

Maine DEP's April 13, 2007 Denial of Samorock LLC's application to build a resort pier in a scenic lobster ground next to the Rockland Breakwater in Rockland Maine
Background, details here

Transcribed copy

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

DEPARTMENT ORDER
IN THE MATTER OF
SAMOROCK, LLC
Rockland, Knox County
PIER, RAMP & FLOAT
L-14246-87-R-N
L-14246-4C-S-M

SITE LOCATION OF DEVELOPMENT LAW
NATURAL RESOURCES PROTECTION
COASTAL WETLAND
WATER QUALITY CERTIFICATION
MINOR REVISION

DENIAL

FINDINGS OF FACT AND ORDER Pursuant to the provisions of 38 M.R.S.A. Sections 481 et seq., Sections 480-A et seq. and Section 401 of the Federal Water Pollution Control Act, the Department of Environmental Protection has considered the application of SAMOROCK, LLC with the supportive data, agency review comments, public comments, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. PROJECT DESCRIPTION:

A. History of Project: In Department Order #L-14246-87-A-N, dated October 14, 1987, the Department approved the development of a hotel resort, 111 attached single-family dwelling units, time share units and an 18-hole golf course. Since 1987 there have been several modifications and amendments to the original Department licensing decision.

B. Summary: The applicant proposes to construct a private 12-foot wide by 550-foot long, pile supported pier with a seasonal 50-foot ramp and a 140-foot float in and adjacent to a coastal wetland to provide shared recreational boating access for residents and guests of a new 45-unit condominium development approved in Department Order #L-14246- 87-0-A. The total maximum length of the pier, ramp and floats at high tide will be approximately 740 feet. The floats will be able to accommodate three to four boats at a time for on-loading and off-loading of passengers. No boats will be

permanently berthed at the dock or float. The project site is located on Warrenton Street in the City of Rockland.

C. Current Use of Site: The site of the proposed project is currently occupied by the Samoset Resort, a hotel resort with residential condominiums, time share units, and an 18-hole golf course. The general public is allowed to cross the applicant's property near the site of the proposed pier to access the Rockland harbor breakwater. Access is obtained through Marie H. Reed Park.

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WETLANDS AND WATERBODIES PROTECTION RULES:

The Natural Resources Protection Act (NRPA) defines coastal wetlands as "all tidal and subtidal lands, including all areas below any identifiable debris line left by tidal action; all areas with vegetation present that is tolerant of salt water and occurs primarily in a salt water or estuarine habitat; and any swamp, marsh, bog, beach, flat or other contiguous lowland which is subject to tidal action during the maximum spring tide level..." 38 M.R.S.A §§480-B(2). The construction of the proposed pier, ramp and float would alter a portion of the coastal wetland and it therefore would require a permit under the NRPA and the Wetlands and Waterbodies Protection Rules, Chapter 310 (Wetland Protection Rules). The Wetland Protection Rules interpret and elaborate on the criteria for obtaining a permit. The rules guide the Department in its determination of whether a project's impacts on the various protected functions and values of the wetland would be unreasonable.

Approximately 38 square feet of coastal wetland would be eliminated by this proposed project and approximately 9,600 square feet of the coastal wetland would be indirectly altered through shading to construct the proposed pier, ramp and float.

Coastal wetlands, such as the intertidal zone and the waters of Penobscot Bay, are wetlands of special significance as defined in Chapter 310 (4), and thus receive extra protection under the rules. For projects proposed to be located in wetlands of special significance, a practicable alternative is deemed to exist unless the project is within one of the categories of potentially acceptable projects listed in the rule. One such category is "water dependent uses". A dock by its nature is a water dependent use and, therefore, the rules allow an applicant to submit evidence to demonstrate that no practicable alternative exists.

A proposed project may be found to be unreasonable if it would cause a loss in wetland area, functions and values and there is a practicable alternative to the project that would be less damaging to the environment. An applicant must provide an analysis of alternatives in order to demonstrate that a practicable alternative does not exist.

Wetland functions are defined in Chapter 310 (3) (J) as: "The roles wetlands serve which are of value to society or the environment including, but not limited to, scenic and aesthetic use,... fisheries, wetland plant habitat, aquatic habitat and wildlife habitat."

The Department's Wetlands and Water bodies Protection Rules, Chapter 310, require that the applicant meet the following standards:

A. AVOIDANCE: The department may find that projects impacts on the coastal wetland are unreasonable if there is a practicable alternative to the project that would be less damaging to the environment. Each application for a coastal wetland alteration permit must provide an analysis of alternatives in order to demonstrate that a practicable alternative does not exist.

The applicant submitted an alternative analysis for the proposed project completed by Pinkham & Greer Consulting Engineers, Inc., and dated December, 2005,

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with a last revision date of March 7, 2007. The Samoset Resort includes over 1 mile of shoreline with the Town of Rockport and the City of Rockland. Most of the shoreline, however, is outside of the protection of the Rockland breakwater. The applicant considered the following alternatives to the proposed pier, ramp and float, and makes the following arguments that each is not practicable:

1) Placing a new pier, ramp and float adjacent to the Flume Cottage, which is on the section of shoreline outside the breakwater. This site, however, is very exposed to the east and would not provide a safe environment for both people and vessels of all sizes. Any location outside of the protection of the breakwater would be undesirable for the same reason. The section of shoreline within Rockland Harbor and inside the protection of the breakwater is the most desirable location for a pier. The breakwater is intended to provide protection for people and vessels so it naturally provides a safe location for the pier. The harbor contains various marine uses and the shoreline is developed with docks, piers, and other commercial and residential structures. There is also a mooring area defined by the City of Rockland off the end of the proposed pier.

2) The continued use of the Samoset's existing dock attached to the Rockland breakwater. This small ramp and float could not accommodate the increased use and larger boats that would be associated with the new 45-unit condominium development. The float is small and is connected to land via the breakwater. The surface of the breakwater is extremely uneven and presents a significant pedestrian hazard, especially at night. This pedestrian access is not viable for residents and guests that have difficulty walking. In addition, there is no ability to operate a small utility vehicle on the breakwater, which makes shuttling people and their gear difficult and there is no place for dinghy storage on the breakwater. Dinghies would have to be stored on land and

without the ability to operate a small vehicle, these boats would have to be carried a significant distance. Further, the breakwater was intended to protect marine structures, not support them. Enlarging the small existing dock and ramp would directly impact the historic structure.

3) Using the existing public and private facilities already present within the Rockland anchorage. There are currently four other public and private marina facilities within Rockland Harbor. Two of these facilities have slips and all four rent moorings. Based on inquires to several of the marina operators, seasonal boat slips and mooring rentals are limited and are often fully rented by late winter. These marinas also offer slip and mooring rentals on a transient basis, but this space is also limited and is typically offered on a first come, first served basis. Dinghy storage and parking are available, though similarly limited at these facilities. The existing facilities in Rockland Harbor are currently operating near capacity. The additional use that the owners of the Samoset condominiums would bring would likely overburden the existing marina facilities. In addition, using these facilities would necessitate travel

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back and forth between the Samorock property and the marinas, adding traffic to local roads and significantly impairing the purpose and value of Samorock's project.

According to the applicant the purpose of the proposed pier is to provide recreational boating access to the ocean for the residents and guests of the new ' 45-unit condominium development approved by the Department in Department Order #L-14246-87-0-A. While the applicant investigated other pier locations within its property boundary and considered the use of existing public and private facilities within Rockland Harbor; it failed to offer convincing evidence that the use of these existing public and private facilities would present an undue burden on the condominium owners.

Evidence in the record from the Rockland Harbormaster document that there is capacity within the City of Rockland anchorage for more than 40 additional moorings some of which are located in the vicinity of the existing ramp and float located on the breakwater and the proposed Samoset pier. All additional moorings within the Rockland anchorage can be serviced off the existing public facilities within Rockland Harbor. Additionally, the public facilities within Rockland Harbor are accessible by visitors to the area on a temporary basis. These facilities are all located within approximately 2 miles of the proposed pier location.

After reviewing the evidence in the record and viewing the project site, the Department finds that there is at least one practicable alternative to the project that would be less damaging to the environment. In particular, the applicant could use the existing marina

facilities within Rockland Harbor as well as their existing ramp and float located on the breakwater. The applicant could provide a shuttle service to the marina facilities within Rockland Harbor and a harbor shuttle to transport residents and guests of the Samoset Resort to and from their boats located on a mooring within the established mooring area in Rockland Harbor. The shuttle service would eliminate the concern regarding excess congestion on town infrastructure and the limited availability of dinghy space at the existing facilities. While a permanent pier would be more convenient, it would not eliminate the need for the applicant to use a mooring system for any use other than transient service. Therefore the use of existing marina facilities with a shuttle service as described above would represent a less damaging practical alternative to the proposed pier, ramp and float.

B. MINIMIZATION: The amount of coastal wetland to be altered must be kept to the minimum amount necessary for meeting the overall purpose of the project. The pier design has gone through several revisions. A proposal originally submitted to DEP in 2001 was for a marina with berthing for 40 yachts. The pier was to be supported by granite blocks and was to have numerous floats. This proposal was subsequently withdrawn. The present design has been substantially modified from the original. This proposal is for a pile supported pier with a temporary berthing capacity of only three to four boats. The pier design was changed from a granite crib construction to the proposed pile supported structure

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in order to reduce the amount of lost intertidal and sub-tidal habitat. The original design also included the construction of a dock house at the edge of the shoreline. The dock house has been moved to beyond 75 feet from the tidal area to further minimize impacts to the coastal wetland.

C. COMPENSATION: In accordance with Chapter 310 (5)(C), neither a functional assessment nor compensation is required for coastal wetland alterations totaling less than 500 square feet of direct impact. The Department did not require that the applicant perform a functional and value assessment of the wetland and or provide compensation for the proposed impacts to the wetlands in this application.

The Department finds that water access for boats does not have to be located on an individual development site or property for it to be practicable. The construction and use of the proposed pier at this location would result in a permanent loss of coastal wetland area and would have additional adverse impacts on the functions and values of the wetland. As a result the State's water bodies would be compromised. Given that the construction of the proposed pier, ramp and float would result in a permanent loss of wetland area, as well as additional impacts to the wetland; and that the applicant has

access to the water through existing marina facilities within close proximity to the development site, the Department finds that the applicant has not adequately demonstrated avoidance of impacts to the coastal wetland.

In determining if the project would result in an unreasonable impact to the coastal wetland, the Department must consider whether the impact is necessary. If there are alternatives, the Department may weigh the impact and the availability of the alternative and find an unnecessary impact to the coastal wetland to be unreasonable. In this case, the Department has found that the applicant has a practicable alternative that would meet the project purpose and not result in new construction in the coastal wetland.

3. WILDLIFE AND FISHERIES & HABITAT CONSIDERATIONS: The Maine Department of Inland Fisheries & Wildlife (IF&W) reviewed the proposed project and stated that the proposed location of the pier, ramp and float is within a mapped high and moderate value waterfowl and wading bird habitat (CWWH 27673-High Value). High and moderate value waterfowl and wading bird habitats are significant wildlife habitats as defined by the Chapter 315, Significant Wildlife Habitat Rules. The habitat directly within the area of the proposed pier is composed of aquatic bed, glacial erratics covered with rockweed, and mudflat and the point of origin of the pier has been previously armored with rip rap.

An IF&W biologist visited the project site on June 27, 2006. IF&W commented that the applicant has modified the original proposal by scaling down the size of the proposed pier. IF&W stated that the construction of a pier, ramp and float system at this location will result in a loss of habitat functions and values. However, IF&W views that loss of habitat functions and values as not having an unreasonable impact to wildlife habitat.

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The Maine Department of Marine Resources (DMR) reviewed the proposed project. In its comments, DMR stated that the inter-tidal area within the area of the proposed pier varies from sand/gravel to mud partially covered with rockweed covered cobble. This area currently provides a typical habitat type for juvenile and young lobsters. Lobsters are abundant in the area because of crevices in the breakwater, kelp beds and eelgrass beds. The proposed pier location is within 200 feet of the Rockland Harbor breakwater and approximately 15 lobster trap buoys were observed within the area of the proposed project. DMR commented that some loss of habitat functions and values may occur through displacement of the traditional lobster fishing area. However, DMR concluded that the proposal for a pier at this location would not have an unreasonable adverse impact on marine habitat.

The applicant modified the original design of the proposed pier by converting the structure from a crib supported pier to a pile supported pier in order to minimize the

amount of intertidal habitat directly affected by the proposed project. However, the applicant has not met the burden of proof to demonstrate that a less damaging alternative is not practicable (see Section 2 above). Although the applicant argues that, to achieve the project purpose, access to the water must be on the immediate grounds of the Samoset Resort, public and private marinas with extra capacity exist in close proximity. The Department finds that water access does not have to be located on the development premises for it to be practicable. Given that the construction of the proposed pier would result in a loss of habitat functions and value; and that the applicant has boating access to the water through its already existing structure and could have access through facilities within the Rockland anchorage, the Department finds that the applicant has not adequately demonstrated avoidance of impacts to marine wildlife and fisheries habitat.

In determining if the project would result in an unreasonable impact to habitat, the Department must consider whether the impact is necessary. The Department may find an unnecessary impact to habitat to be unreasonable. In this case, the Department finds that the applicant has a practicable alternative that would meet the project purpose and not result in new construction in or over habitat for marine and other aquatic life. Therefore, the impacts of this project on aquatic life and habitat are unnecessary and unreasonable. The Department finds that the proposed project would result in an unreasonable adverse impact to marine wildlife and fisheries habitat.

4. EXISTING SCENIC, AESTHETIC, RECREATIONAL OR NAVIGATIONAL USES:

Each applicant must demonstrate that its proposed project does not unreasonably interfere with existing scenic, aesthetic, recreational and navigational uses of the coastal wetland. To guide applicants and assist the Department in its analysis of potential impacts to scenic and aesthetic uses, the Board of Environmental Protection has adopted Chapter 315, Assessing and Mitigating Impacts to Scenic and Aesthetic Uses, which interprets and elaborates on this criterion of the NRPA. In accordance with Chapter 315, the applicant submitted a description of the property and the proposed project, a scenic and aesthetic visual impact report, and a copy of the Department's Visual Evaluation Field Survey Checklist as Appendix A to the application. In its visual impact report, the

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applicant depicted how the pier would be viewed from five different vistas: the Marie H. Reed Memorial Park, the public beach/harbor (at the base of the proposed pier), the lighthouse at the end of the breakwater, the harbor area (off Jameson Point), and outside of the breakwater coming into the harbor. The visual impact report was last modified on March 1, 2007.

The proposed pier would be located in Rockland Harbor, which is a public natural resource visited by the general public, in part, for the use, observation, enjoyment and

appreciation of its natural and cultural visual qualities. The site of the proposed pier and the surrounding area is currently used for recreational access to the Rockland breakwater, general recreation, including swimming, recreational boating, and commercial lobster fishing.

The Rockland harbor breakwater is a century old breakwater and a public and historical landmark listed on the National Register of Historic Places. The current access to the breakwater is a footpath that leads from the Marie H. Reed Memorial Park through the near shore area adjacent to the beach. The area inside the breakwater is currently used as a safe place for boats and schooners to moor during storms. In addition, the sub-tidal area directly adjacent to the breakwater is utilized by lobster fisherman to set their traps.

The Maine Historic Preservation Commission reviewed the proposed project in accordance with § 106 of the National Historic Preservation Act, as amended. The Maine Historic Preservation Commission stated that, based on the design of the pier, as indicated by plans dated 7/20/06, and further described in the Pierce Atwood letter dated August 21, 2006 and accompanying visual simulations, the proposed pier will have not effect the eligibility of the Rockland breakwater or any other identified historic properties to appear on the National Register of Historic Places. MHPC stated that their review policy does not allow for comment on any portion of the project other than its affect on the eligibility criteria of the identified historic structures.

Residents of the Rockland area submitted comments stating that the breakwater is very important to the State of Maine and the City of Rockland. In their comments, several area residents commented that the construction of the proposed pier would unreasonably interfere with their enjoyment of the scenic beauty of the Rockland breakwater, and such enjoyment by the many tourists and visitors to this area. They argue that the breakwater has aesthetic and recreational value to the citizens of Maine beyond the functions it was designed to serve one century ago. Information submitted by the residents' document that the Rockland breakwater attracts thousands of visitors to the Rockland area each year. The visitors view the Rockland harbor and the Rockland breakwater from Marie H. Reed Park and the associated pathway from the park to the breakwater. The residents state that the construction of a pier, ramp and float at this location would significantly obstruct the view of Rockland Harbor and the Rockland breakwater and severely impact the enjoyment of this valuable scenic resource. In addition, members of the boating public stated that their scenic and aesthetic enjoyment of the coastal wetland would be adversely affected by the construction of the proposed pier, ramp and float. The scenic and aesthetic enjoyment of the resource by people walking on the breakwater would also be impacted although to a lesser degree. In addition, some boaters stated that the

proposed pier, ramp and float would result in a loss of a safe harbor area for large schooners to moor temporarily during storms. In its review comments, the DMR also commented that the displacement or loss of some mooring area would result through the construction of the proposed pier.

Department staff visited the project site on February 2, 2007. After reviewing the applicant's proposal and supporting evidence, agency comments and other comments received from the public, the Department has determined that two of the scenic vistas examined will be significantly adversely affected through construction of the proposed 740-foot pier, ramp and float. The scenic impact will occur to views from the Marie H. Reed Memorial Park, which serves as the primary access point for the public to the Rockland breakwater and the harbor/beach area at the base of the proposed pier.

The applicant has submitted a copy of a Quit Claim Deed, documenting that the City of Rockland transferred ownership of Marie H. Reed Park to Samorock, LLC on September 10, 1973. Although the beach area where the pier abutment would be anchored is owned by the applicant, the public has had historical access and use of the near shore and intertidal areas since prior to 1973. Marie H. Reed Park contains a lawn area with several benches and constitutes the sole land access point for the general public to the Rockland breakwater. The applicant contends that Marie H. Reed Park is not a scenic resource or public lands visited by the general public for the use, observation, enjoyment, and appreciation of natural or cultural visual qualities, as described by Chapter 315 of the Department's rules. Under Chapter Rules, the Department considers a scenic resource as the typical point from which an activity in, on, over, or adjacent to a protected natural resource is viewed.

The list of scenic resources includes, but is not limited to, the Rockland Breakwater Light, the Atlantic Ocean, and locations of national, State, or local scenic significance. A scenic resource visited by a large number of people who come from across the country or state is generally considered to have national or statewide significance. A scenic resource visited primarily by people of local origin is generally of local significance. While the Department recognizes that Marie H. Reed Park is now owned by the applicant, the general public has enjoyed unlimited access to this area for many years. The park has historically been the primary land access point for the general public to view Rockland Harbor and the Rockland breakwater. The Department finds that Marie H. Reed Park is a scenic resource that has both national and local significance and, as a result, is a scenic resource pursuant to Chapter 315 Rules.

It is the responsibility of the applicant to demonstrate that the proposed design does not unreasonably interfere with existing scenic and aesthetic uses, and thereby diminish the public enjoyment and appreciation of the qualities of a scenic resource, and that any impacts have been minimized. The proposed pier, ramp and floats will become a significant structure visible from swimmers, and boaters on the ocean near the shore between the breakwater and the proposed pier, from Marie H. Reed Park and from the

beach/harbor area at the base of the pier structure. The Department's determination of impact is based on the following visual elements of the landscape: landscape compatibility, scale contrast, and spatial dominance. In consideration of these criteria the Department finds that the applicant has failed to demonstrate that the proposed pier, ramp and float will not dominate the landscape from the public viewpoint at both Marie H.

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Reed Park and the beach/harbor area at the base of the proposed pier structure. For the users of the coastal wetland, such as people walking along the intertidal area, and boaters, the pier would be a significant visual intrusion, traversing the entire width of the intertidal area. While persons walking the intertidal area would be able to pass beneath the dock, the dock would dominate the landscape and partially obstruct and/or fragment the view along the intertidal area towards the Rockland breakwater and across Rockland Harbor, significantly detracting from the visual and aesthetic quality of the resource and thereby interfering with this use of the coastal wetland. Additionally, the proposed pier, ramp and float will displace some traditional fishing area resulting in an impact on this traditional use and navigation within this portion of Rockland Harbor.

In determining whether the project would result in an unreasonable interference with scenic aesthetic, recreational or navigational uses, the Department must consider whether the impact to those uses is necessary. The Department may find an unnecessary impact to scenic aesthetic, recreational or navigational uses to be unreasonable. In this case, the Department finds that the applicant has a practicable alternative that would meet the project purpose and not result in new construction that would adversely impact existing scenic, aesthetic, recreational or navigational uses (see section 2 above). Therefore, the Department finds that the impacts of this project on scenic, aesthetic, recreational and navigational uses are unreasonable.

5. SOIL EROSION: Based on the proposed methods of construction as outlined in the application, the Department finds that the activity will not cause unreasonable erosion of soil or sediment nor unreasonably inhibit the natural transfer of soil from the terrestrial to the marine environment.

6. WATER QUALITY CONSIDERATIONS: The applicant proposes to use lumber treated with chromated copper arsenate (CCA) to construct the pier. To protect water quality, all CCA treated lumber must be cured on dry land in a manner that exposes all surfaces to the air for 21 days prior to the start of construction. Provided the CCA treated lumber is cured as described above, the Department finds that the proposed project will not violate any state water quality law. The Department does not anticipate that the proposed project will violate any state water quality law, including those governing the

classification of the State's waters.

7. OTHER CONSIDERATIONS:

The Department did not identify any other issues involving, the natural transfer of soil, natural flow of water, water quality, or flooding.

BASED on the above findings of fact, and subject to the conditions listed below, the Department makes the following conclusions pursuant to 38 M.R.S.A. Sections 480-A et seq. and Section 401 of the Federal Water Pollution Control Act:

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- A. The proposed activity would unreasonably interfere with existing scenic, aesthetic, recreational, and navigational uses.
- B. The proposed activity would not cause unreasonable erosion of soil or sediment.
- C. The proposed activity would not unreasonably inhibit the natural transfer of soil from the terrestrial to the marine or freshwater environment.
- D. The proposed activity would unreasonably harm a significant wildlife habitat.
- E. The proposed activity would not unreasonably harm a freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic or adjacent upland habitat, travel corridor, freshwater, estuarine, or marine fisheries or other aquatic life.
- F. The proposed activity would not unreasonably interfere with the natural flow of any surface or subsurface waters.
- G. The proposed activity would not violate any state water quality law including those governing the classifications of the State's waters.
- H. The proposed activity would not unreasonably cause or increase the flooding of the alteration area or adjacent properties.
- I. The proposed activity would not be on or adjacent to a sand dune.

THEREFORE, the Department DENIES the above noted application of Samorock LLC. to construct a pier, ramp and float, and all applicable standards and regulations:

DONE AND DATED AT AUGUSTA, MAINE, THIS 13TH DAY OF APRIL, 2007

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BY: DAVID P. LITTELL, COMMISSIONER

PLEASE NOTE THE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES

Date of initial receipt of application: 12/23/2005

Date of application acceptance: 01/13/2006

Date filed with Board of Environmental Protection April 17, 2007

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