believes that the proposed length of the project actually makes it more of a docking facility than a pier, and (if only for safety reasons) should be shortened in design.

David Hartig then offered his comments for the record, as a resident of Magnolia Shores. Mr. Hartig has boats and wave runners that he enjoys, but believes the proposed project to be too long in length. He also offered the opinion that, if this project was approved by the Department, then there should be something contained within the permit as to future allowances and/or conditions on additional growth of the community with regard to such permit requests. He further commented that continued growth would cause a continued increase in water traffic,

which again lends public concern toward safety issues (i.e., again, wake zones, speed limits, etc.). In his opinion, the Applicant stating that they would not allow boats to be tied overnight is "a joke". Despite all of these concerns, however, Mr. Hartig would be agreeable to allowing them to construct a shorter 40-foot pier, with four deeded slips that are owned (thus preventing 180 families trying to utilize 4 slips).

Martha Keller, Environmental Commissioners for Fenwick Island, was the next to offer comment on this permit application. Her concerns centered upon the negative environmental impacts that this proposed project would have upon the local vegetation, the fish, swan and eel grass, potential disruption of the animal species/habitat, and general degradation of animal and plant communities from crop damage, indirect wind damage, and boat hull pressures. Ms. Keller also voiced concerns about the toxins already present in Little Assawoman Bay and Dirickson Creek, as well as the potential erosion factor associated with such projects. In response to Ms. Keller's concerns, Ms. Herr from the Department offered assistance with regard to obtaining any available information concerning these issues. Mr. Pierson also offered that the Applicant is proposing a project in compliance with current DNREC standards, and are going by their guidelines with regard to their pending application.

In response to these comments from the Applicant, Ms. Keller voiced additional concerns regarding the lighting, the noise, and (again)

overall concern with regard to safety issues associated with this project. Ms. Herr then assured Ms. Keller, as well as all those in attendance (as she did at the beginning of the hearing) that the Department is still in the process of evaluating this application, however, in addition to the environmental impacts which any given proposal may have, DNREC also reviews such applications in light of a public interest review. Specifically, because the underwater land under Dirickson Creek is public underwater land belonging to all the citizens of Delaware, the Department is very sensitive to the fact that it is the trustee of such lands. Thus, every time the Department grants a permit (or, in this case, a lease to the applicant for the proposed project), it is, in essence, taking a small portion of the public land out of use by the general public and placing it into a more restrictive project, and so DNREC is very sensitive to both environmental impacts and public interest reviews when it comes to permitting matters such as the present one.

Other persons from the public continued to offer their comments for the record, echoing the majority concerns with regard to the overall length of the proposed pier, safety issues, enforcement of the rules and regulations as set up by the homeowners association with regard to use of the proposed structure, and adverse environmental impacts due to the continued (growing) development of the area. Additional concerns continued to be voiced about the aforementioned Ordinance originally reviewed at the County Council level as well.

At the conclusion of the hearing, the Hearing Officer thanked everyone for attending and providing their comments for the record. Additionally, due to the voiced concern by some in attendance wishing to obtain additional information regarding this matter in general, the Hearing Officer allowed the record to remain open for public comment through close of business on the following Friday, September 15, 2006, at which time the record formally closed with regard to all public comment and concerns.

During the ten days from the date of the hearing and the close of the public record (September 5-15, 2006), a number of additional submissions from the public were received by the Department, again, all echoing concerns previously voiced at the hearing. Two particular submissions, however, were of significance to the Hearing Officer during her review of the record in this case. The same are noted at this time, and will be discussed in the proceeding section at greater length:

1. Attached hereto as Exhibit "A" (and expressly incorporated into this Hearing Officer's Report) is a copy of the letter received by the Department from Lawrence B. Lank, Director of Planning and Zoning, Sussex County Planning & Zoning Commission, dated September 14, 2006. This letter specifically addresses one of the concerns voiced at the hearing, and confirms that, should the Secretary decide to grant Swann Cove's pending permit application for this pier structure, the developers of that community would be required to apply back to Sussex County to

amend their conditions and stipulations of approval. This step would be necessary, due to Condition #14 of their original approval stating that "No individual boat dock or boat launching facilities for motorized boats shall be permitted".

2. Attached hereto as Exhibit "B" (and expressly incorporated into this Hearing Officer's Report) is a copy of the letter dated September 14, 2006, received by the Hearing Officer from Tim Willard, Esquire, counsel for the Applicant, Swann Cove, LLC. This letter responds to the comments received from the public at the hearing on September 5, 2006, and proposes several revisions to the original application. Most notably, the Applicant offers to reduce the pier length from 125 feet to 80 feet, remove the two finger piers at the ends of the "T" dock, and confirm the additional uses of the dock to be for fishing and crabbing, as well as for temporary dockage for residents of Swann Cove.

As a result of the September 14, 2006 correspondence from Mr. Willard, the WSLS Section of the Department reviewed the proposed revisions to the original application, and offered their comments and position on the same to the Hearing Officer in their Memorandum dated January 3, 2007. This Response Document is attached hereto as Exhibit "C" in its entirety, is expressly incorporated into this Hearing Officer's Report at this time, and will be discussed at length below.

III. **Findings:**

Much review and consideration has gone into the permit application request made for this proposed community pier and dock structure for Swann Cove, LLC. And, while it can be looked upon by the Department as a positive step by the Applicant to offer revisions to their original permit application in response to public comments and concerns voiced at the public hearing, there are still concerns about the proposed project which remain unaddressed at this time. The Department's Response Document details the proposed revisions to Swann Cove's project offered by the Applicant, and offers its comments regarding each such revision, as follows:

1. ***Reduction of the pier length from 125 feet to 80 feet:***

While it is a positive step to offer a reduction in the project's proposed length in light of public concerns regarding same, WSLS notes that no detailed bathymetry was provided to the Department to demonstrate that the reduced length of 80 feet is necessary. In response, the Department believes that more detailed bathymetry would be necessary to justify the length of the pier, even at its reduced length of 80 feet.

2. ***Removal of the two finger piers at the end of the dock:***

The Applicant notes that this offer to remove the finger piers as originally proposed is being done (again) in response to the voiced

concerns of the adjacent property owners regarding this project, specifically, the public's concern that, should the project be permitted by DNREC, it would essentially be allowing the "construction of a marina". Even if the finger piers were removed, however, the Department notes that a valid concern remains that more than 4 vessels could dock at the community pier for extended periods of time. It also essentially proposes a new structure for which technically the Applicant has not applied with the Department, nor has the public been afforded any opportunity at which to review and/or offer comments concerning same. Moreover, Swann Cove has never provided a detailed description of the rules and restrictions with regard to the use of the proposed pier to the Department, nor have they formally designated an individual to be held responsible for enforcement and/or policing of the same. To provide such information now would, again, deny the public the ability to voice comments and/or concerns regarding same, as such provisions were non-existent at the time of the public hearing.

3. ***Enlarging the stated use of the structure from temporary dockage for residents of Swann Cove (with no overnight docking) to include the allowance of fishing and crabbing as well:***

Again, the need to extend to a length of even 80 feet into the waterway requires more detailed bathymetry to ensure minimization of the structure. This has not yet been provided to the Department, and to

do so at this juncture would again deny the public the ability to offer comment concerning same.

IV. Conclusions and Recommendations:

Based on the 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 (lease) to construct a community pier and dock structure in Dirickson Creek in Selbyville, Sussex County, Delaware. Although it is commendable that the Applicant did listen to the concerns of the public at the time of the hearing and offer to revise some of the particulars of the pier structure as set forth in its initial application in the light of such public comments, it still remains the position of the Department that, even with revisions, the concerns brought forth by the public at the hearing on September 5, 2006, are not being adequately addressed.

For the reasons stated above, I hereby recommend that the application of Swann Cove, LLC, to construct a community pier and dock structure for the residents of Swann Cove in Dirickson Creek in Selbyville, Sussex County, Delaware, be ***denied.*** 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. The Applicant, Swann Cove, LLC, has not yet demonstrated the necessity to extend the proposed structure into the waterbody, even at the reduced length of 80 feet;
3. Even with the removal of the two finger piers at the ends of the proposed "T" dock, a valid public concern remains that more than 4 vessels could dock at the community pier for extended periods of time;
4. While commendable that the Applicant showed a willingness to modify its original application to accommodate the public concerns associated with this project, the revised project essentially proposes a new structure for which the public has not yet had an opportunity to review and/or offer comments concerning same;
5. Swann Cove has never provided a detailed description of the rules and restrictions with regard to the use of the proposed pier to the Department, nor have they formally designated an individual to be held responsible for enforcement and/or policing of the same. To provide such information now would, again, deny the public the ability to voice comments

and/or concerns regarding same, as such provisions were non-existent at the time of the public hearing;

6. As stated in Sussex County's letter of September 14, 2006 (and attached hereto as Exhibit "A"), Swann Cove's current community plan approval contained certain conditions and/or stipulations of approval. Condition #14 specifically indicates that individual boat dock/boat launching facilities for motorized boats shall not be permitted. Thus, Swann Cove is presently restricted from constructing such a facility, until such time as they apply to the Sussex County Planning and Zoning Commission and successfully complete that entity's public hearing processes to formally amend their conditions/stipulations of approval;

7. The Department does support some type of structure to accommodate the Swann Cove community for fishing, crabbing and small boat launching, provided that adequate documentation, as noted previously in this report (and specifically in the Department's Response Memorandum dated January 3, 2007, attached hereto as Exhibit "C") is submitted to 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

/ahear/Swann Cove