

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12203-1010

In the Matter

- of -

the Application for a Freshwater Wetlands Permit
to Construct a Single Family House and Associated Structures on
Vacant Land Located at 40 Caswell Road,
Montauk, Town of East Hampton, Suffolk County, New York

- by -

GINO ANTONINI,

Applicant.

DEC Application No.: 1-4724-01609/00001

DECISION OF THE COMMISSIONER

June 17, 2009

DECISION OF THE COMMISSIONER

Gino Antonini ("applicant") filed an application for a freshwater wetlands permit with the New York State Department of Environmental Conservation ("Department") for the construction of a single family residence and associated structures, including a sanitary septic system and parking area/driveway, on undeveloped property that applicant owns at 40 Caswell Road, Montauk, Town of East Hampton, Suffolk County, New York (the "project"). A portion of Freshwater Wetland MP-31, which is classified as a Class I freshwater wetland, is located on applicant's property.

Department staff denied the permit application and applicant requested a hearing. Following referral to the Office of Hearings and Mediation Services, the matter was assigned to Administrative Law Judge ("ALJ") Daniel P. O'Connell, and an adjudicatory hearing was held. For the reasons stated in the ALJ's hearing report, a copy of which is attached, the determination of Department staff to deny the application for a freshwater wetlands permit is upheld. I adopt the ALJ's hearing report as my decision in this matter.

To receive a freshwater wetlands permit from the Department, an applicant is required to demonstrate that a proposed project is compatible with the policy of the Freshwater Wetlands Act to preserve, protect and conserve freshwater wetlands and prevent their despoliation and destruction (see section 24-0103 of the New York State Environmental Conservation Law; see also section 663.1 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ["6 NYCRR"]).

In this matter, applicant's proposed project involves constructing a residence in the adjacent area of regulated freshwater wetland MP-31 and clearing and grading in that adjacent area. These activities are identified in the Department's freshwater wetlands regulations as "P(N)", that is, "usually incompatible with a wetland and its functions or benefits" (see 6 NYCRR 663.4[d]). Pursuant to the DEC's freshwater wetland regulations, activities identified as "P(N)" are evaluated to determine whether they meet three tests of compatibility (see 6 NYCRR 663.5[e][1]). For those projects that fail to meet the compatibility tests, regulatory weighing standards are considered (see 6 NYCRR 663.5[e][2]).

In addition to the above-referenced regulated activities, applicant also proposes to install a sanitary system within the adjacent area on the property. This activity is identified in the Department's freshwater wetlands regulations as "P(X)", that

is, "incompatible with a wetland and its functions and benefits" (see 6 NYCRR 663.4[d]). When proposed activities fall within the designation of "P(X)," the weighing standards in 6 NYCRR 663.5(e)(2) must be applied.

Based upon the record before me, the proposed project would adversely impact freshwater wetland MP-31 and its adjacent area. I note, in particular, the close proximity of the proposed activities, including the installation of the septic system, to the wetland. Furthermore, the buffering capabilities of the adjacent area would be significantly impaired.

As set forth in the hearing report, and as demonstrated by the record, applicant did not meet the compatibility tests and the weighing standards set forth in the freshwater wetland regulations. Applicant did not carry his burden of establishing that the proposed project would comply with all applicable laws and regulations administered by the Department. Accordingly, the application for the proposed project is denied.

For the New York State Department
Environmental of Conservation

By: _____/s/_____
Alexander B. Grannis
Commissioner

Albany, New York
June 17, 2009

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12203-1550

In the Matter

- of -

the Application for a Freshwater Wetlands Permit
to construct a single family house and
associated structures on vacant land located at
40 Caswell Road, Montauk (Suffolk County), New York

- by -

GINO ANTONINI

Applicant

DEC Application No.: 1-4724-01609/00001

HEARING REPORT

- by -

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

Proceedings

In September 2007, Gino Antonini (Applicant) filed an application (No. 1-4724-01609/00001) for a freshwater wetlands permit with Staff from the Department of Environmental Conservation Region 1 Office (Department staff). The application was filed pursuant to Environmental Conservation Law (ECL) Article 24 (Freshwater Wetlands), and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Part 663 (Freshwater Wetlands Permit Requirements). Applicant owns real property located at 40 Caswell Road, Montauk, (Town of East Hampton, Suffolk County), New York. A portion of Applicant's property is a Class I freshwater wetland identified as MP-31 (Montauk Point, US Geological Survey [USGS] Quadrangle).

Applicant proposes to construct a single-family house and associated structures including a parking area and sanitary septic system at the undeveloped 40 Caswell Road site. As part of the review required by the State Environmental Quality Review Act (ECL Article 8 [SEQRA]), Department staff determined that Applicant's proposal is a Type II action (see 6 NYCRR 617.5[c][9] and [10]). Upon review, Staff denied the permit application by letter dated March 18, 2008. By letter dated April 4, 2008, Applicant requested a hearing.

Subsequently, the Office of Hearings and Mediation Services received the hearing request on September 8, 2008, and Administrative Law Judge (ALJ) Daniel P. O'Connell was assigned to the matter. The Notice of Public Hearing dated January 22, 2009 (the Hearing Notice) appeared in the Department's *Environmental Notice Bulletin* on January 28, 2009. Applicant duly published the January 22, 2009 Hearing Notice in *The East Hampton Star* on January 29, 2009. The Hearing Notice scheduled the public hearing for 10:00 a.m. on February 24, 2009.

I. Legislative Hearing and Issues Conference

As scheduled in the January 22, 2009 Hearing Notice, the public hearing commenced at 10:00 a.m. on February 24, 2009 at the Montauk Public Library with a legislative hearing session to receive unsworn statements from the public. No one appeared to comment about the subject permit application.

Following the legislative hearing session, the issues conference (see 6 NYCRR 624.4[b]) immediately convened. As provided in the January 22, 2009 Hearing Notice, requests for full party status were due by February 20, 2009. No petitions were filed by the due date. In addition, no one appeared at the issues conference to present a late-filed petition for party status as provided for by 6 NYCRR 624.5(c). Consequently, the only parties to the proceeding are Applicant and Department staff (see 6 NYCRR 624.5[a]).

During the issues conference, the parties discussed the regulated land use activities associated with Applicant's proposal that are identified in the chart at 6 NYCRR 663.4(d). The parties stipulated that the issues for adjudication would be the standards for permit issuance as outlined at 6 NYCRR 663.5(e). In addition to addressing the compatibility standards at 6 NYCRR 663.5(e)(1), the parties agreed that the weighing standards (see 6 NYCRR 663.5[e][2]) should also be addressed during the hearing. (Issues Conference Tr. at 3-11.) The central issue for adjudication was whether Applicant's proposal would comply with the weighing standards associated with a Class I freshwater wetland.

II. Site Visit

After the adjudicatory hearing concluded on February 24, 2009, the ALJ visited Applicant's property with the parties' representatives.

III. Adjudicatory Hearing

The adjudicatory hearing commenced immediately after the issues conference. Gino Antonini and his brother, Steve, attended all phases of the public hearing.

Applicant was represented by Stephen R. Angel, Esq. (Esseks, Hefter & Angel, LLP, Riverhead, New York). Roy Haje, President of En-Consultants (Southampton, New York) testified on behalf of Applicant.

Kari Wilkinson, Esq., Assistant Regional Attorney, from the Department's Region 1 Office appeared on behalf of Department staff. Robert F. Marsh, Manager, Bureau of Habitat at the Region 1 Office testified for Department staff.

After the witnesses testified, each counsel presented an oral closing statement. The record of the hearing closed on

April 14, 2009 upon receipt of the stenographic transcript of the adjudicatory hearing.

Findings of Fact

Project Site and Location

1. On March 28, 2003, Gino Antonini purchased real property located at 40 Caswell Road, Montauk (Town of East Hampton, Suffolk County), New York (Tr. at 106). The property is identified as Lot No. 250 and is located on the corner of Caswell Road and Agnew Avenue (SCTM 300-31-02-22). (Exhibit 2.)
2. Applicant's property at 40 Caswell Road is part of a subdivision called Oceanside at Montauk. A map of the Oceanside at Montauk subdivision was filed on August 7, 1957. The subdivision includes several hundred lots, and the lots range in size from approximately 7,000 to 10,000 square feet. Applicant's property at 40 Caswell Road is 9,015 square feet. (Exhibits 2, 5 and 6.) On this part of Long Island, lots for single family homes are typically this size (Tr. at 33).

Freshwater Wetland MP-31

3. Freshwater Wetland MP-31 appears on the Montauk Point US Geological Survey (USGS) Quadrangle, which is also identified as the Department's Freshwater Wetlands Map 10 of 39 for Suffolk County. Freshwater Wetland MP-31 consists of a group of wetland areas with a combined area that exceeds 12.4 acres. On the Montauk Point USGS Quadrangle, the wetland areas that comprise MP-31 are encircled by a dashed line. Freshwater Wetland MP-31 is a Class I wetland. (Exhibit 4.)
4. Based on Suffolk County Tax Maps (Exhibit 6; also see Exhibit 5), Applicant's property is part of a block of residential lots bordered by Caswell Road (east), Agnew Avenue (south), Prentice Place (west) and Hoppin Avenue (north). As noted above, Applicant's property is in the southeast corner of the block at the corner of Caswell Road and Agnew Avenue. On this block, all the lots but Applicant's are developed with single family homes (Exhibit 8).

5. Two wetland areas of Freshwater Wetland MP-31 are located within the block formed by Caswell Road, Agnew Avenue, Prentice Place, and Hoppin Avenue. One wetland area is located generally near the northwest corner of the block, and the second is located generally near the southeast corner of the block. Another wetland area is located due south of Applicant's property on the southern side of Agnew Avenue. (Exhibits 4, 10 and 12.)
6. A portion of the second wetland area described in the previous Finding of Fact is located on Applicant's property. The wetland area, on and adjacent to Applicant's property, and a portion of the wetland area located south of Agnew Avenue are depicted on Exhibit 10.
7. The area of the individual wetland areas that are collectively identified as Freshwater Wetland MP-31 are not part of this hearing record. In addition, the distances between these wetland areas are not known.
8. Applicant's property has never been developed. At present, it is heavily covered with wetland (e.g., sedge, winterberry and cinnamon fern), and upland (e.g., black cherry, and Asiatic bittersweet) plant species (Tr. at 20, 56-57). Because site visits were conducted in the late fall and winter, the fauna that use the site are unknown. It is expected that birds would visit the site based on the plants growing on the site. In the Montauk area, amphibians such as spring peepers and tree frogs use wetland pools as breeding habitat. (Tr. at 20, 58, 78.)
9. On December 22, 2004, Staff from the Town of East Hampton Planning Department delineated the boundary of that portion of MP-31, which is located on Applicant's property. As a result of that delineation, approximately 45% of the area of Applicant's property is regulated freshwater wetland (4,027 square feet). Although the remaining area of the property (i.e., 4,988 square feet) is upland, this portion of the site is within the 100-foot adjacent area. (Exhibit 2; Tr. at 24, 55, 57.)
10. The delineated boundary of the freshwater wetlands area located on Applicant's property roughly divides the site in half along the north-south axis. The western portion of the site is generally freshwater wetland, and the eastern portion of the site, which fronts Caswell Road, is the upland portion of the site. The average distance from the

wetland boundary to Caswell Road is about 50 feet. (Exhibit 2.)

Applicant's Proposal

11. Exhibit 2 to the hearing record is a survey and plan of Applicant's property by William J. Walsh, Land Surveyor (Montauk, New York), which depicts the proposed development of the site. Applicant would clear about 3,600 square feet of the site for the proposed development. All cleared areas would be located exclusively in the adjacent area. After the building envelope is cleared, a portion of it would be filled, and the building footprint would be graded. (Tr. at 56-57, 60.)
12. Applicant proposes a two-story house oriented in a north-south direction. The first floor footprint of the house would be 689 square feet. The area of the second story would be larger because of proposed overhangs. The house would be setback 20 feet from Caswell Road. At the closest point, the western side of the house would be about four feet from the freshwater wetland boundary. (Exhibit 2; Tr. at 17, 24, 56-57.)
13. Potable water for Applicant's proposed house would be provided by the local municipality. Access to the potable water supply is available from Caswell Road. (Exhibit 2.)
14. According to Applicant's survey and plan (Exhibit 2), the sanitary system would consist of a septic tank, a cesspool or ring, and an additional expansion ring. The septic tank would be located on the eastern side of the house with the wastewater line extending from the southeast corner of the house. The septic tank would be located between the house and Caswell Road. The line from the septic tank would extend southwest to the first ring (*i.e.*, the cesspool). At its closest point, the first ring would be about 27 feet from the boundary of the freshwater wetland. The line from the first ring would extend west southwest to the second (or expansion) ring. The expansion ring would be located south of the house between the house and Agnew Avenue and, at its closest point, it would be about 11 feet from the freshwater wetland boundary. (Tr. at 18, 24-25, 57)
15. Applicant proposes to install a retaining wall that would extend south from the southwest corner of the house toward Agnew Avenue. Fill would be placed on the eastern side of

the retaining wall to increase the elevation of this portion of the site. The elevation of the site would need to be raised to accommodate components of the sanitary system by providing sufficient separation distance between the bottom elevation of the rings and the water table. (Exhibit 2; Tr. at 18, 24-25.)

16. On March 31, 2006, McDonald Geoscience dug a test hole on the site. The location of the test hole was on the eastern portion of the site just off of Caswell Road. The results of the test hole are reported on Exhibit 2. Within one foot, the soil type is described as dark brown loam. From one to 4.9 feet below ground level, the soil type is described as brown clayey sand. Groundwater was encountered from between 4.9 feet to 48 feet, and the results are reported as water in brown clayey sand. (Exhibit 2.)
17. Based on the results from the test hole, the brown clayey sand at the proposed location for the septic tank and rings would need to be removed and replaced with better draining materials. The reason to replace the onsite soils is to assure that wastewater from the rings does not flow laterally, but travels down toward the nearest significant surface waterbody, which in this case is the Atlantic Ocean located due south of the site. (Tr. at 27-29.)
18. Neither Applicant's consultant nor Department staff undertook any studies related to groundwater flow on, or in the vicinity of, the site (Tr. at 45-46, 92).
19. Applicant proposes to construct a parking area that would be located east of the northeast corner of the house. The driveway and parking area would be 360 square feet, and would provide access to Caswell Road. They would be constructed with compacted gravel, which is permeable. At its closest point, the parking area would be about 27 feet from the freshwater wetlands boundary. (Exhibit 2; Tr. at 18, 24-25, 56-57.)

Adjacent Properties

20. The wetland area located on Applicant's property, which is part of Freshwater Wetland MP-31, is also located on the following parcels identified by Suffolk County Tax Map (SCTM) Parcel Nos. 0300-31-2-24.1; 0300-31-2-15&16; 0300-31-2-17.2; and 0300-31-2-17.1 (Exhibits 6 and 8). Each of these parcels is developed with a house and sanitary system.

The distance between the respective homes and the freshwater wetland boundary is not part of this hearing record (Tr. at 84).

21. Parcel No. SCTM 0300-31-2-24.1 is located west of Applicant's property, and faces Agnew Avenue. The wetland area on this property is located on the northeast corner. The first house on Parcel No. SCTM 0300-31-2-24.1 had been constructed prior to the enactment of ECL Article 24. Subsequently, the Department issued a freshwater wetlands permit to demolish the first house and construct a new one. The footprint of the new house, although located within the 100-foot adjacent area, is more landward from the wetland boundary than the original house. When the second house was constructed, the sanitary system was moved from the northeast corner of the property - near or in the freshwater wetland - to the southwest corner of the property. The relocated sanitary system is now located about 80 feet from the freshwater wetland boundary. (Exhibits 6, 8, 10; Tr. at 84, 105-106.)
22. Parcel No. SCTM 0300-31-2-15&16 is located due north of Parcel No. SCTM 0300-31-2-24.1. The house on this double lot faces north on Hoppin Avenue. The wetland area is located on the southeast corner of the lot. (Exhibit 10.) It is not known when the site was developed. In addition, the distance between the freshwater wetland boundary, and the house and sanitary system are not part of this hearing record.
23. Parcel No. SCTM 0300-31-2-17.2 is located immediately to the east of Parcel No. SCTM 0300-31-2-15&16 along Hoppin Avenue. With respect to Applicant's property, Parcel No. SCTM 0300-31-2-17.2 is located to the northwest. Based on Exhibit 10, a third to one half of the site may be freshwater wetland. Department staff, however, did not delineate the freshwater wetland boundary on Parcel No. SCTM 0300-31-2-17.2. The location of the house and the sanitary system on Parcel No. SCTM 0300-31-2-17.2 with respect to the freshwater wetland boundary is not part of this hearing record. It is not known when the site was developed. (Tr. at 87-88, 105.)
24. Parcel No. SCTM 0300-31-2-17.1 is located at the corner of Hoppin Avenue and Caswell Road, immediately to the north of Applicant's property. Based on Exhibit 10, the freshwater wetland area is located on the southwest corner of the site. The location of the house and the sanitary system on Parcel

No. SCTM 0300-31-2-17.1 with respect to the freshwater wetland boundary is not part of this hearing record. It is not known when the site was developed. (Tr. at 89, 105.)

25. Other building lots are available in Montauk that do not have freshwater wetlands on them, or are large enough to avoid the wetlands and the 100-foot adjacent area (Tr. at 71).

Discussion

I. Freshwater Wetland MP-31

Freshwater Wetland MP-31 appears on the Montauk Point USGS Quadrangle, which is also identified as the Department's Freshwater Wetlands Map 10 of 39 for Suffolk County. Freshwater Wetland MP-31 consists of a group of wetland areas with a combined area that exceeds 12.4 acres. On the Montauk Point Quadrangle, the wetland areas that comprise MP-31 are encircled by a dashed line. Freshwater Wetland MP-31 is a Class I wetland. (Exhibit 4.) A portion of one of the wetland areas that are collectively identified as Freshwater Wetland MP-31 is located on Applicant's property. (Exhibits 2, 10.)

The procedures for identifying, classifying and mapping freshwater wetlands are outlined in 6 NYCRR Part 664 (Freshwater Wetlands Maps and Classification). There are four classes of freshwater wetlands. Class I wetlands have the highest rank, and the ranking descends through Classes II, III, and IV (see 6 NYCRR 664.4[a]).

The regulatory classes of freshwater wetlands are based on various characteristics that reflect the benefits provided by each wetland. For example, special features such as providing habitat for endangered, threatened or migratory animal species, or the presence of endangered or threatened plant species may be relied upon to classify wetlands. Other characteristics such as cover type plant species, the location of the wetlands, and hydrological conditions may also serve as the bases for wetlands classification. (See 6 NYCRR 664.5.)

Regulated freshwater wetlands have an area of at least 12.4 acres or, if smaller, have unusual local importance as determined by the Commissioner during the mapping process (see 6 NYCRR 664.2[f]). Two or more areas may be considered to be a single wetland for regulatory purposes if they are determined by the

Commissioner to function as a unit, or to be dependent upon each other, in providing one or more of the wetland benefits, and if they are no more than 50 meters (about 165 feet) apart. These areas are included, and labeled as a single wetland on the official maps. (See 6 NYCRR 664.7[b].)

Some activities undertaken in the area surrounding regulated freshwater wetlands are also regulated pursuant to ECL Article 24. This area is referred to as the adjacent area. Except under specific conditions, the adjacent area extends 100 feet landward from the boundary of the freshwater wetlands (see 6 NYCRR 663.2[b]).

Mr. Marsh did not know precisely the size of the wetland area located on Applicant's property and the adjoining properties but, based on Exhibit 10, estimated the wetland area to be about 1/4 acre. Also, the distances between this wetland area and the others that collectively constitute Freshwater Wetland MP-31 are not part of the hearing record. Mr. Marsh did not know the characteristics associated with MP-31 that served as the basis for its Class I designation. (Tr. at 103-104.) During the hearing, Applicant did not raise any issue about the scope of the Department's jurisdiction over his property located at 40 Caswell Road, pursuant to ECL Article 24.

The delineated boundary of the freshwater wetlands area located on Applicant's property generally divides the site in half along the north-south axis. The western portion of the site is regulated freshwater wetland, and the eastern portion of the site, which fronts Caswell Road, is the upland portion of the site. Because the average distance from the wetland boundary on Applicant's property to Caswell Road is about 50 feet, activities undertaken on the upland portion of the site would be located in the adjacent area and, therefore, would also be regulated pursuant to ECL Article 24 (see ECL 24-0105, 24-0107; 6 NYCRR 663.2[z]). Applicant proposes to undertake all activities associated with his proposal in the adjacent area of the site.

II. Standards for Permit Issuance

This hearing was conducted pursuant to 6 NYCRR Part 624 (Permit Hearing Procedures). Applicant bears the burden of proof to demonstrate that his proposal would comply with all applicable laws and regulations related to the scope of the Department's jurisdiction (see 6 NYCRR 624.9[b][1]). Whenever factual matters are involved, the party bearing the burden of proof must sustain

that burden by a preponderance of the evidence (see 6 NYCRR 624.9[c]).

To receive a freshwater wetlands permit from the Department, an applicant is required to demonstrate that a proposed project is compatible with the policy of the Freshwater Wetlands Act to preserve, protect and conserve freshwater wetlands and prevent their despoliation and destruction (see ECL 24-0103). With respect to the captioned matter, Applicant's proposal involves clearing, grading, and filling the site before constructing a house and related structures in the adjacent area of regulated Freshwater Wetland MP-31. In the adjacent area, these activities are identified as "P(N)", or "usually incompatible with a wetland and its functions or benefits" (see 6 NYCRR 663.4[d], Items 20, 23, 25 and 42). For purposes of review for this permit application, Item 42 would include the construction of the proposed house, as well as the construction of the proposed retaining wall and parking area (Tr. at 60).

Pursuant to the regulations, proposed activities identified as P(N) are evaluated to determine whether they would meet three tests of compatibility outlined at 6 NYCRR 663.5(e)(1). For those regulated activities that fail to meet the compatibility tests, designated weighing standards must then be considered. The weighing standards are outlined at 6 NYCRR 663.5(e)(2), and depend on the designated wetland classification.

In addition to the regulated activities identified above, Applicant also proposes to install a sanitary system within the adjacent area of the site. In the adjacent area, this activity is identified as "P(X)", or "incompatible with a wetland and its functions or benefits" (see 6 NYCRR 663.4[d], Item 38). When proposed activities are considered P(X), the weighing standards outlined at 6 NYCRR 663.5(e)(2) must be considered.

A. Compatibility Tests

To support his freshwater wetlands permit application, Applicant offered the expert testimony of Roy Haje, President of En-Consultants, (Southampton, New York). Mr. Haje's education and work experiences are outlined in his curriculum vitae, which is identified in the hearing record as Exhibit 9. Based on his education and work experiences, Mr. Haje is qualified to offer an expert opinion about whether Applicant's proposal would comply with the applicable compatibility and weighing standards in order to obtain the requested freshwater wetlands permit.

Department staff offered the expert testimony of Robert Marsh, who is the Manager for the Bureau of Habitat at the Department's Region 1 Office. Mr. Marsh's education and work experiences are outlined in his resume, which is identified in the hearing record as Exhibit 14. Based on his education and work experiences, Mr. Marsh is also qualified to offer an expert opinion about whether Applicant's proposal would comply with the applicable compatibility and weighing standards in order to obtain the requested freshwater wetlands permit. Mr. Marsh conducted a technical review of Applicant's freshwater wetlands permit application (Tr. at 51).

Mr. Haje explained that all of the activities associated with Applicant's proposal would be located in the adjacent area of the site, although he acknowledged that some elements associated with Applicant's proposal would be located as close as a few feet from the freshwater wetland boundary. According to Mr. Haje, building in such proximity to the freshwater wetland cannot be avoided here due to the size of Applicant's property and local zoning setback requirements. (Tr. at 15.)

Mr. Haje opined that the proposal includes several significant mitigation measures. First, there would be no development within the freshwater wetlands. Second, the footprint of the proposed house would be "quite small." In addition, the proposed location of the sanitary system would be as far from the freshwater wetlands as possible, and the offsite parking area would be gravel and not paved. (Tr. at 24-25.)

In addition, Mr. Haje stated that Applicant would be willing to reduce the width of the proposed house to increase the distance between the house and the freshwater wetland. Mr. Haje explained further that other proposed mitigation that Applicant has considered includes, using indigenous plant species with high environmental value to revegetate and enhance those areas on the site disturbed during construction; and building the house on piles, which would disturb the site less than by constructing a full basement. (Tr. at 32.)

In Mr. Marsh's view, the proposed planting plan and the use of piles go toward minimizing potential adverse impacts rather than mitigating them. Mr. Marsh observed that presently the site is in a natural, undeveloped state. Given the current site conditions, Mr. Marsh opined that Applicant could only attempt to minimize potential impacts if he intends to develop the site as proposed. (Tr. at 72.)

Mr. Haje acknowledged that Applicant's proposal would not comply with the first compatibility standard concerning the preservation, protection and conservation of the wetland and its benefits (see 6 NYCRR 663.5[e][1]). Mr. Haje explained that locating all aspects of Applicant's proposal in the adjacent area would not be compatible given the wording of the first compatibility standard. (Tr. at 37.)

For the following reasons, Mr. Haje opined, however, that Applicant's proposal would comply with the second and third compatibility standards because it would result in no more than insubstantial degradation to, or loss of any part of, the wetland, and would be compatible with public health and welfare (see 6 NYCRR 663.5[e][1]). First, all development would be located in the adjacent area. Second, the proposed house would be small. (Tr. at 37.)

Mr. Marsh agrees with Mr. Haje's assessment that Applicant's proposal would not meet the first compatibility standard, and opined that Applicant's proposal would also not meet the second and third compatibility standards. For example, clearing, filling, grading, and constructing a house and parking area in the adjacent area would permanently remove wildlife habitat; adversely impact the current drainage pattern on the site; and substantially reduce the ability of the adjacent area on the site to serve as a buffer by preventing pollutants and nutrients from reaching the wetland (Tr. at 63-67).

Applicant has not shown by a preponderance of the evidence that his proposal would comply with all three compatibility standards outlined at 6 NYCRR 663.5(e)(1). The majority of the activities associated with this proposal such as clearing, grading, filling and constructing a house and parking area are considered usually incompatible by operation of the regulation. Given the proximity of all proposed activities to the freshwater wetland boundary, Applicant did not overcome the presumption of incompatibility associated with these proposed regulated activities. Accordingly, the weighing standards must be applied before the Commissioner can make a determination about Applicant's pending freshwater wetlands permit application.

The construction of a sanitary system in the adjacent area of a freshwater wetland is an incompatible activity pursuant to the regulations (see 6 NYCRR 663.4(d), Item 38). Therefore, regardless of the potential compatibility of the other regulated activities associated with Applicant's proposal, the weighing standards must be applied by operation of the regulation with

respect to the proposed sanitary system (see 6 NYCRR 663.5[e][2]). In his closing statement, Applicant conceded this point by stating that the weighing standards apply to his permit application (Tr. at 109).

B. Weighing Standards

Where, as here, regulated activities associated with a proposal are considered incompatible or would not meet the three tests for compatibility, a permit may be issued only if the various regulated activities meet each of the weighing standards applicable to the affected wetland (see 6 NYCRR 663.5[e][2]). As noted above, MP-31 is a Class I freshwater wetland.

1. Public Health and Welfare

According to Applicant's survey and plan (Exhibit 2), the sanitary system would consist of a septic tank, a cesspool or ring, and an additional expansion ring. The proposed location of the septic tank would be between the house and Caswell Road. The line from the septic tank would extend southwest to the first ring (*i.e.*, the cesspool), which would be about 27 feet from the boundary of the freshwater wetland. The line from the first ring would extend west southwest to the second (or expansion) ring. The expansion ring would be located south of the house between the house and Agnew Avenue, and it would be about 11 feet from the freshwater wetland boundary. (Tr. at 18, 24-25, 57.)

As part of the proposed sanitary system, Applicant would install a retaining wall extending south from the southwest corner of the house toward Agnew Avenue. Fill would be placed on the eastern side of the retaining wall to increase the elevation of this portion of the site. Mr. Haje explained that the elevation of the site would need to be raised at this location to accommodate the cesspool and expansion ring by increasing the separation distance between the bottom elevation of the rings and the water table. (Tr. at 18, 24-25.)

On March 31, 2006, McDonald Geoscience dug a test hole on the site, and the results are reported on Exhibit 2. Based on the results from the test hole, Mr. Haje opined that material at the proposed location for the septic tank and rings would need to be removed and replaced with better draining materials. According to Mr. Haje, the reason to replace the onsite material is to assure that wastewater from the rings does not flow laterally, but travels down toward the nearest significant surface waterbody which, in this case, is the Atlantic Ocean

located south of the site. (Tr. at 27-28.) In addition, Mr. Haje noted that the area south of the site is already heavily developed (Tr. at 38).

Suffolk County Department of Health (SCDOH) must review and approve the design, and supervise the construction of the proposed sanitary system. The record of this hearing does not include any information about whether Applicant has filed any plans or an application with SCDOH for the sanitary system depicted on Exhibit 2. If Applicant filed plans and an application with SCDOH, the status of the review is not known.

During the hearing, Mr. Haje opined that the proposed sanitary system would be compatible with the public health and welfare weighing standard because all of the components would be located as far away from the freshwater wetland boundary as possible given the size of Applicant's property and local setback requirements (Tr. at 25, 40-41). Mr. Haje also noted that the proposed system depicted on Applicant's plan is typical of the systems installed in the area. Therefore, Mr. Haje expects that SCDOH would approve the proposed sanitary system. (Tr. at 11, 34-35.)

Mr. Marsh's opinion about the potential adverse impacts associated with the proposed sanitary system is different from Mr. Haje's. According to Mr. Marsh, the rules and regulations implemented by SCDOH generally prohibit the approval of any sanitary system that would be located closer than 100 feet from a wetland. When a sanitary system is proposed to be located within 100 feet of a wetland, Mr. Marsh stated that SCDOH will confer with Department staff about the potential for any adverse impacts, and that Department staff has expertise in evaluating the potential impacts that sanitary systems may have on wetlands (Tr. at 76-77). Based on his work experiences in Region 2, Mr. Marsh is not aware of any circumstance where SCDOH approved a sanitary system that would have been located within 75 feet from a freshwater wetland boundary (Tr. at 76).

In addition, Mr. Marsh opined that other aspects of Applicant's proposal would not be compatible with the public health and welfare. Given the proximity of the proposed development to the freshwater wetland boundary, Mr. Marsh concluded that the buffering capacity of the adjacent area on the site would be permanently impaired.

Mr. Marsh also said that Department staff would not be able to regulate the use of pesticides and fertilizers on the

developed areas of the site (Tr. at 65). Mr. Marsh stated that the wetlands filter surface waters that recharge groundwater. According to Mr. Marsh, this process is important on Long Island because the population relies on the sole source aquifer for its drinking water. (Tr. at 68, 73.)

With respect to the application of the weighing standards to the proposed sanitary system, I find the opinion offered by Mr. Marsh to be more persuasive than that offered by Mr. Haje. All components of the proposed sanitary system would be located within 50 feet of the freshwater wetland. Given the proximity to the wetland as well as the need to bring additional fill to the site, I accept Mr. Marsh's opinion that the proposed sanitary system would not be compatible with the public health and welfare, and would not minimize potential adverse impacts on the functions and benefits of the wetland.

In addition, I note that Applicant, who has the burden of proof, did not offer any information from the Suffolk County Department of Health concerning the acceptability of the design for his proposed sanitary system. In addition, Applicant offered nothing to refute Mr. Marsh's testimony that the SCDOH confers with Department staff when proposed systems would be located within 100 feet of freshwater wetlands, and relies on Staff's analysis with respect to potential adverse impacts. The absence of such proof weighs against issuing a permit (see 6 NYCRR 663.5[f][1]).

Applicant demonstrated that, but for his property, all the other neighboring lots surrounding the wetland area are developed with onsite sanitary systems. Based on Exhibit 10, the existing homes appear to be very close to the freshwater wetland boundary. Applicant, however, did not offer any information about the actual distance of the sanitary systems serving these houses to the freshwater wetland boundary. Except for Parcel No. SCTM 0300-31-2-24.1, located west of Applicant's property, Mr. Marsh testified that he does not know the location of the other sanitary systems for the other houses (Tr. at 46).

With respect to Parcel No. SCTM 0300-31-2-24.1, Mr. Marsh testified that the Department issued a freshwater wetlands permit to demolish the first house on the property and to construct a new one. The footprint of the new house, although located within the 100-foot adjacent area, is more landward from the wetland boundary than the original house. When the second house was constructed, Mr. Marsh explained further that the sanitary system was moved from the northeast corner of the property to the

southwest corner of the property. According to Mr. Marsh, the relocated sanitary system is now about 80 feet from the freshwater wetland boundary. (Tr. at 84, 105-106; Exhibits 6, 8, 10.) Although the new sanitary system on Parcel No. SCTM 0300-31-2-24.1 is within the adjacent area of the wetland, it is more than 75 feet landward from the wetland boundary which, based on Mr. Marsh's unrefuted testimony, is the minimum distance from the wetland that SCDOH finds acceptable.

Applicant cannot build a house on his property without some kind of sanitary system. The one proposed as part of the pending freshwater wetland permit application would not be compatible with the public health and welfare weighing standard. This lack of compatibility alone is a sufficient basis on which to deny the requested permit. Nevertheless, the other weighing standards are discussed below for purpose of completeness.

2. Practicable Alternative and Cumulative Impacts

According to Mr. Haje, Applicant's proposal is the only practicable alternative that would accomplish his objective, which is to build a house on the site. Mr. Haje stated that Applicant's property is zoned residential, and noted that most other surrounding lots have already been developed. Mr. Haje stated further that Applicant does not own any other property. Mr. Haje also explained that degradation to the freshwater wetland would be minimized because the proposed house is small, and would be located as far from the boundary of the freshwater wetland as practicable given the local setback requirements. (Tr. at 40-41.) Mr. Haje said that other than Applicant's proposal, the only other alternative is to leave the lot vacant (Tr. at 44-45).

Mr. Marsh testified, however, that alternatives to Applicant's proposal exist. According to Mr. Marsh, other building lots are available in Montauk that do not have freshwater wetlands on them, or are large enough to avoid the wetlands and the 100-foot adjacent area. (Tr. at 71.)

Mr. Marsh also expressed concern about potential cumulative impacts associated with Applicant's proposal. Mr. Marsh explained that if Department staff were to issue a permit for Applicant's proposal, there would be pressure for additional development. Mr. Marsh observed that often times the owner of a newly constructed house will subsequently seek permission to add an addition, deck, pool, or other additional, accessory structures. In addition, owners of other lots similarly situated

near wetlands subsequently seek permits to develop their respective lots further, according to Mr. Marsh. (Tr. at 74-75.)

Mr. Haje showed that Applicant's proposal is typical of the development that now exists in the area (Exhibits 8, 13). Given the character of the community, Applicant argued that his proposal is reasonable (Tr. at 7, 109).

A proposal is the only practicable alternative if no other is physically or economically feasible. According to the regulations, this weighing standard does not mean that the most profitable or least costly alternative is the only feasible one, nor that the least profitable or more costly alternative is the only feasible one. (See 6 NYCRR 663.5[f][2].)

As noted by Applicant's consultant, his objective is to build a house on this residentially zoned lot (Tr. at 40). It is significant to note, first, that Applicant did not testify that his objective was to construct his primary residence at the 40 Coswell Road property and, second, that Applicant has provided a Connecticut mailing address.

Applicant, however, has failed to demonstrate that his proposal is the only practicable alternative to meet this objective based on Mr. Marsh's testimony concerning the availability of other properties not within the scope of the Department's freshwater wetland jurisdiction.

During the hearing, Applicant's expert also testified that local setback requirements limited the configuration of the proposal. As part of his alternatives analysis, however, Applicant did not offer any information to show whether the local zoning ordinance provides for a variance from the established setback requirements, or whether Applicant applied for a variance from the setback requirements and the Town of East Hampton denied this application.

3. Compelling Economic or Social Need

With respect to the weighing standards that must be applied to Class I wetlands, the regulations state, in pertinent part that:

"Class I wetlands provide the most critical of the State's wetland benefits, reduction of which is acceptable only in the most unusual circumstances. A permit shall be issued only if it is determined that

the proposed activity satisfies a compelling economic or social need that clearly and substantially outweighs the loss of or detriment to the benefit(s) of the Class I wetland" (6 NYCRR 663.5[e][2]).

The regulations explain, in detail, how this provision must be interpreted. According to the regulations, permits for the vast majority of activities that could not avoid reducing a benefit provided by a Class I wetland would not be approved. Here, the word *reduction* applies not just to the loss of any benefit, but to the partial loss or reduction of a benefit. (See 6 NYCRR 663.5[f][4][i].)

Mr. Haje opined that the proposal would minimize degradation to the freshwater wetland given the proposed size of the house, and its location from the wetland boundary based on the site constraints and local setback requirements (Tr. at 41). Mr. Haje, however, did not offer an opinion about how minimizing any degradation to the wetland would avoid reducing any wetland benefits. Mr. Marsh, on the other hand, explained there was a potential for the partial loss or reduction of wetland benefits from Applicant's proposal (Tr. at 65-67). Here, I conclude that a reduction of wetland benefits would occur.

To be permitted, Applicant's proposal must satisfy a compelling economic or social need. According to the regulations, the word *compelling* in this phrase means that the proposal is necessary or unavoidable. (See 6 NYCRR 663.5[f][4][ii].) Applicant has demonstrated a personal desire to develop the site, but he did not show a compelling economic or social need consistent with the regulations. The proposed house would serve no public purpose, and no public interest would be served by its construction.

Finally, the compelling economic or social need must clearly and substantially outweigh the loss of, or detriment to, the wetland benefits. *Clearly* means there is no serious debate that the need for the proposal outweighs the potential loss of, or detriment to, the wetland benefits. *Substantially* means that the margin of outweighing must be large or significant. (See 6 NYCRR 663.5[f][4][iii].) By failing to demonstrate a compelling economic or social need for his proposal, Applicant has not shown how his proposal would clearly and substantially outweigh the loss of, or detriment to, the wetland benefits.

Based on the foregoing discussion, I conclude that Applicant's proposal would not satisfy a compelling economic or

social need that would clearly and substantially outweigh the loss of, or detriment to, the benefits associated with MP-31, a Class I regulated freshwater wetland.

Conclusions

As discussed fully above, the regulated activities proposed by Mr. Antonini, which include the construction of a house, parking area, and sanitary system, do not meet the standards for issuance of a freshwater wetlands permit. In particular, the hearing record shows that Applicant's proposal would comply with neither the three compatibility tests nor the weighing standards applicable to a Class I freshwater wetland.

Recommendation

The Commissioner should deny the captioned freshwater wetlands permit application.