LICENSEE RESPONSE TO APPEAL

COPY

Gibbons & Calderwood, L.L.P.

Attorneys at Law
Post Office Box 616
9 Washington Street
Camden, Maine 04843
email: paul@gibbons.midcoast.com

Paul L. Gibbons
Terry W. Calderwood

Telephone 207-236-3325
Fax 207-236-8611

May 21, 2009

Susan M. Lessard, Chair
Board of Environmental Protection
c/o Terry Hanson
#17 State House Station
Augusta, ME 04333-0017

In Re: Appeal In the Matter of Appeal of Department Permit (L-024406-4P-AN)
Approval for Construction of pier, ramp and float system

Dear Ms. Lessard:

Enclosed please find Arthur Choate's, Licensee, Objection to Appellant's (Dark Harbor Partners) Appeal regarding the above-captioned matter.

Very truly yours,

GIBBONS & CALDERWOOD, L.L.P.

Paul L. Gibbons

PLG/sh

cc: See copy list attached.

H:\00190\ZONING\Tim Choate-pier\Correspondence\Susan Lessard 6-29-09 doc

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
17 STATE HOUSE STATION
AUGUSTA, ME 04333

IN THE MATTER OF

ARTHUR B. CHOATE Islesboro, Waldo County PIER, RAMP, & FLOAT SYSTEM L-24406-4P-A-N (approval)	) ARTHUR CHOATE'S, LICENSEE,) OBJECTION TO APPELLANT'S) APPEAL)

Summary

Arthur B. Choate seeks to build this pier so he can recreate on the water around his property and to have improved emergency access to the mainland. The record shows that there is no other practical alternative for the location of this pier other than the Choate property. Gartley & Dorsky, Choate's engineer, represent that the pier design will withstand the wind and seas and there is no evidence in the record to rebut this expert opinion. The winter storage of floats above the high annual tide on this property will not result in an unreasonable interference with scenic uses or result in an unreasonable impact. In granting this permit, the Commissioner did not approve of the salvaging of granite blocks on site. Instead, the approval allowed granite blocks to be used to support this pier. There are not misstatements of fact in the Choate application. The requirement that there be no practical alternative to meet the Avoidance standard of Chapter 310, and the requirement that this pier will not result in unreasonable interference with existing scenic and aesthetic uses constitute rules without standards and are therefore Void for Vagueness.

Procedural History

On March 24, 2009 the Department of Environmental Protection approved Arthur B. Choate's application to construct a permanent granite crib supported pier system with seasonal ramp and float. The permanent pier will measure 5 feet wide and 70 feet long. The design includes a 3 foot by 40 foot long seasonal ramp and a 15 foot wide by 25

foot long seasonal float. The permanent pier system is necessary to update the functionality of the applicant's access to the ocean . See Department order L-014406-4P-A-N

By letter dated March 24, 2009, the appellants filed an appeal of this decision to this Board. The appeal included 20 attachments, eight of which were not part of the Department's licensing record, and therefore, constituted supplemental evidence. These appellants claimed that they met the due diligence requirements for the admission of the following eight exhibits.

a. Attachment 6 - aggrieved persons map
b. Attachment 7 - Practical alternative analysis-Dark Harbor Partners.- aerial photos
c. Attachment 8 - "Islesboro Landscape character and composition
d. Attachment 9 - Dark Harbor Partners standard boundary survey
e. Attachment 10 - John Pratt email
f. Attachment 11 - Nakomis Nelson April 16, 2009 letter
g. Attachment 12 - Tarratine Club regulations
h. Attachment 18 - public shoreline access in Maine

By decision dated June 8, 2009, Susan M. Lessard, Board Chair, excluded all requested supplemental exhibits except Attachment 6 because this map was already part of the existing record.

Objection to Appeal

Arthur B. Choate, the Licensee, objects to this Appeal. This appeal must be denied because the Commissioner's decision is supported by the record and there is no error of law and no abuse of discretion. The Licensee's request for a pier meets all nine requirements of 38 M.R.S.A. 480-D and all the relevant regulations set forth in Chapter 310 and Chapter 315 of the Maine Code of Regulations.

Claims of these Appellants

The Appellants claim that the decision of the Department must be overturned because:

1. the Department incorrectly applied the Avoidance standard found in Chapter 310 Section 5 (A) because they claim the Tarratine Club is an alternative that is reasonable and practical;

2. the Department incorrectly evaluated the impact of the pier on the landscape as described in Chapter 315 (9A) because there are 14 piers on the westerly side of the island of Islesboro and only 1 existing private pier on the easterly side of the Island where the Licensee's property is located;

3. the Department incorrectly applied the no unreasonable impact standard found in Chapter 310 Section 5 (D) because the gangway and float will be stored above the high annual tide (HAT) during the winter months which will have an impact of the scenic use of this coastal wetland and the pier will not perform as represented because of its exposure to the open wind and ocean and that the Licensee engineers never considered the impact of the 42 foot boat that will be tied to the pier.

4. the Department failed to consider Maine's common law as it relates to granite blocks described in the project.

5. the Appellants claim that two statements contained in the Licensee's application are misleading and a third statement is simply factually incorrect and that the Department's reliance on these three statements lead it to an incorrect conclusion.

Avoidance

The record supports the conclusion that there is no practical alternative for the location of this pier other than on the Licensee's property because the Licensee submitted several alternative options to this pier project, none of which were practical or reasonable.

The Avoidance standard is found in chapter 310 section 5 General Standards which states:

> **Avoidance.** *No activity shall be permitted if there is a practicable alternative to the project that*

would be less damaging to the environment. Each application must provide an analysis of alternatives (see Section 9(A)) in order to demonstrate that a practicable alternative does not exist.

Section 9 (A) of chapter 310 provides:

9. Application Requirements

A. Alternatives Analysis. *A report that analyzes whether a less environmentally damaging practicable alternative to the proposed alteration, which meets the project purpose, exists. Determining whether a practicable alternative exists includes:*

(1) Utilizing, managing or expanding one or more other sites that would avoid the wetland impact;

(2) Reducing the size, scope, configuration or density of the project as proposed, thereby avoiding or reducing the wetland impact;

(3) Developing alternative project designs, such as cluster development, that avoid or lessen the wetland impact; and

(4) Demonstrating the need, whether public or private, for the proposed alteration.

The "alternative analysis" standard must be read in the context of the rights of the shoreland property owner.

All common law owners of property abutting the ocean have, subject to reasonable restrictions, the right to wharf out to the navigable portion of the body of water.

[A] littoral proprietor and riparian owner, as is universally conceded, have [sic] a qualified

> *property in the waterfrontage, belonging by nature to their land; the chief advantage growing out of the appurtenant estate in the submerged land being the right of access over an extension of their water fronts to navigable water, and the right to construct wharves, piers or landings subject to such general rules and regulations as the legislature, in the exercise of its powers, may prescribe for the protection of public rights in rivers or navigable waters.* See Great Cove Boat Club v Bureau of Public Lands 672 A2d 91, 95

A pier is a "Water Dependent Use. Chapter 310 Section 3 (W) definitions provide:

> ***W. Water Dependent Use.*** *A use which cannot occur without access to surface water. Examples of uses which are water dependent include, but are not limited to,* ***piers****, boat ramps, marine railways, lobster pounds, marinas and peat mining. Examples of uses which are not water dependent include, but are not limited to, boat storage, residential dwellings, hotels, motels, restaurants, parking lots, retail facilities and offices.* (emphasis added)

The regulations anticipate that piers may not have a practicable alternative. Chapter 310 Section 5(A) provides in part as follows:

> *In wetlands of special significance, projects for which no practicable alternative may exist are limited to those necessary for:*
>
> *(1) Health and safety;*
>
> *(2) Crossings by road, rail or utility lines;*
>
> *(3) Water dependent uses;*
>
> *(4) Expansion of a facility or construction of a related facility that cannot practicably be located*

elsewhere because of the relation to the existing facility, if the existing facility was constructed prior to September 1, 1996;

(5) Mineral excavation and appurtenant facilities; or

(6) Walkways.

A fair reading of the regulations is that the authors understood that a pier may have no practicable alternative.

Even if the avoidance standard applies, the Licensee met that requirement. The Department correctly found that Arthur B. Choate met the avoidance requirement by submitting several alternative options. The decision provides in part:

> *The applicant considered several alternative options to the proposed project:*
>
> 1. *The applicant considered sharing an abutting or nearby pier. However, the applicant determined that this was not a feasible alternative option because the closest private pier is on the east side of the island and is 0.6 miles to the south of the project site.*
>
> 2. *The applicant considered utilizing a public or private slip/mooring space. The applicant determined that there are no slips or mooring spaces available at the local and private marinas. The applicant contacted the municipal Code Enforcement Officer who stated that there is a waiting list for mooring space at the public marinas known as Ferry Dock and Big Tree, which is impractical because it is too remote from the Choate site.*
>
> 3. *Upon request, the applicant considered usage of dock facilities at the Tarratine Club. The applicant*

stated that the Tarratine Club does not allow its members to have boats on their floats. The purpose of the floats is only for loading and offloading passengers. The applicant further stated that only dinghies are allowed to be at the dock for longer durations of time.

4. *The applicant acknowledged that a relative owns a dock on the western side of the island. However, the applicant stated that permission to use this dock has not been extended to him, nor does he hold the rights to use that property in any manner. Thus, the applicant determined that this dock is not a viable alternative option to the proposed project.*

The Appellants' only recorded response to alternative analysis is a letter from James Houghton dated January 20, 2009 that states: *"I would assume that because of the Choate's membership in the Tarratine Club, they have full access to docking facilities five minutes from their home."*

There is no foundation for this statement--nothing to verify how Mr. Houghton can verify how he knows of the Choates' membership at the Tarratine Club, and he does not explain the procedures employed in use of moorings and the rules for dock use by the Tarratine Club. This letter alone could not justify a finding that the Tarrantine Club offers a practical alternative to a pier at the Choate residence.

Any practical alternative analysis under Chapter 310 9(A) must show that any substitute alternative must meet the "the project purpose."

Alternatives are practicable if they are "[a]*vailable and feasible considering cost, existing technology and logistics based on the overall purpose of the project.*" 2 C.M.R. 06096310-3 § 3(R) (2002). Choate's application indicates that the overall purpose of the project was access to the water *from his property* in exercise of his right to wharf-out to navigable waters.

While the existing records do not show it, even if there are moorings, dockage for dinghies and access to a large boat are all available 0.5 miles from the site at the Tarratine Club or some other location, this does not constitute a practical alternative to a pier at the Choate residence.

Choate plainly wants to recreate on the water around his property, not around the local marina. The real issue is that there is no place available to leave his large boat at a dock to enjoy it as he wishes.

The Tarratine Club does not allow direct access to a dock for the Choate Boat. Having a boat on a mooring to be accessed by a dinghy is completely different situation than being able to have a boat tied to a wharf. Often the owner will keep the boat at his dock and put it out on a mooring in the evening. A private dock for personal use by the Choates during the day is not available anywhere else on the island other than his own property.

The Tarratine Club is located on the opposite side of the Island of Islesboro from the Choate property. Traveling more than 0.5 miles by road to get to the Tarratine Club makes it most impractical when compared to a pier at the Choate residence.

Choate's power boat is 42 feet long. There is room for guests. If his boat were stuck at the Tarratine Club on the opposite side of the Island, then Choate and all his guests would have to get into a car with all provisions for boating including, but not limited to, picnic baskets, coolers, rain gear, coats and sweaters, fishing gear etc. Then once at the Club, the car must be unloaded. If the dock was in use, he could either wait or use a dinghy. This would require several trips to the boat to unload all passengers and gear. Upon the return from a boating trip, the process would have to be repeated all over again. This is neither reasonable nor practical.

Deleted: powering

Deleted: powering

The fact that others may wish to use the Tarratine Club does not mean that it constitutes a practical alternative for this Licensee. The size of one's boat, the frequency with which it will be used, and the cost of and the ability to pay for a pier at the locus are all factors, outside of the alternative analysis of Chapter 310, that causes others to choose a different approach.

The Choate property is not only shorefront property but it is also located on Islesboro, which is an island. Access to the mainland is limited to the ferry schedule or by private boat. In emergencies, the fastest and most reliable way to the mainland is one's own boat tied to a float in front of the property. A 42 foot power boat moored at a site 0.5 miles away on a dock that is being used by a large group of people simply is inadequate emergency access when compared to a 42 foot power boat tied to a pier at the Choate residence.

Look at the purpose of this pier. The record shows that there is no practical alternative location for this pier other than the Choate property. The decision of the Department in this regard must be upheld.

Assessing and Mitigating Impacts to Scenic and Aesthetic Uses.

The Appellants claim that because there are 14 piers on the westerly side of Islesboro and only one pier on the easterly side of the Island, it renders the easterly side of the shore pristine and that one additional pier on this side of the island would result in an unreasonable interference with the existing scenic use of the easterly side of the Island of Islesboro.

The Department found after an on site inspection that "Although the project is visible from vantage points on the water, the project is not visible from nearby scenic resources of statewide significance. These nearby scenic resources include Dark Harbor, and Maine Road Overlook. These resources are approximately 1000 feet and 3300 feet, respectively, from the project site." There is nothing in the record to rebut this factual conclusion.

As part of this application Choate submitted a copy of the Department's Visual Evaluation Field Survey Checklist as Appendix A, with a description of the property and the proposed project. The application also contained photographs, including an aerial photograph of the proposed project site.

From the site visit and from this information contained in the application, the Department concluded that "the area immediately surrounding the project area is well screened from direct adjacent views

by large vegetation. Also the project was evaluated using the Departments Visual Impact Assessment (VIA) Matrix and was found to have an acceptable potential visual impact rating . The Department concluded "that the location and scale of the proposed activity is compatible with the existing visual quality and landscape characteristics found within the view shed of the scenic resource in the project area.

The mere fact that there are more private piers on the westerly side of the Island of Islesboro than the easterly side, does not mean that one additional pier on the easterly side of the Island will "unreasonably interfere with the scenic uses". The Appellants argument here must fail.

Unreasonable Impact

The Appellants make the naked claim that the Choate pier may not "perform as intended" given its exposure to seasonal winds and seas and the Licensee's intention to dock a 42 foot boat alongside the float, and they claim that the storage of the seasonal float above the high annual tide (HAT) will have a direct and cumulative impact on the scenic and aesthetic uses of the coastal wetland for the public and for the Appellants.

Gartley & Dorskey, Arthur B. Choate's engineers, completed the application for this permit and also designed the pier and the seasonal floats. In the application, Gartley and Dorsky note that the Choate property faces open ocean and that Arthur Choate will dock a 42 foot boat there. In response to Beth Callahan, the DEP project manager, Gartley and Dorsky wrote to her dated January 20, 2009 which is part of the record. The letter states in part as follows:

> "Proposed pier location is exposed to prevailing fall storm wind direction and winter storm direction (comment from Harbor Committee). The pier is designed to account for the prevailing storm wind directions, including granite supports. An inspection of recent aerial photography indicates there are other piers on the eastern side of Islesboro, including some depicted in the submission. Structures on other islands as well as the eastern coast of the

> mainland that are regularly built to account for these winds."

This expert opinion cannot be rebutted by a naked statement that the pier "may not perform as intended".

These are seasonal floats. They will be store above the high annual tide on this property. The Department found that this site is well screened from the neighbors. Presumably, the recreational boat traffic would significantly be reduced during the winter and fall season. To claim that the on site seasonal storage of these floats would unreasonably interfere with existing scenic uses is an unreasonable claim. There are no facts in the record to support such a claim.

The records support the conclusion that the pier project does not violate the unreasonable impact standard.

Salvaging of Granite Blocks

These Appellants claim that the Department failed to consider Maine common law as it relates to the salvaging of the granite blocks for this project.

The Department did not approve the salvaging of granite blocks but rather approved the use of granite blocks. In its decision, the Department states:

> *"To the extent possible, the applicant proposes to salvage many of the blocks for the crib from a pre-existing structure located in the intertidal and subtidal area adjacent to the project site. If more blocks are needed or granite blocks from the pre-existing structure are unobtainable, blocks will be acquired from an off-site location."*

If these granite blocks do not belong to the Licensee, then they cannot be used. The Department made no attempt to determine the right of the Licensee to the granite block at the site.

In response to the question: "Is the granite block part of seafloor (CEO and Harbor Committee comment) Gartley and Doskey, Choate's engineers, made the following response in their letter to Beth Callahan:

> *"The Department of Marine Resources has provided a preliminary response on this matter. The suggestion provided by DMR is to utilize open stacking, as depicted in the submission, to allow for movement of materials through the construction, and increasing the available surface area to support biological growth. We believe that the appropriate actions, in consultation with the germane regulatory body, are presently proposed to support reuse of the granite blocks"*

Even with the response, the Department was careful not to grant permission to use these on-site granite blocks in its decision.

Misleading Statements

These Appellants claim that the Licensee did not provide an answer to the following question contained in the application and, therefore, the permit should be denied: "What facilities are nearby?" The Appellants claim that the Licensee failed to identify Big Tree and Ferry Beach as nearby public boat launch sites and failed to identify the Tarratine Club as the nearest public, commercial or private Marina..

By water the Tarratine Club is located miles away from this site. The Licensee in his January 29, 2009 letter to Beth Callahan, prepared by Gartley and Dorsky, states:

> *"We understand from a member of the Tarratine Club that it does not allow members to have boats on the floats other than for loading and offloading passengers. We further understand that only dinghies are allowed at the dock for longer duration."*

This supplemental information acknowledges the Tarratine Club and states unrebutted facts as to why the Club is not a practical alternative to a pier on the Choate property.

These Appellants claim that the following statement made by Choate in his application is so misleading that the Board should reverse the Department's decision because the Department based its decision on misleading information. The statement is as follows:

> *The applicant considered sharing an abutting or nearby pier. However, the applicant determined that this was not a feasible alternative option because the closest private pier (is) on the east side of the Island is (0.6 miles to the south of the project site.*

These Appellants claim that this statement is misleading because the Tarrantine Club is 0.5 miles from the site and because it is closer by one tenth of a mile, than the pier referred in the above statement and that the above statement is so misleading as to require a reversal of the Department decision.

The DEP staff was aware of the Tarratine Club not only form its site visit and the aerial map submitted but also from the January 29, 2009 letter to Beth Callahan from Gartley & Dorksy.

These Appellants claim the Licensee made another statement in his application which is misleading. These statement is as follows:

The applicant considered utilizing a public or private slip/mooring space. The applicant determined that there are no slips or moorings spaces available at the local and private marinas. The applicant contacted the municipal Code Enforcement Officer who stated that there is a waiting list for mooring space at the public marinas known as Ferry Dock and Big Tree.

These Appellants offer no record evidence as to why this statement is misleading.

Undaunted, these Appellants claim yet another statement in the application is misleading.

The applicant considered usage of dock facilities at the Tarratine Club. The applicant stated that the Tarratine Club does not allow its members to have boats on their floats. The purpose of the floats is only for loading and offloading passengers. The applicant further stated that only dinghies are allowed to be at the dock for longer durations of time.

These Appellants offer no record evidence to rebut this allegation.

Void for Vagueness

Whether something unreasonably interferes with existing scenic and aesthetic uses is a question that can be answered only in the eyes of the beholder. Any applicant for a private pier reading the Avoidance requirements of Chapter 310 would not know what he must do to obtain a permit.

In Kosalka v. Town of Georgetown, 2000 ME 106, 752 A.2d 183, the Maine Supreme Judicial Court reminded land use regulatory agencies that individuals seeking to make improvements to their property. *"are entitled to know with reasonable clarity what they must do under state or local land use control laws to obtain the permits or approvals they seek."* Id. ¶ 12, 752 A.2d at 186.

The Maine Supreme Court struck down an ordinance reliant on a "compatible with existing uses" standard as failing *"to articulate the quantitative standards necessary to transform the unmeasured qualities ... into specific criteria objectively usable by both the Board and the applicant."* Wakelin v. Town of Yarmouth, 523 A.2d 575, 577 (Me.1987).

Land use control, to pass the due process test, must answer two questions: (1) *"what must an applicant do to obtain a permit," and (2) "under what set of facts should the [Board] grant or deny the application"*? 2000 ME 106, ¶ 16, 752 A.2d at 187

Whether something unreasonably interferes with existing scenic and aesthetic uses is a question that can be answered only in the eyes of the beholder. When a private pier applicant discovers that that is an

"Avoidance" criterion he or she would have not idea what would constitute a practical alternative to this project. What would constitute a "practical alternative" that would result in the denial of the permit. What is the standard?

There is no quantitative standards necessary to transform the unmeasured qualities of a practical alternative or an unreasonable interference with scenic use, into specific criteria objectively usable by both the DEP and the applicant.

What if a marina were available 200 yards away or twenty miles away? What if Choate had been rejected for membership in the private marina? Would an unwelcomed applicant receive a permit?

If Choate was denied this permit because of his membership in a private Yacht club; if he decided not to pay his dues, would he then be entitled to a permit?. If he sold the property to someone who could not get a membership, or if their membership was put on a waiting list, would the result change?

How much impact must a pier have on scenic use before it constitutes an unreasonable impact?

As every dock will have some scenic impact and some impact on the environment and wildlife in the area, pursuant to the Board's standards, any dock can be approved or disapproved purely on the whim of the reviewer, without any objective criteria to guide either the decision-maker or future applicants. The approval criteria provided insufficient notice to Choate or anyone else of the criteria he had to meet for approval.

These standards are void for vagueness.

For all of reasons stated above, this appeal must be denied and the Licensee is entitled his permit.

June 29 2005

Paul L. Gibbons, Bar #1491
Attorney for Arthur (Tim) Choate
9 Washington Street
P.O. Box 616
Camden, Maine 04843
207-236-3325

H:\00190\ZONING\Tim Choate-pier\Appeal\Objection to Thomas appeal -2.doc