

HEARING OFFICER'S REPORT

TO: The Honorable Shawn M. Garvin
Cabinet Secretary, Department of Natural Resources and Environmental Control

FROM: Lisa A. Vest
Public Hearing Officer, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: Permit Application of Christopher At the Townes At Bayshore Village, LLC, to construct and operate a new 18 slip community marina, to mechanically maintenance dredge in portions of public subaqueous lands southeast of Lighthouse Cove Lane, and in two Unnamed Private Lagoons, located at the terminus of Lighthouse Cove Lane, and to dispose of the dredged material on-site via sealed dump truck to an enclosed area to be incorporated within a landscaped berm located east of Lighthouse Cove Lane, Fenwick Island, Sussex County, Delaware, thus necessitating Applicant to obtain the following: (1) a Marina Permit, including an Operations and Maintenance Plan; (2) a Subaqueous Lands Lease; (3) a Subaqueous Lands Permit; and (4) Water Quality Certification.

DATE: October 7, 2020

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Thursday, February 20, 2020 at 6:00 p.m. by the Department of Natural Resources and Environmental Control (“DNREC”, “Department”) at the Fenwick Island Town Hall, located at 800 Coastal Highway, Fenwick Island, Delaware, to receive public comments on the permit application of Christopher At the Townes At Bayshore Village, LLC (“Applicant”), to obtain the following: (1) a Marina Permit (including an Operations and Maintenance Plan); (2) a Subaqueous Lands Lease; (3) a Subaqueous Lands Permit; and (4) Water Quality Certification. The Applicant proposes to construct and operate a new 18 slip community marina, to mechanically maintenance dredge in portions of public subaqueous lands southeast of Lighthouse Cover Lane, and in two unnamed private lagoons, located at the terminus of Lighthouse Cove Lane, and to dispose of the dredged material on-site via sealed dump truck to an enclosed area to be incorporated within a landscaped berm located east of Lighthouse Cove Lane in Fenwick Island, Sussex County, Delaware.

The operation proposed in the Applicant's permit application is subject to the requirements of Delaware's *Subaqueous Lands Act* (7 Del.C. Chapter 72), the Department's *Marina Regulations* (7 DE Admin. Code 7501), the *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504), the *Regulations Governing the Control of Water Pollution* (7 DE Admin. Code 7201), Section 401 of the federal *Clean Water Act*, and 7 Del.C. Chapter 60

It should be noted that the original design for the development of a community marina at this location has been modified. The revisions to the proposed plans, along with the reasoning behind those changes, will be discussed in detail below.

With regard to the historical ownership of the property involved in this permitting matter, the Department's Division of Water, Wetlands and Subaqueous Lands Section ("WSLS"), initially received an application on April 4, 2019, submitted by the property owner at that time, Lighthouse Cove Investors, LLC ("LCI"), for the development of a new 22 slip community marina at the aforementioned location. Subsequently, several public comments in opposition to the project were received. At that time, LCI considered the Department's public hearing process to be an undue hardship, in that it would result in delayed commencement of construction of the community development. As a result, LCI withdrew that application (Marine Permit; Operations & Maintenance Plan; Subaqueous Lands Lease; Subaqueous Lands Permit; Water Quality Certification – 157/19) on July 24, 2019.

In order to facilitate the construction of the residential community development, LCI applied for and was issued a Letter of Authorization (LA-279/19) on October 3, 2019 to replace/repair the bulkhead within the same footprint as the existing structure. Subsequently, on October 29, 2019, the WSLS received a new application from Environmental Resources, Inc., submitted on behalf of LCI, to construct a community marina docking facility at the same location as previously referenced herein.

The permit application, dated October 21, 2019, and submitted to the Department on behalf of LCI on October 29, 2019, now proposed the construction of a new 18 slip community marina (reduced in size from the originally proposed 22 slip marina). During the initial review of the application, LCI informed the WSLS of the near imminent transfer of the property. The final transfer of the property from LCI to Christopher At the Townes At Bayshore Village, LLC was executed on December 6, 2019. Documentation of this property transfer was received by the Department on December 17, 2019.

Prior to placing the project on public notice, discussions on the recent permitting history between LCI and the subject property were held with the current property owner. Since the Department had received several comments from the surrounding community members objecting to the project (as previously proposed by LCI), the WSLS determined that it was in the public's best interest to hold a public hearing.

The announcement for a public hearing was placed on a 20-day public notice period on January 22, 2020. After advertisement of the public hearing, the Department once again received numerous written comments in objection to the project. The objectors to the project expressed navigational concerns with regards to the narrowness of the waterbody, in combination with the increased boat traffic congestion and the impact to the Town of Fenwick Island community. Additional objections were raised on the need to constantly dredge to maintain navigable water depths. Other objections included concerns with pollution of the waterbody and the effect on local flora and fauna.

Accordingly, the Department held its public hearing in this matter on February 20, 2020, at the Fenwick Island Town Hall, located at 800 Coastal Highway, Fenwick Island, Delaware. The public hearing was attended by the Department's WSLS staff, representatives of the Applicant, and individuals from the public, who offered verbal comment for inclusion into the hearing record at that time.

At the time of the February 20, 2020 public hearing, Applicant presented the proposal to construct and operate a new 18 slip community marina by installing a 16 inch wide by 700 foot long portion of boardwalk, two (2) 6 foot wide by 24 foot long docks and five (5) boat lifts with four associated pilings each. Additionally, Applicant proposes to mechanically maintenance dredge 180± cubic yards to a depth of 3.5 feet below Mean Low Water (MLW) in portions of public subaqueous lands and two unnamed private lagoons southeast of Lighthouse Cove, located at the terminus of Lighthouse Cove Lane, and to dispose of the dredged material on-site via sealed dump truck to a 22 foot wide by 110 foot long super silt fenced enclosed area to be dewatered, graded and capped with topsoil to be incorporated within a landscaped berm located east of Lighthouse Cove Lane at 38.452209, -75.057211, Fenwick Island, Sussex County, Delaware (“Application” or “proposed project”).

Following the public hearing, a field study at the location of the proposed marina was conducted by the Department, in light of the concerns voiced by members of the community with regard to safety and navigational issues surrounding the proposed project. As a result of that field study, and also based upon consultation between the Applicant and the Department regarding the same, the design of this proposed project was modified by the Applicant. The modifications were made by the Applicant in order to (1) address concerns about this proposed project that were voiced by the public at the time of the hearing; and (2) comply with all statutory and regulatory requirements as set forth herein.

The Applicant’s proposed project is subject to the requirements of Delaware’s *Subaqueous Lands Act* (7 Del.C. Chapter 72), the Department’s *Marina Regulations* (7 DE Admin. Code 7501), the *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504), the *Regulations Governing the Control of Water Pollution* (7 DE Admin. Code 7201), Section 401 of the federal *Clean Water Act*, and 7 Del.C. Chapter 60.

The modifications made to the Applicant’s originally proposed project, the concerns raised by the public at the time of the hearing, and the Department’s responses to the same, will all be addressed in greater detail below. Proper notice of the hearing was provided as required by law.

II. SUMMARY OF THE PUBLIC HEARING RECORD:

The public hearing record (“Record”) consists of the following documents: (1) a verbatim transcript; (2) seven documents introduced by Department staff at the public hearing held and marked accordingly by this Hearing Officer as “DNREC Exhibits 1-7”; (3) one large map with lagoon widths, and a series of site photographs depicting the location of the proposed project, introduced by the Applicant’s consultant, Edward Launay (of Environmental Resources, Inc.) at the time of the aforementioned public hearing, and marked accordingly as “Applicant Exhibits 1 and 2” respectively; and (4) the Technical Response Memorandum from Julie R. Molina, Environmental Scientist, WSLS, dated July 24, 2020.

The Department’s persons primarily responsible for reviewing this application, Ms. Molina, along with Tyler Brown, then-Program Manager, WSLS, Division of Water, developed the Record with the relevant documents in the Department’s files.

Following opening remarks from this Hearing Officer, Ms. Molina offered a brief presentation for the benefit of the Record. Ms. Molina explained the recent permitting history of the site, as well as an overview of the Applicant’s Marina application. Subsequent to the Department’s presentation, Mr. Launay proceeded to offer a brief presentation on behalf of the Applicant, again for the benefit of the Record.

Mr. Launay pointed out that the Letter of Authorization (LA-279/19) issued by the Department was a minimization in channelward encroachment from the original April 4, 2019 application previously submitted by LCI. The previous application had originally requested to repair the bulkhead by stepping-out in front of the existing bulkhead to construct a new bulkhead. However, the Letter of Authorization allowed for the replacement of the bulkhead within the exact footprint of the existing structure.

Mr. Launay further noted the project is largely located on the applicant's private subaqueous lands (east and west lagoons), with only six moorings located in public subaqueous lands along the northern property boundary. Mr. Launay described the boardwalk as a minor encroachment, since it would not exceed the face of the bulkhead pilings in subaqueous lands. In addition, slip widths were reduced in the west lagoon to provide a wider buffer from the adjacent property.

Mr. Launay expressed the Applicant's position that the proposed layout and design of the marina would have no impact to existing navigational channels or lagoons, since boats have historically moored along the bulkhead. He then pointed to other nearby lagoon systems, which are as narrow as 28 feet wide and, commonly, to about 50 feet wide. For comparison in those locations, he stated that there are boatlifts and other structures that would be more of an impediment to navigation than the minor channelward encroachment of the boardwalk. He concluded by providing an aerial with lagoon widths and site photos as exhibits on behalf of the Applicant.

After the Applicant's presentation had concluded, the floor was then opened for the purpose of offering public comment on the Record regarding this proposed project. Several commenters expressed concern for the northern limits of the project site as being a navigational and safety hazard. The northern bend was described as a dangerous corner from a visibility standpoint for those utilizing kayaks, standup paddle boards and other non-motorized watercraft.

Representatives from the Town Council of Fenwick Island also raised concern for the six mooring berths on the north side of the subject property, specifically noting that the mooring of six vessels along the 200-foot-long northern face of the bulkhead would be too congested. Additional concerns were voiced on the impacts to the approximately 40 properties within the incorporated limits of the Town of Fenwick Island located east of the project site, noting water quality concerns and the frequency of dredging.

It should be noted that this Hearing Officer closed the Record with regard to receipt of public comment at the conclusion of the public hearing.

Following the aforementioned public hearing, the WSLS conducted a field survey, in consideration of concerns raised by members of the public during the hearing, specifically, with regards to potential navigational and safety hazards with vessels moored along the northern limits of the project site. On June 24, 2020, WSLS staff laid out buoys offset approximately twelve feet along the north side of the subject property. Physical measurements were taken at the site as well as the location of the buoys collected using a Global Positioning Unit (GPS) capable of submeter accuracy. The course of a vessel was then navigated toward entering and exiting the canal system several times while being cognizant of the buoys acting as vessels.

Upon entry to the lagoon, visibility was acceptable when taking a wide turn, but visibility decreased when exiting due in-part to the sharp angle in the canal system as well as the aforementioned boat lift positioned on the corner on the opposite shoreline. Additionally, it was determined that with vessels moored along the 35-foot-long pinch point of the canal, there would be a waterway passage of approximately 32 feet.

The WSLS contacted the Applicant's consultant after concluding the above field survey to relay public safety concerns on the mooring of vessels along the narrowest pinch point of the canal on the northern face of the project site, and the field observations. In an effort to address the navigational concerns at the site, the Applicant's consultant submitted revised plans on July 18, 2020.

The Applicant's revised plans submitted to the Department included a minimization of slip capacity dimensions, which resulted in a re-organization of the slip mooring locations. Specifically, the mooring of six vessels along the 200-foot-long northern face of the bulkhead was minimized to five vessels with a 42-foot-wide no mooring zone located along the area of greatest concern (the pinch point). Additionally, slip locations were slightly shifted, and slip widths were minimized to allow a buffer distance of 21 feet (originally 16 feet) from the adjoining property in the east lagoon, and remained 17.6 feet (when the proposed structure was originally 13 feet) from the adjoining property in the west lagoon.

A Technical Response Memorandum (“TRM”) was requested by this Hearing Officer from the technical experts in the Department’s Division of Water, WSLS. Specifically, the TRM was asked to (1) address the questions and concerns voiced by the public at the time of the public hearing; (2) provide a formal regulatory review of the Applicant’s proposed marina project; and (3) offer the Division of Water’s conclusions and recommendations with regard to the Applicant’s pending permit application for the benefit of the Record generated in this matter.

I find that the Division of Water’s TRM, dated July 24, 2020, offers a detailed regulatory review of all aspects of the Applicant’s proposed marina project, identifies all of the concerns raised at the public hearing of February 20, 2020, and responds to them in a balanced manner, accurately reflecting the information contained in the Record. Thus, the aforementioned TRM is attached hereto as Appendix “A” and expressly incorporated herein as such.

III. RECOMMENDED FINDINGS AND CONCLUSIONS:

This Applicant proposes to construct and operate a new 18 slip community marina, to mechanically maintenance dredge in portions of public subaqueous lands and two unnamed private lagoons southeast of Lighthouse Cove, located at the terminus of Lighthouse Cove Lane, and to dispose of the dredged material on-site in Fenwick Island, Sussex County, Delaware, as set forth above.

Preliminarily, I find that the proposed project will require the Applicant to obtain a Marina Permit, a Subaqueous Lands Lease, a Subaqueous Lands Permit, and a Water Quality Certification from the Department’s WSLS.

I further find that the Applicant’s proposed project is subject to the following federal and state statutory and regulatory requirements:

- Delaware’s *Subaqueous Lands Act* (7 Del.C. Chapter 72);
- The Department’s *Regulations Governing the Control of Water Pollution* (7 DE Admin. Code 7201);

- The Department’s *Marina Regulations* (7 DE Admin. Code 7501);
- The Department’s *Regulations Governing the Use of Subaqueous Lands* (7 DE Admin. Code 7504);
- Section 401 of the federal *Clean Water Act*; and
- 7 *Del.C.* Chapter 60.

In reviewing the applicable statutes, regulations, and weighing public benefits against detriments, the Department’s TRM notes that the construction of the community marina and maintenance dredging as described in the application for the Marina Permit, Operations and Maintenance Plan, Subaqueous Lands Lease, Subaqueous Lands Permit and Water Quality Certification by the Applicant, complies with the Regulations administered by the WSLs.

The Applicant has applied for a marina facility largely located on the applicant’s private subaqueous lands, with only five moorings located in public subaqueous lands. The Public Trust Doctrine holds that lands under navigable waters are open to the public for commerce, navigation, fishing, and recreation. The mooring of vessels along the northern bulkhead in public subaqueous lands aligns with the rights and privileges granted through the Public Trust Doctrine.

As noted previously, subsequent to the public hearing, through agency consultation, and as set forth in the Department’s TRM, the Applicant worked to realize their objectives while remaining responsive to the safety concerns voiced by both the public and the Department, through numerous alternatives to the original proposed plan, as follows:

- The Applicant reduced the number of slips proposed to align with the number of townhomes (18 slips to serve the 18 townhomes in the community). No further marina development would be allowed by the Department unless the number of townhomes increased in the community served by the proposed marina.
- Minimization of channelward encroachment impacts was achieved through the repair of the bulkhead through the replacement in its existing footprint rather than 18 inches in-front of the existing bulkhead.

- Accommodations were made to address public concerns for the impairment of water access to the adjoining properties in the dead-end of the east and west lagoons by increasing buffer distances.
- As described in detail above, the Applicant has endeavored to address navigational safety concerns through a vessel exclusion zone.

Furthermore, in order to address the navigational and public safety concerns, the following special condition is included in the draft Marina Permit and draft Subaqueous Lands Lease:

Permanent or transient berthing of vessels shall not be permitted within the 42-foot-wide vessel exclusion zone, commencing 82 feet from the east corner of the north facing bulkhead, as labeled on the approved plans. Signage and a fence clearly marking the vessel exclusion zone shall be installed at the specified location. The Permittee is strictly responsible for the management of the vessel exclusion zone. Failure to maintain the vessel exclusion zone free of vessels, shall constitute reason for this Marina Permit and Subaqueous Lands Lease being revoked and removal of all structures authorized herein.

The Department's TRM further notes that the proposed marina has minimized potential sources of contamination by providing convenient access to a sewage pumpout system, by not providing fueling facilities, and by not allowing major vessel maintenance work to be done on the grounds of the marina. Additionally, the submitted Operations and Maintenance Plan for the marina has rules and regulations for boat tenants which contain best management practices and tips, including, but not limited to, ways to control oil in the bilge, management of vessel sewage disposal, trash and recycling. Also included are emergency procedures and the safety precautions implemented during hurricanes and severe weather events.

The State of Delaware is charged with upholding the Public Trust Doctrine, which has been used historically in protecting the public's rights to fishing, commerce, navigation, recreation and even preservation as an appropriate public use. The Department recognizes that there are concerns associated with this project, but has balanced those concerns.

The Record developed in this matter indicates that the Department's experts have considered all statutes and regulations that govern projects such as the Applicant's proposed project, and have recommended issuance of all permits necessary for completion of the same. I find and conclude that the Applicant has adequately demonstrated its compliance with all requirements of the statutes and regulations as noted herein, and that the Record supports approval of the permit application submitted by Christopher At the Townes at Bayshore Village, LLC.

In conclusion, I recommend that all permits required for this proposed project, consistent with the Record developed in this matter, be issued by the Department in the customary form, and with appropriate conditions.

Further, I recommend the Secretary adopt the following findings and conclusions:

1. The Department has jurisdiction under *7 Del. C.* §§6003, 6004, 6006(4), and all other relevant statutory authority, to make a final determination on the Applicant's permit application after holding a public hearing, considering the public comments, and all information contained in the Record generated in this matter;

2. The Department provided proper public notices of the permit application of Christopher At the Townes at Bayshore Village, LLC, and of the public hearing held on February 20, 2020, and held said hearing to consider any public comment that may be offered on the same, in a manner required by the law and regulations;

3. The Department considered all timely and relevant public comments in the Record, as established in the Department's above referenced TRM;

4. The Department has carefully considered the factors required to be weighed in issuing all permits required of this proposed marina project, and finds that the Record supports approval of the Applicant's permit application, and the issuance of all required permits associated with same;

5. The Department shall issue the following permits to the Applicant: (1) a Marina Permit; (2) a Subaqueous Lands Lease; (3) a Subaqueous Lands Permit; and (4) Water Quality Certification. Furthermore, said permits shall include all special conditions as set forth in the Department's draft permits, to ensure that Delaware's environment and public health will be protected from harm;

6. The Department has an adequate Record for its decision, and no further public hearing is appropriate or necessary; and

7. The Department shall serve and publish its Order on its internet site.

/s/Lisa A. Vest
LISA A. VEST
Regulatory Specialist

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Attachments/Appendix:

Appendix A: Division of Water TRM (07/24/2020)