



STATE OF DELAWARE
**DEPARTMENT OF NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL**

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OFFICE OF THE
SECRETARY

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Secretary's Order No.: 2020-W-0036

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; (2) a Subaqueous Lands Lease; (3) a Subaqueous Lands Permit; And (4) Water Quality Certification

Date of Issuance: December 21, 2020

Effective Date: December 21, 2020

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC"), pursuant to 7 *Del.C.* §§6003, 6004(b), 6006(4), Delaware's *Subaqueous Lands Act* (7 *Del.C.* Chapter 72), and all other relevant statutory authority, the Department issues this Order, approving: (1) a Marina Permit; (2) a Subaqueous Lands Lease; (3) a Subaqueous Lands Permit; and (4) Water Quality Certification to allow Christopher At the Townes At Bayshore Village, LLC ("Applicant"), 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 background of 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 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 new permit application, dated October 21, 2019, submitted on behalf of LCI, and received by the Department 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 the current owner, 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 October 21, 2019 permit application 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 proposed 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 subsequent 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 modifications made to the Applicant’s proposed project, the concerns raised in the comments received from the public, and the Department’s responses to those concerns, will all be addressed in greater detail below. Proper notice of the hearing was provided as required by law.

Background, Procedural History and Findings of Fact

As noted above, the Department held a public hearing on February 20, 2020 concerning the Applicant's proposed project as set forth in the Application of October 21, 2019. Several commenters that attended the public hearing 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.

Following the public hearing, the WSLs conducted a field survey, in consideration of concerns raised by members of the public during the hearing. 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. 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 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.

At the request of Hearing Officer Lisa A. Vest, a Technical Response Memorandum ("TRM") was prepared by the technical experts in the Department's 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 WSLs's conclusions and recommendations with regard to the Applicant's pending permit application (specifically, the revised plans for this proposed project subsequently submitted to the Department), for the benefit of the Record generated in this matter.

Subsequent to the Department's TRM having been received for inclusion into the hearing record, Hearing Officer Vest prepared her Hearing Officer's Report ("Report"), dated October 7, 2020, which expressly incorporated the TRM therein. Ms. Vest's Report set forth the procedural history, summarized and established the record of information ("Record") relied on in the Report, and provided findings of fact, reasons, and conclusions that recommend the Department approve the pending Application, with the Applicant's revised plans as noted above, subject to the conditions set forth in the Draft Permit prepared by the WSLs.

Reasons 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 the following: (1) a Marina Permit; (2) a Subaqueous Lands Lease; (3) a Subaqueous Lands Permit; and (4) a Water Quality Certification from the Department's WSLS. I further find that the Applicant's proposed project is subject to the federal and state statutory and regulatory requirements previously referenced herein.

In reviewing the applicable statutes, regulations, and weighing public benefits against detriments, the Department's experts in the WSLS have concluded that the construction of the community marina and maintenance dredging as described in the Applicant's revised project plans for the Marina Permit, Operations and Maintenance Plan, Subaqueous Lands Lease, Subaqueous Lands Permit and Water Quality Certification, complies with the Regulations administered by the WSLS. The permits and associated approval documents that would be issued by the Department would be reflective of the revised plans submitted by this Applicant, and would include operational and maintenance plans for the Applicant, to ensure continued protection of public health, safety and the environment.

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, the Applicant developed alternatives to the originally proposed project in order to minimize environmental impacts. These modifications include the following:

- A reduction in the number of slips originally 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.
- Navigational safety concerns were addressed 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 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.

In conclusion, 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 (with revised plans), 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 Application submitted by Christopher At the Townes at Bayshore Village, LLC. Accordingly, this Order approves all permits required for this proposed marina project, consistent with the Record developed in this matter, and directs that the same be issued by the Department in the customary form, and with appropriate conditions.

Further, the Department concludes and directs the following:

1. The Department has jurisdiction under *7 Del. C. §§6003, 6004, 6006(4), 7 Del.C. Chapter 72*, 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 Report, prior to issuing this Order as its final decision;

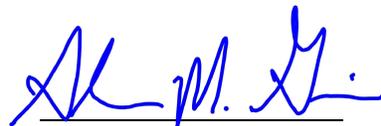
4. The Department has carefully considered the factors required to be weighed in issuing all permits required of this proposed marina project, and finds that the Record supports approval of the Application, with revised plans, based upon the terms and conditions in the draft documents prepared by the WSLs, and the issuance of all required permits associated with same;

5. The Department shall issue the following permits to the Applicant: (1) Marina Permit MP-404/19; (2) Subaqueous Lands Lease SL-404/19; (3) a Subaqueous Lands Permit SP-404/19; and (4) Water Quality Certification WQ-404/19. 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 adopts the Report and its attachments as further support for this decision;

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

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



Shawn M. Garvin
Secretary