

BEFORE THE ENVIRONMENTAL APPEALS BOARD FOR  
THE STATE OF DELAWARE

DELAWARE COMMUNITY BENE-  
FITS AGREEMENT COALITION,  
MARIE REED, KAREN  
CHEESEMAN, SIMEON HAHAN,  
JEFFREY RICHARDSON, and DR.  
MUJAHID NYAHUMA,

Appellants,

v.

STATE OF DELAWARE DEPART-  
MENT OF NATURAL RESOURCES  
AND  
ENVIRONMENTAL CONTROL,

Appellee.

EAB Appeal No. 2021-07  
2021-08  
2021-09  
2021-10  
(CONSOLIDATED)

**ORDER**

Pursuant to due and proper notice of time and place of hearing served on all parties in interest, and to the public, the above-stated cause of action came before the Environmental Appeals Board (“Board”) on July 26, 2022, via remote Web conferencing.

Members of the Board present and constituting a quorum were: Dean Holden (Chair), Frances Riddle, Michael Horsey, and Robert Mulrooney. After challenge, Board Member Randall Horne recused himself. Deputy Attorney General Kevin P.

Maloney represented the Board. Appellants Karen Cheeseman, Simeon Hahn, Jeffrey Richardson and Marie Reed (“the Individual Appellants”) appeared *pro se*. Appellant Dr. Mujahid Nyahuma did not appear. Appellant Delaware Community Benefits Agreement Coalition (“DCBAC” or the “Organizational Appellant”) was previously dismissed from the Appeal because it was not represented by counsel by Order of the Board dated April 28, 2022.

Deputy Attorneys General Devera Scott and Jameson Tweedie represented Appellee Delaware Department of Natural Resources and Environmental Control (“DNREC”). Walter L. Burton, Jr., Esquire and Thomas Hanson, Esquire represented Diamond State Port Corporation (“DSPC”). Thaddeus J. Weaver, Esquire, Shoshana (Suzanne Ilene) Schiller, Esquire and Jill Hyman Kaplan, Esquire represented Appellants Greenwich Terminals LLC, GMT Realty and Gloucester Terminals LLC (“Port Operators”). Andrew S. Levine, Esquire and Joelle E. Polensky, Esquire represented Appellant Port of Philadelphia (“Port of Philadelphia”). Michelle J. Skjoldal, Esquire and David A. Rockman, Esquire represented Appellant Walter Curran (“Curran”).

### **STATEMENT OF THE CASE AND PROCEEDINGS**

On October 18, 2021, DCBAC and the Individual Appellants appealed Secretary’s Order No. 2021-CZ-0019 (“Order 2021-W/CCE-0026” or the “Secretary’s

Order”) issued by DNREC. On October 20, 2021, Port Operators appealed the Secretary’s Order. On October 20, 2021, the Port of Philadelphia appealed the Secretary’s Order. On October 20, 2021, Curran appealed the Secretary’s Order. The Secretary’s Order authorized the issuance of a subaqueous lands permit associated with the construction of a new container port on the Delaware River at the DSPC Edgemoor property, located at 4600 Hay Road, Edgemoor. New Castle County, Delaware (the “Facility” or the “Project”).

On March 1, 2022, DNREC filed a Motion to Bifurcate Proceedings in which it moved that the appeal be separated into two proceedings: 1) a hearing on potentially dispositive motions; and 2) a hearing on the merits. The Board granted DNREC’s Motion to Bifurcate by Order dated March 3, 2022. Also on March 1, 2022, DNREC filed a Motion to Dismiss, joined by DSPC, contending that the Appeal should be dismissed for lack of standing and for lack of legal representation of the Organizational Appellant. On April 28, 2022 this Board issued an order finding that (1) the appeal of the DCBAC must be dismissed because it is not represented by counsel; (2) the Individual Appellants may proceed with the prosecution of their appeals contingent upon the filing of individual amended Statements of Appeal and affidavits or declarations designed to establish their basis for standing to prosecute the appeal; (3) that the issue of standing was not yet ripe for decision.

I. **PORT OPERATORS’ MOTION TO RECUSE BOARD MEMBER HORNE**

On July 25, 2022, the Port Operators filed a Motion for Disqualification of Board Members Horne and Marcozzi. As noted above, Mr. Marcozzi had previously recused himself from participation in the Appeal. Port Operators contended that Mr. Horne should be disqualified because of his long-term associations with, respectively, (a) Gulftainer and the Diamond State Port Corporation (“DSPC”), whose plans to construct a new port facility at the Edgemoor property located at 4600 Hay Road, Wilmington, Delaware, are at the center of these proceedings, and (b) Duffield Associates, LLC – now part of Verdantas (a new company created by a hedge fund) - the engineering consultant hired by Applicant to guide its plans for new port construction.

At the July 26, 2022 hearing, Mr. Horne addressed the Motion to Disqualify. Mr. Horne testified that he retired from employment with Gulftainer on December 31, 2019, but he had worked for them for two years including when they entered into a contract with the State of Delaware regarding the construction of the facility. Mr. Horne testified that, prior to his employment with Gulftainer, he was in the employ of DSPC for 15 years. He emphasized that he receives no current income from DSPC but does receive a pension from them. (Tr. pp. 8-9.<sup>1</sup>)

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<sup>1</sup> The abbreviation “Tr.” is used throughout this Order to refer to the transcript of the Board’s hearing on July 26, 2022,

The Individual Appellants, the Port of Philadelphia, the Port Operators, and Curran expressed their support for the Motion. DNREC took no position on the Motion. (Tr. pp.14-16) After hearing the position of the various parties and confirming that the Board would still have a quorum in his absence, Mr. Horne decided to recuse himself voluntarily thus obviating the necessity of a Board vote. (Tr. p.17)

## **II. DNREC'S PARTIAL MOTION TO DISMISS**

On June 17, 2022, DNREC filed a Partial Motion to Dismiss in which it argued that (1) the Board lacks subject matter jurisdiction over the federal consistency certification; (2) the water quality certification claim (a) was not timely filed, (b) predates the Order, (c) addresses matters outside the Board's jurisdiction, and (d) is unripe. The Partial Motion to Dismiss also contended that the Individual Appellants have failed to establish standing.

### **The Board's Subject Matter Jurisdiction**

The Board hereby decides to defer ruling on its jurisdiction to address the federal consistency certification claim and the water quality certification claim until the Motions in *Limine* hearing or the hearing on the merits of the appeal.

### **Standing**

DNREC argues that the Appeal filed by each individual must be dismissed in its entirety for lack of standing. Standing is a threshold question to ensure the party

is in fact entitled to mount a legal challenge. DNREC contends that the five Individual Appellants have filed five individual appeals, but their Statements of Appeal do not comply with the Board's Order. The Board required each individual to file an individual amended Statement of Appeal and affidavits or declarations to establish standing: "The Individual Appellants may proceed with the prosecution of their appeals contingent upon the filing of (1) individual amended Statements of Appeal and (2) Affidavits or Declarations designed to establish their basis for standing to prosecute the appeal." DNREC contends the Individual Appellants failed to comply with the Order of the Board because they failed to file the Affidavit of Declarant which established the basis for standing for the Appeal.

DNREC argues the individual appeals lack particularity, and except for the individuals' names and addresses, the Statement of Appeals, which include the individual's declaration of standing, are nearly identical. Generic declarations of standing are not sufficient to bring a claim before the Board. The law provides a right to appeal to the Board for: "[a]ny person whose interest is substantially affected by any action of the Secretary." In *Nichols*, the Delaware Supreme Court applied the same strict standing requirements for bringing an appeal before the Environmental Appeals Board. Thus, to have standing to appeal, DNREC contends Appellant must show: (1) that Appellant has suffered an injury in fact that is concrete and particularized, (2) that Appellant's injury is "fairly traceable to the challenged action of the

defendant,” and (3) that Appellant’s injury must be capable of being remedied by a favorable ruling by the Board. Appellant, as “[t]he party invoking the jurisdiction of the court, or the Board, bears the burden of proving that he or she has standing to bring the action.” This includes demonstrating all three elements of standing.

In summary, DNREC contends the Appellants have failed to demonstrate standing in their individual appeals. According to DNREC, the Appellants have failed to establish an injury which is concrete and particularized and failed to establish the injury was fairly traceable to the actions of the Department and have failed to comply with the Board’s direct order. Therefore, according to DNREC, the appeals of the Individual Appellants must be dismissed.

### **SUMMARY OF THE TESTIMONY**

#### **Ms. Reed testified that:**

She is a lifelong resident of Southbridge, and she has experienced negative community health impacts in her neighborhood resulting from the operation of the Port of Wilmington in the form of heavy truck traffic, smoke, and a high cancer rate. (Tr. at pp. 50-51)

#### **Ms. Cheeseman testified that:**

The proposed facility is “right down the street from where I currently reside, where I grew up... and where my grandkids are.” The proposed facility is going to affect the use of the park and air quality. (Tr. at p. 46)

**Mr. Hahn testified that:**

He lives “within one mile of the port expansion area” and is a “frequent recreational user of the Delaware River in the immediate vicinity of the project site at Fox Point Park” and the uses include “walking, hiking, recreational fishing, boating and other water contact things.” (Tr. at p. 47) Shoreline access in the area is “horrible.” Lack of access has led to cumulative impacts to recreation in the area including impacts to shorelines, natural resources and endangered species such as the Atlantic sturgeon. (Tr. p. 48) He is “very interested” in the mitigation aspect of the permitting process and believes that taxpayers “should be considered as having standing.” (Tr. p. 50) Both land-based and water-based recreational activities would be reduced as a result of the project. (Tr. p. 52) He has “health and safety concerns related to the dredging of contaminated sediments” and believes he will be harmed by water quality impacts. (Tr. p. 88)

**Mr. Richardson testified that:**

He is a member of the Delaware Community Benefits Coalition, a resident of Wilmington, an educator and an activist working at the community and national level addressing issues of social, racial, economic and environmental Justice. (Tr. p. 19) He contends that his “injuries are addressable by [the] EAB overturning DNREC’s decision to grant the permit for this dangerous project” and that “indi-



viduals in this country and in Delaware have every right to organize to fight pollution in their communities and ask agencies to protect and respect that right.” (Tr. pp. 21-22) He contends that the State has a duty to provide legal assistance to Delaware residents and that the public hearing process was “weak, anemic, not clear, not substantive.’ (Tr. p. 31)

“We demand and deserve a public participation process that is real, substantive, transparent, and undergirded by a commitment to enforce the laws developed to protect human health, our air, water and communities, all of which will be severely degraded if the current permit is not reversed, and the knowledge and voices of community residents continue to be blunted or otherwise diminished.” (Tr. p.41) Environmental justice “seeks equity for minority and low-income communities that may be disproportionately exposed and vulnerable to adverse environmental impacts” and is not occurring in this process and the challenge to our standing demonstrates a lack of environmental justice in this process. (Tr. p. 42) We have standing “because we have a monumental stake in the outcome of this process’ and we will “be injured.” We have standing because “we are citizens and have a right to be heard.” (Tr. p. 44) Many injuries “unrelated to property values including harm to the local ecology and wildlife are more than enough to establish particularized harm.” (Tr. p. 89)

**Dr. Nyahuma**

Dr. Nyahuma did not personally appear at the July 26, 2022, hearing.

**III. PORT OPERATORS AND CURRAN JOINT MOTION FOR SUMMARY JUDGMENT**

**Positions of the Parties**

Port Operators and Curran argue DNREC did not adhere to its own regulations when it issued the Approvals based on an application that was unquestionably incomplete and out-of- date. DNREC’s *Regulations Governing the Use of Subaqueous Lands*, in a sub-section entitled “Requirements for Every Application,” state that an applicant applying for a Subaqueous Lands Act permit “shall provide the information requested in the appropriate application form,” 7 *Del Admin C.* § 7504-3.1.1.2, and they elsewhere state that an applicant “shall maintain the application in a current state...” *Id.* § 7504-3.1.3. DSPC did neither according to Port Operators and Curran. The movants claim that DSPC failed to “provide the information requested in the appropriate application form” when it failed to identify what measures would be used to “reduce the frequency of the dredging” in the place of the removed shoaling fans. The movants contend that the Board should grant summary judgment in the movants favor, reverse the approvals and remand DNREC with instructions

to DSPC to complete its application by supplying the required and up-to-date information regarding its proposed methods for reducing maintenance dredging and allowing for public comment on the newly supplied information.

DSPC argues that in order to potentially reduce the amount of future maintenance dredging, and in response to a contextual question in the Construction Permit application, its application proposed the use of sedimentation fans (*i.e.*, shoaling fans). At the time, DSPC submitted its application, the extent to which the shoaling fans would reduce the need for future maintenance dredging had not yet been determined and that the scope and approval of future maintenance dredging is not the subject of this construction application approved by DNREC, and DSPC will submit a future application related thereto with its own administrative process.

During the public comment period, the Appellants raised issues with DSPC's proposed use of shoaling fans to potentially reduce the amount of future maintenance dredging. After further evaluation of the issues raised by Appellants and DNREC, and in order to make the project more environmentally friendly, on March 25, 2021, DSPC informed DNREC that it was no longer considering using shoaling fans. DSPC notes that consistent with prior practices and precedent, DNREC did not require DSPC to re-submit its permit application because the proposed revisions in fact further reduced the environmental impact of the proposed project.

DSPC contends that Appellants' argument that DNREC failed to adhere to its own regulations by not requiring DSPC to resubmit its application and restart the administrative process also is misplaced. DNREC's historical practice has never been to require applicants to resubmit applications when the public process results in modifications that reduce environmental impact. The purpose of the public hearing and comment period during the administrative review process is to identify ways to reduce environmental impacts and make the overall project better for the applicant and the public at large. The process does not require endless cycles of amendments stifling any real progress on projects.

#### IV. **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Prior to the July 26, 2022, hearing and in accordance with the Board's Regulations, DNREC provided the Board the Chronology consisting of the record before the Secretary with respect to Secretary's Order No. 2021-CZ-0019. In deciding this Motion to Dismiss, in addition to considering the Chronology, the Board considered the written submissions of the Parties, the testimony presented and the oral argument from the Parties. Following the closing arguments by each of the Parties, the Board entered into executive session as permitted by 7 *Del. C.* § 6008(a) to deliberate and receive legal advice.

## DNREC’S PARTIAL MOTION TO DISMISS

After deliberation and careful review of Parties’ respective arguments, the Board, for the reasons that follow, by a vote of 4 to 0, granted the Motion to Dismiss the Curran Amended Statement of Appeal.

After deliberation and careful review of Parties’ respective arguments, the Board, for the reasons that follow, by a vote of 4 to 0, granted the Motion to Dismiss the Individual Appellants for lack of standing.

The Board finds that Curran's attempted challenge to the WQC must be dismissed because the claim is untimely. Seven *Del. C. sec. 7210 (a)* requires an appeal taken pursuant to the Subaqueous Lands Act must be perfected within 20 days after the announcement of the decision. Mr. Curran filed his original appeal on October 20, 2021. Mr. Curran amended his appeal three months later to contain the argument that DNREC did not comply with its regulatory obligation because it did not act on the WQC. Curran's Amended Statement of Appeal was filed on January 20, 2022. The Board finds that the WQC claim was not filed within the 20-day statutory appeal period and is therefore time barred and must be dismissed.

“Standing is a threshold question” to ensure the party is in fact entitled to mount a legal challenge. *Dover Historical Soc. v. City of Dover Planning Comm’n*, 838 A.2d 1103,1110 (Del. 2003). To have standing to appeal, Appellants must show:

(1) that the Appellant has suffered an injury in fact that is concrete and particularized, (2) that Appellant's injury is "fairly traceable to the challenged action of the defendant," and (3) that Appellant's injury must be capable of being remedied by a favorable ruling by the Board. *Food & Water Watch v. Del. Dep't of Natural Res. and Env'tl. Control*, 2018 WL 4062112, at \*3 (Del. Super. Aug. 24, 2018).

Appellant, as "[t]he party invoking the jurisdiction of the court, or the Board, bears the burden of proving that he or she has standing to bring the action." *Eastern Shore Env'tl.*, 2004 WL 440413, at \*3; *Nichols*, 74 A.3d at 644 (appellant failed to meet his burden). This includes demonstrating all three elements of standing. *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

During deliberations, the Board found that the Individual Appellants, failed to comply with the Board's Order to submit "Affidavits or Declarations designed to establish their basis for standing to prosecute the appeal" and that their generic, largely identical assertions, are not sufficient to establish standing to bring an appeal before the Board.

During deliberations, the Board also found that each of the individual appellants failed to demonstrate that their alleged injuries are concrete as opposed to general dissatisfaction with the Project and the permitting process. In addition, the Board found that each of the Individual Appellants failed to demonstrate particularized in-

jury or injury distinguishable from that of the general public. Many of the Appellants based their purported injury on residing in the vicinity of the proposed facility and noted that they may recreate less due to the facility. Such speculation, in the opinion of the Board, is an insufficient basis upon which to establish standing. The Board noted that an interstate highway and previously developed industrial land exist between some Appellants' homes and the proposed facility and serve as a natural buffer.

## **PORT OPERATORS AND CURRAN MOTION FOR SUMMARY**

### **JUDGMENT**

After deliberation and careful review of Parties' respective arguments, the Board, for the reasons that follow, by a vote of 4 to 0, denied the Port Operators and Curran's Motion for Summary Judgment.

"A summary judgment motion is a determination by the court concerning a case or aspect of a case made prior to trial that obviates the need for trial of the matter." David L. Finger & Louis J. Finger, *Delaware Trial Handbook* § 2:11 (2010). Under Superior Court Civil Rule 56(c), "when there is no genuine issue as to any material fact" and the "moving party is entitled to a judgment as a matter of law," summary judgment will be entered in the moving party's favor. *See* Del. Super. Ct. Civ. R. 56(c). "The purpose of summary judgment is to provide a method by which issues of law involved in a case may be speedily brought before a trial court

and disposed of without unnecessary delay. The disposition of litigation by motion for summary judgment is encouraged as it can result in a prompt, expeditious and economical ending of lawsuits.” *Delaware Trial Handbook, supra*, § 2:11.

The Board concluded, during its deliberations, that the Port Operators and Curran’s Motion for Summary Judgment must be denied. The Board found that there are disputed issues of fact and that there are significant questions as to whether Appellants are entitled to judgment as a matter of law. Appellants contend DSPC was required to amend its permit application, which is contrary to past practice and, at the very least, represents a material factual dispute precluding summary judgment. *Hoechst Celanese Corp. v. Certain Underwriters at Lloyd's London*, 656 A.2d 1094, 1100 (Del. 1995) (“[T]he evidence presented raised a material factual dispute which precluded the entry of summary judgment”); *TIBCO Software, Inc. v. nThrive Revenue Systems, LLC*, 2020 WL 6194006 (Del. Super. Ct. Oct. 22, 2020) (summary judgment denied due to disputes of material fact). The Board found as a matter of fact that DSPC’s removal of the shoaling fans was not substantial enough to require the permitting process to start all over again. Instead, it found that the rule of reason, as well as a reading of the regulations as a whole, leads to the conclusion that some back and forth on the specifics of the project is both normal and beneficial. The Board finds that it has been DNREC’s practice not to require applicants to amend applications and resubmit them for a public hearing and comment based on changes



which reduce the environmental impact of the proposal. *See, (McFaul, Sr. v. Secretary of DNREC et al., EAB Appeal No. 2003-01 (Oct. 3, 2003), (the Appellant argued DNREC accepted an incomplete and misleading application that justified revocation or denial of the permit. Id. at 1-3. The Board disagreed, concluding that, “not every permit application received by [DNREC] is going to be approved in precisely the terms set forth in that application. The permitting process is often fluid with modifications being made as the agency and public provide input into the process.) See also, Lampner v. DNREC, EAB Appeal No. 2019-02 (Oct. 2, 2019), (Appellants argued, inter alia, the Secretary’s decision should be remanded because there was a lack of compliance with provisions requiring notice and comment due to a revised application. In affirming the Secretary’s Order, the Board concluded, as a matter of law, that, “DNREC’s decision not to re-notice the revised application or to subject the Project to an additional public hearing is reasonable and supported by the evidence and the law.” Id. at 9-10.)*

**IT IS SO ORDERED**, this 21st day of October 2022, that;

- 1) The appeals of the Individual Appellants are dismissed because they failed to carry their burden of establishing standing to prosecute the Appeal.
- 2) The Curran Amended Motion of Appeal is dismissed as being filed untimely.

3) The Board makes no determination at this time with respect to the federal consistency certification claim and the water quality certification claim.

4) The Board denies the Port Operators and Curran's Motion for Summary Judgment because it finds there exist disputed issues of fact and it is far from certain that movants are entitled to judgement as a matter of law.

Date: 10/21/2022 /s/ Dean Holden  
Dean Holden, Chairperson

**The following three Board members concur in this decision:**

Date: 10/21/2022 /s/ Robert Mulrooney  
Robert Mulrooney, Board Member

Date: 10/24/2022 /s/ Michael Horsey  
Michael Horsey, Board Member

Date: 10/21/2022 /s/ Frances Riddle  
Frances Riddle, Board Member

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DELAWARE COMMUNITY BENEFITS  
AGREEMENT COALITION, MARIE  
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STATE OF DELAWARE DEPARTMENT  
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EAB Appeal No. 2021-07  
2021-08  
2021-09  
2021-10  
(CONSOLIDATED)

**CERTIFICATE OF SERVICE**

I, Dean Holden, Environmental Appeals Board Chairman, hereby certified that on October 24, 2022, I caused true and correct copies of the foregoing Order to be served on the following:

<i><b>Via Certified Mail/Return Receipt</b></i> Marie Reed 1111 D Street Wilmington, DE 19801 <i>Individual Appellant</i>	<i><b>Via Certified Mail/Return Receipt</b></i> Karen Cheeseman 31 South Pennewell Drive Wilmington, DE 19809 <i>Individual Appellant</i>
<i><b>Via Certified Mail/Return Receipt</b></i> Simeon Hahn 501 Lennox Road Wilmington, DE 19801 <i>Individual Appellant</i>	<i><b>Via Electronic Mail and Certified Mail/Return Receipt</b></i> Jeffrey Richardson 700 West 21 <sup>st</sup> Street Wilmington, DE 19802 <a href="mailto:info@delebac.org">info@delebac.org</a> <i>Individual Appellant</i>

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<p><b><i>Via Electronic Mail and Certified Mail/Return Receipt</i></b>  Joelle E. Polesky, Esquire  1000 N. West Street, Suite 1200  Wilmington, DE 19801  Telephone: (302) 295-4856  <a href="mailto:jpolesky@stradley.com">jpolesky@stradley.com</a></p> <p><i>Of Counsel:</i>  Andrew S. Levine, Esquire  Stradley Ronon Stevens &amp; Young, LLP  2005 Market Street, Suite 2600  Philadelphia, Pennsylvania 19103  <a href="mailto:alevine@stradley.com">alevine@stradley.com</a></p> <p>Attorneys for Appellant Philadelphia Regional Port Authority</p>	<p><b><i>Via Electronic Mail and Certified Mail/Return Receipt</i></b>  Thaddeus J. Weaver, Esquire  704 King Street, Suite 500  P.O. Box 1031  Wilmington, DE 19899-1031  Telephone: (302) 571-8867  <a href="mailto:tweaver@dilworthlaw.com">tweaver@dilworthlaw.com</a></p> <p><i>Of Counsel:</i>  Jill Hyman Kaplan, Esquire  Shoshana Schiller, Esquire  Stephen D. Daly (No. 6022)  Manko, Gold, Katcher &amp; Fox LLP  401 City Avenue, Suite 901  Bala Cynwyd, PA 19004  <a href="mailto:jkaplan@mankogold.com">jkaplan@mankogold.com</a>  <a href="mailto:sschiller@mankogold.com">sschiller@mankogold.com</a>  <a href="mailto:sdaly@mankogold.com">sdaly@mankogold.com</a></p> <p>Attorneys for Appellants Greenwich Terminals LLC, GMT Realty, LLC, and Gloucester Terminals LLC</p>

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*Attorneys for Appellant Walter Curran*

*/s/ Dean Holden* \_\_\_\_\_

Chair