STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233

In the Matter

- of -

the Application for a
Wild, Scenic and Recreational Rivers System Permit
Pursuant to Article 15, Title 27, of
the Environmental Conservation Law and
Part 666 of Title 6 of the Official Compilation of Codes,
Rules and Regulations of the State of New York

- by -

THOMAS BUSIELLO,

Applicant.

DEC Permit Application ID No. 1-4734-01998/00003

DECISION OF THE COMMISSIONER

July 1, 2019

DECISION OF THE COMMISSIONER

Thomas Busiello (applicant) filed an application with the New York State Department of Environmental Conservation (Department) to subdivide a 1.02-acre parcel of real property located at 11 Albatross Lane, Smithtown, Suffolk County (site or property), into two separate lots (one approximately 0.6-acre lot and one approximately 0.4-acre lot). An existing single family dwelling, pool, patio, driveway and septic system are situated on the northern portion of the site. The southern portion of the site is undeveloped and naturally vegetated. Applicant proposes to construct a single family residence, driveway and septic system on the southern portion of the site.

Since the entire property is located within the Nissequogue Recreational River corridor, it is subject to the requirements of the Wild, Scenic and Recreational Rivers System Act (Act) and the implementing regulations (*see* Environmental Conservation Law [ECL] article 15, Title 27 and 6 NYCRR part 666).[1] As set forth in the regulations, each private dwelling in a recreational river area must be on a lot of at least two acres in size (*see* 6 NYCRR 666.13[C][2][b], note [iii]). Because applicant seeks to subdivide his property and then construct a single family residence, an area variance is required due to the lot size (*see* 6 NYCRR 666.9[a][2]). Accordingly, applicant applied to the Department both for a Wild, Scenic and Recreational Rivers System permit (permit) as well as an area variance from the two acre minimum lot size requirement.

By letter dated November 17, 2017, Department staff determined that applicant's proposed project failed to satisfy the standards for issuance of a permit and that applicant did not qualify for a variance from the two acre lot minimum (*see* Hearing Exhibit [exhibit] DEC 1.11). In response to the denial, applicant requested a hearing.[2] The matter was referred to the Office of Hearings and Mediation Services and assigned to Administrative Law Judge (ALJ) P. Nicholas Garlick. An adjudicatory hearing conducted pursuant to 6 NYCRR part 624 was held on January 29, 2019. Upon receipt of final briefs from the parties, the ALJ closed the hearing record.

ALJ Garlick prepared the attached hearing report in which he determines that the permit application and request for a variance fail to meet applicable legal and regulatory standards, and accordingly, recommends that I uphold Department staff's determination to deny the permit application and variance. I hereby adopt the hearing report as my decision in this matter, subject to my comments below.[3]

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[1] *See* ECL 15-2714 (3)(ee) (classifying the Nissequogue River as a recreational river).

[2] Initially, by letter dated June 7, 2017, Department staff declined to review applicant's request for a permit and area variance because "a previous application for the same or similar activities was submitted in June 2005" and denied (exhibit DEC 1.9). After applicant requested a hearing (*see* exhibit DEC 1.10), Department staff determined that "because the lot is in new ownership" a review of the proposal was warranted (exhibit DEC 1.11). Applicant subsequently submitted letters renewing its request for a hearing (*see* Hearing Report at 1, n 1).

[3] Similar proposals to divide a parcel of property in this same river corridor have been rejected by Commissioner decision (*see e.g. Matter of Reddock*, Decision of the Commissioner, July 26, 2017; *Matter of DeCillis*, Decision of the Commissioner, August 28, 2007). As set forth in the July 1985 Draft Environmental Impact Statement for Statewide Wild, Scenic and Recreational Rivers System Regulations Part 666 (DEIS), the

Burden and Standard of Proof

In this proceeding, applicant bears the burden of proof to demonstrate that his "proposal will be in compliance with all applicable laws and regulations administered by the department" (6 NYCRR 624.9[b][1]). Where factual matters are involved, an applicant must sustain its burden of proof by a preponderance of the evidence (*see* 6 NYCRR 624.9[c]). Applicant has failed to meet that burden here.

Discussion

In recognition that many rivers in the State "possess outstanding natural, scenic, historic, ecological and recreational values" and that "[i]mprovident development and use of these rivers and their immediate environs" could result in negative environmental impacts, the Legislature enacted the Act (*see* ECL 15-2701[1] and [2]). The Act creates a wild, scenic and recreational rivers system for the purpose of protecting and preserving designated rivers for the benefit of future generations (*see* ECL 15-2701[3] and [4]). In furtherance of this legislative mandate, the Department promulgated statewide regulations "for the management, protection, enhancement and control of land use and development in [these] river areas" (ECL 15-2709[1]; *see also* 6 NYCRR 666.2[a]).

As noted, applicant's subdivision proposal does not meet the two acre minimum requirement. The regulations however provide that the Department may grant a variance from the regulations in certain circumstances. "In making its determination, the department will consider the benefit to the applicant if the variance is granted, as weighed against the adverse impacts upon river resources" (6 NYCRR 666.9[a][2]). The Department will consider:

"(i) whether and to what extent a change will be produced in the character of the river corridor or a detriment to nearby properties will be created by the granting of the area variance;
(ii) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance;
(iii) whether the requested area variance is substantial;
(iv) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the river corridor; and
(v) whether the alleged practical difficulty was self-created" (*see id.* at 666.9[a][2][i]-[v]).

In addition, applicant can provide evidence that the strict application of the provision at issue will result in significant economic injury (*see id.*).[4]

Nissequogue Recreational River represents "an important open space within a developed area," and is the only river on the north shore of Long Island (*see* DEIS, at 62).

[4] Applicant failed to proffer any evidence at the hearing concerning whether a strict application of the area variance would result in significant economic injury. Accordingly, I need not reach this issue.

In his hearing report, ALJ Garlick evaluated each of the area variance factors and determined that the applicant failed to meet his burden with respect to the variance request (*see* Hearing Report at 5-12). I concur with ALJ Garlick's reasoning and conclusions as discussed below.

– Character of the River Corridor

With respect to the criteria set forth in 6 NYCRR 666.9(a)(2)(i) and (iv), applicant testified that the variance, if granted, would not affect the character of the river corridor because the river is not visible from the site (*see* Hearing Transcript [tr] at 31-33,40). In addition, applicant contends that his proposal is consistent with the character of the neighborhood as all the surrounding lots are less than two acres and contain single family homes (*see id.* at 33-35, 38-40). Moreover, applicant's witness testified at the hearing that the construction of a new home on the southern portion of the property would not affect nearby properties and only serve to "enhance" the neighborhood (tr at 55-56).

At hearing, Department staff presented testimony that granting a variance from the two acre lot minimum would affect the character of the river corridor and result in adverse environmental impacts (tr at 82; *see also* Hearing Report at 6). Department staff testified that, among these impacts, granting an area variance will increase housing density resulting in a change in the aesthetic nature of the river corridor (tr at 76-81). In addition, an increase in excess nutrients from a lawn and sanitary system could potentially impact water quality (tr at 78-79).[5]

Both the Act and ECL 3-0301(1)(b) provide for a cumulative impact analysis in the context of these permitting decisions (*see Matter of Wilson*, Decision of the Acting Commissioner, November 3, 2010, at 4, n 2 [holding that the "language of the Act . . . independently require[es] that cumulative impacts be considered in the application and variance review process"]). While Department staff acknowledges that a single subdivision of a site would probably not result in a large environmental impact, successive approvals of a similar nature would erode the two-acre requirement that has been established for the protection, management and enhancement of the river corridor (tr at 86-87; *see also* Hearing Report at 6-7 [Department staff comments on the negative precedent that would be set by granting the requested variance and the negative cumulative impacts]).

I agree with ALJ Garlick that Department staff has demonstrated that certain adverse impacts accompany an increase in housing density and those impacts, taken together with a variance from the two-acre requirement, warrant the denial of the applicant's application.

[5] Department staff indicated that excess nutrients contribute to an increase in invasive aquatic vegetation which in turn has the potential to impact fish productivity and hamper recreational activities (tr at 80-81).

– Alternatives

Pursuant to 6 NYCRR 666.9[a][2][ii], applicant must demonstrate whether the benefit sought can be achieved by some feasible method other than an area variance. Here, in the absence of an area variance, the benefit sought (construction of another home) cannot be achieved at the site (*see* DEC 1.4; *see also* tr at 30-31, 36-37, 54, 57, 76). Applicant testified at hearing that he has not researched purchasing an alternate property for the construction of the home (tr at 45). Applicant failed to address whether there are alternative sites available outside of the regulated area for this purpose.[6]

– Substantial Nature of the Variance

Applicant maintains that the variance is not substantial because "[a]ll the properties are single family dwellings that surround my area and that's what I propose, and I meet the zoning requirements with the town of Smithtown for half zoning" (tr at 37). It is clear however that the requested variance would be a substantial deviation from the two-acre minimum lot requirement established under 6 NYCRR 666.13(C)(2)(b), note (iii). The existing site is already below the two acre standard for the recreational river corridor. By subdividing the site, the resulting two lots would each be substantially less in acreage than the regulations allow (tr at 83-84). This reduced sizing, in addition to being a substantial deviation from the two acre regulatory requirement, has the potential to result in negative environmental impacts (*see id.* at 83-84, 109; *see also Matter of DeCillis*, Decision of the Commissioner, August 28, 2007, at 5).

– Self-Created Hardship

Finally, I find that applicant's need for an area variance is self-created (*see* 6 NYCRR 666.9[a][2][v]). Here, applicant purchased the site in 2015, decades after the promulgation of 6 NYCRR part 666 (*see* exhibit DEC 3).[7] Thus, applicant is deemed to have had at least constructive, if not actual, notice that the site was subject to regulation under 6 NYCRR part 666 (*see Matter of Whelan*, Decision of the Commissioner, December 1, 1992, at 1 [holding that "the (applicants') difficulty is self-created as the restrictions imposed by Part 666 predate the Applicants' purchase of the property"]).

In addition, evidence in the hearing record indicates that a prior landowner filed a notice covenant with the deed of the property (*see* exhibits DEC 5, DEC 6 [covenants noting that the site is situated within a recreational river corridor of the Nissequogue River as designated by the ECL and 6 NYCRR part 666 and referencing various activities that require written authorization from the Department prior to being conducted]). Although applicant indicated that he was unaware of the covenant at the time he purchased the property, his attorney conceded at hearing that "the covenant . . . was recorded and . . . would have been in a title report that Mr. Busiello got or his lawyer got at the time he bought the property" (tr at 64-65).

[6] Pursuant to 6 NYCRR 666.9(b)(6), a written request for a variance should contain a discussion of alternative site possibilities outside the river area. Applicant's application merely states, "Applicant does not own property other than this lot for the proposed construction" (*see* exhibit DEC 1.4 at 3).

[7] 6 NYCRR part 666 was originally promulgated in 1986.

In sum, applicant chose to purchase a site upon which an additional residence could only be constructed with approval of an area variance from the Department. Accordingly, applicant's difficulty is self-created.

Conclusion

Based on this record, the application for a wild, scenic and recreational rivers system permit, and the request for an area variance, are denied.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: July 1, 2019
Albany, New York

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HEARING REPORT

- by -

_____/s/_____
P. Nicholas Garlick
Administrative Law Judge

June 24, 2019

SUMMARY

Applicant Thomas Busiello applied to staff of the Department of Environmental Conservation (DEC Staff) for an area variance and a Wild, Scenic, and Recreational Rivers System (WSRR) permit pursuant to article 15, title 27, of the Environmental Conservation Law (ECL) and part 666 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) (Exh. DEC 1). Applicant is the owner of a 1.02-acre property (property) located at 11 Albatross Lane, Smithtown, Suffolk County, New York (tax map no. 101-1-27) (Exh. DEC 4). The property is located entirely within the Nissequogue Recreational River Corridor (t. 103). An existing single-family dwelling is located on the property. Applicant proposes to subdivide the property into two lots and construct a second single family dwelling and associated structures on the newly created vacant lot (Exh. DEC 1.4). This report recommends the Commissioner uphold DEC Staff's denial of the requested area variance.

PROCEEDINGS

Applicant submitted applications for a WSSR permit and for a lot area variance to DEC Staff with separate cover letters dated January 26, 2017 (Exhs. DEC 1.2, 1.3, & 1.4). In documents dated February 14, 2017, DEC Staff issued a negative declaration pursuant to the State Environmental Quality Review Act (SEQRA) (Exh. DEC 1.7) and a notice of complete application (Exh. DEC 1.8). In a letter dated June 2, 2017, DEC Staff wrote to applicant dismissing the application on the grounds that the requested variance was substantially similar to a permit application that had been denied on September 28, 2005 (Exhs. DEC 1.1 & 1.9). By letter dated June 10, 2017, the applicant requested a hearing (Exh. DEC 1.10)[1].

DEC Staff issued a notice of permit denial, dated November 17, 2017 (Exh. DEC 1.11), advising applicant that the proposed subdivision of the property and construction of a second single family dwelling did not meet the standards for issuance of a variance for a WSRR permit. DEC Staff subsequently referred this matter for hearing on October 23, 2018 (Exh. DEC 1.12), and it was assigned to me on November 15, 2018.

[1] Applicant's counsel sent several letters requesting a hearing. In addition to the June 10, 2017 letter, the file contains letters dated July 1, 2017 and October 12, 2017.

After consultation with the parties, I scheduled a hearing on the application to commence on January 29, 2019. The notice of public hearing was published on December 19, 2018 in the Environmental Notice Bulletin and applicant published the hearing notice on the following day in The Smithtown News. In accordance with the hearing notice, I presided over a legislative hearing, issues conference, and adjudicatory hearing on January 29, 2019 at the Department's Region 1 Office, 50 Circle Road, Stony Brook, New York.

Following the hearing, closing briefs were received on March 4, 2019. Subsequently, the applicant requested an opportunity to submit a reply brief, which was received on March 18, 2019, at which time the record closed.

Legislative Hearing

The hearing notice advised that the Department would accept written and oral comments on the proposed project from interested persons and organizations, and that a legislative hearing would be held to receive comments at 10:00 a.m. on January 29, 2019. No written or oral comments were received. I noted on the record that no members of the public were present to comment on the application, and closed the legislative hearing at approximately 10:20 a.m.

Issues Conference

The hearing notice advised that an issues conference would be held immediately following the legislative hearing to define, narrow and, if possible, resolve the issues for adjudication. The notice further advised that, on or before January 18, 2019, interested persons and organizations could file for party status and propose issues for adjudication. No filings for party status were received. Accordingly, only DEC Staff and applicant participated in the issues conference.

As agreed upon by the parties, the issues identified for adjudication are the reasons cited by DEC Staff for denying the permit, as set forth in the notice of permit denial (Exh. DEC 1.11). The notice states that the proposal failed to satisfy the standards for issuance of a WSRR permit set forth under 6 NYCRR 666.13. Specifically, DEC Staff determined that the proposal does not comply with 6 NYCRR 666.13(C)(note iii), which requires each dwelling in a recreational river area to be on "a lot of at least 2 acres." DEC Staff further determined that the

proposal does not satisfy the standards for an area variance set forth at 6 NYCRR 666.9(a)(2). Specifically,

- "whether and to what extent a change will be produced in the character of the river corridor or a detriment to nearby properties will be created by the granting of the area variance" (6 NYCRR 666.9[a][2][i]),

- "whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance" (6 NYCRR 666.9[a][2][ii]),

- "whether the requested area variance is substantial" (6 NYCRR 666.9[a][2][iii]),

- "whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the river corridor" (6 NYCRR 666.9[a][2][iv]), and

- "whether the alleged practical difficulty was self-created, which consideration will be relevant to the decision of the department, but will not necessarily preclude the granting of the area variance" (6 NYCRR 666.9[a][2][v]).

Adjudicatory Hearing

The adjudicatory hearing was held on January 29, 2019. Vincent J. Trimarco, Esq., appeared on behalf of applicant and called two witnesses: applicant Thomas Busiello; and Margaret Remhild, a licensed real estate broker. Kari Wilkinson, Esq., appeared on behalf of DEC Staff and called two witnesses: Heather Amster, Real Property Supervisor, DEC Region 1; and Robert F. Marsh, Natural Resources Supervisor, DEC Region 1.

FINDINGS OF FACT

1. By a deed recorded on October 23, 2015, Thomas Busiello, the applicant, and Bernadette L. Grasso took title to property located at 11 Albatross Lane, Smithtown, Suffolk County, New York (tax map no. 101-1-27) (Exh. DEC 3). By a second deed recorded on December 31, 2015, Mr. Busiello took sole title of the property (Exh. DEC 4).

2. Before Mr. Busiello took title, the prior owner of the property applied to the Department to subdivide the property and

construct a second house. This application was denied on September 28, 2005 (Exh. DEC 1.1). Subsequently, on July 12, 2006 and again on February 3, 2010, the prior owner recorded a covenant to the deed with the Suffolk County Clerk declaring the property to be in the recreational river corridor of the Nissequogue River and stating any future owner would need Department approval to conduct any regulated activity on the property (Exhs. DEC 5 & 6).[2]

3. The property located at 11 Albatross Lane is 44,620 square feet or approximately 1.02 acres in size and contains a single-family house on its northern half (Exh. DEC 1.2). Applicant proposes to subdivide the property into two lots: one of which would be 25,792 square feet or approximately 0.6 acres where the existing house is located; and a second lot of 18,828 square feet or approximately 0.4 acres where a second single-family home is proposed (Exhs. DEC 1.2 & DEC 1.13).

4. The property is contained in a subdivision known as Forrestwood for which the map was filed in the Suffolk County Clerk's office in 1959 (t. 19). Most of the lots in this subdivision were developed between 1960 and 1970 (t. 21) although there has been some new construction within the last twenty years (t. 52).

5. The property is located entirely within the Nissequogue Recreational River Corridor (Exhs. A1 & DEC 8).

POSITIONS OF THE PARTIES

Applicant argues that the proposed subdivision and construction of a second single family dwelling on the property meets area variance issuance standards and should be granted.

DEC Staff argues that applicant's proposal fails to meet the requirements for an area variance and the denial of the application was appropriate.

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[2] At the hearing, Mr. Busiello testified that, at the time of his purchase of the property, an advertisement stated that the lot was sub-dividable (t. 18) and that his attorney at the time of the purchase never told him about the notice covenants (t. 19, 41). Applicant did stipulate to the fact that the title report generated at this time would have revealed the notice covenants (t. 64-65).

DISCUSSION

As discussed above, a hearing in this matter was held to review applicant's claim that DEC Staff erred in failing to grant him an area variance for his proposed subdivision. Applicant has the burden of proof to demonstrate that the proposed project will be in compliance with all applicable laws and regulations administered by the Department, as set forth in 6 NYCRR 624.9(b)(1).

The notice of permit denial states that because the property is located entirely in the recreational river corridor of the Nissquogue River, each private dwelling or mobile home must be on a lot of at least two acres, as required by 6 NYCRR 666.13(C)(note iii). Because the proposed subdivision does not meet this two acre minimum, a variance is required pursuant to 6 NYCRR 666.9. This section of the regulations sets forth five factors to be considered by DEC Staff in deciding whether or not to grant an area variance. The notice concludes that the application fails to meet any of the variance standards (Exh. DEC 1.11).

The first of these five standards is found at 6 NYCRR 666.9(a)(2)(i) which states that the Department will consider "whether and to what extent a change will be produced in the character of the river corridor or a detriment to nearby properties will be created by the granting of the area variance." The notice of permit denial states that the granting of an area variance will increase housing density and associated environmental impacts, including an increase in sanitary effluent reaching groundwater, and an increase in traffic, noise, and light pollution, leading to a decrease in the aesthetic qualities of the area. Granting the variance would fail to preserve and restore the recreational qualities of the river area, as mandated by ECL 15-2707(2)(c)(2). (DEC Exh. 1.11).

At the hearing, Mr. Busiello testified that he did not believe that his proposed subdivision would have an effect on the character of the river corridor because: his house was over 2,100 feet from the river corridor;[3] there are over fifty houses

[3] There is some dispute about the distance. Mr. Busiello states his home is 2,100 feet from the river while Mr. Marsh estimated the distance to be about 1,800 feet and that Mill Pond, which is part of the river corridor, is about 1,100 feet from the property to the southwest (t. 74). This dispute does not affect

between the proposed new house and the river; and he cannot see or hear the river from his property (t. 31). He also stated that his proposed subdivision would not cause any detriment to nearby properties because even if the variance were granted, both lots would have more road frontage than his neighbors (t. 33) so it would not look out of place (t. 34). He stated that he has one of the largest lots in his subdivision and the existence of an old curb cut where the second lot is proposed suggests that in the past the subdivision of his property was contemplated (t. 35).

Applicant's second witness, Margaret Remhild, a licensed real estate broker with extensive experience in Smithtown, testified that, in her opinion, the proposed subdivision would meet the requirements for the Town of Smithtown and the Suffolk County Department of Health (t. 53). She also stated that the proposed project would not have an adverse impact because the river was not visible from the property (t. 55) and that it would enhance the neighborhood (t. 56). It would also have the benefit of increasing local tax revenues (t. 57).

DEC Staff offered the testimony of Robert Marsh, Natural Resource Supervisor, who stated that the purpose of the wild and scenic rivers regulations, including the two-acre zoning requirement, is to protect and enhance the aesthetic and natural ecological features of the river corridor by maintaining the rural or natural environment to the greatest extent possible (t. 75). He testified that granting an area variance in this case would not be consistent with the purpose of the regulations because of: the loss of natural vegetation for construction of the new house; the additional pollution from the septic system and fertilizers; and the loss of wildlife habitat (t. 77). In addition, even though the proposed new home is not visible from the river, it would increase the density of the river corridor and negatively impact its rural character (t. 78). The additional septic system and lawn fertilizers would also increase the nutrients reaching the river corridor and would negatively impact fish and wildlife, potentially leading to a rise in invasive species (t. 78).

Mr. Marsh also expressed concern about not just the impact from this requested variance, but also the precedent it would set and the cumulative impact from other variances resulting in higher density in the area (t. 79). Because there has been

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the analysis regarding whether an area variance should be issued.

little new development in the area since the enactment of the regulations, by granting this area variance other homeowners would seek similar variances which would create a change in character for the area (t. 82). Additional construction would lead to increased impervious surfaces leading to less recharge to the aquifer, faster runoff, longer droughts, and increased flood risk (t. 80). Recreational features of the river corridor would also be negatively impacted by the additional pollution and faster runoff, which would also decrease the opportunities for scientific research on the river (t. 81). The reduction in recreational activities on the river could potentially affect neighboring properties (t. 83).

In his closing brief, applicant's counsel argues that this proposed subdivision would not produce a change in the character of the river corridor or cause a detriment to nearby properties because the river could not be seen from the house and the neighborhood surrounding the applicant's properties contains many single-family homes constructed on half acre lots. DEC Staff counsel disagrees and argues in her brief that the record supports the conclusion that both the character of the area and recreational opportunities on the river would be negatively impacted if the variance were granted.

Based on the evidence in the record, the Commissioner should conclude that applicant has failed to establish that the proposed subdivision and subsequent development of the property meet this standard for an area variance. DEC Staff's testimony regarding the precedent and potential cumulative impacts that may result from the granting of an area variance are especially persuasive. As the Commissioner has held, "[s]uccessive approvals of a similar nature would erode the 'at least' two acre regulatory standard which is the standard established for the protection, management and enhancement of the river corridor. An approval of similar projects could result in cumulative impacts that would impair the natural resources of the river corridor" (Matter of Wilson, Decision of the Commissioner, November 3, 2010, at 3-4 [internal footnotes and citations omitted]).

The second standard to be considered when an area variance is requested is found at 6 NYCRR 666.9(a)(2)(ii) which states that the Department will consider "whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance." The notice of permit denial states that the applicant can achieve the benefit he seeks, construction of a single-family home, by

purchasing another buildable lot outside the river corridor or a lot within the corridor that conforms to Part 666.13 regulations (DEC Exh. 1.11).

At the hearing, Mr. Busiello testified that in order to purchase another buildable lot, he would have to spend money (t. 37) and that he had not researched purchasing another lot (t. 45). The applicant's second witness, Margaret Remhild testified that if the area variance was denied, then there was no other way for him to develop his lot further (t. 57).

In his testimony, DEC Staff member Marsh restated the argument made in the notice of permit denial that the applicant could achieve his goal of building another home by purchasing a lot outside the river corridor or a lot within the corridor of more than two acres (t. 83).

In his closing brief, applicant's counsel argues that the applicant's purchase of property outside the river corridor that he could then subdivide does not benefit applicant. The only thing applicant can do with this property is increase the size of his existing home, which would lead to all of the same impacts identified by DEC Staff at the hearing. DEC Staff counsel argues that there is no evidence in the record to show applicant could not purchase and develop another lot outside the river corridor.

Although applicant's desire to avoid the costs of purchasing another lot is understandable, applicant proffered no evidence at hearing to demonstrate that other means of achieving his objective are not "feasible for the applicant to pursue" (6 NYCRR 666.9[a][2][ii]). Based on the evidence in the record, the Commissioner should conclude that applicant has not met his burden to establish that the benefit he seeks, to construct a second single family dwelling, cannot be achieved by some method, feasible for the applicant to pursue, other than an area variance.

The third standard for granting an area variance is found at 6 NYCRR 666.9(a)(2)(iii), which states that the Department will consider "whether the requested area variance is substantial." The notice of permit denial states that the variance requested is substantial because it requires an approximately 1.5-acre variance for each lot from the minimum two-acre lot size found in the regulations (DEC Exh. 1.11).

At the hearing, Mr. Busiello testified that he did not believe the requested area variance was substantial because his proposed lots would meet local zoning requirements and the neighborhood contains other single-family homes (t. 37), none of which occupy a lot two acres in size (t. 38). Applicant's second witness, Margaret Remhild testified that she believed the variance would not be substantial because the proposed new house would be in keeping with the existing neighborhood (t. 57).

DEC Staff member Marsh testified that he believed the requested variance was substantial because the proposed lots (approximately 0.5 acres each) were only a quarter of the minimum two-acre lot size set forth in the regulations (t. 84).

In his closing brief, applicant's counsel argues that the requested variance is not substantial because it conforms to local zoning standards and the character of the area. DEC Staff counsel disagrees, arguing that by permitting a lot a quarter the size of that specified in the regulations would be substantial.

Based on the evidence in the record, the Commissioner should conclude the variance requested by applicant is substantial. The determining factor is that the extent of the area variance sought by applicant differs from the minimum lot size established under the regulations (see Matter of Affordable Homes of Long Island, LLC v Monteverde, 128 AD3d 1060, 1062 [2d Dept 2015] [upholding the denial of an area variance where, among other things, "the [Hempstead Board of Zoning Appeals] concluded that . . . the requested 20% variance from the required minimum lot area was substantial"]). In this case, the minimum residential lot size is two acres and applicant's request for a 75 percent reduction from this minimum lot size is substantial (see Matter of DeCillis, Decision of the Commissioner, Aug. 28, 2007, at 5).

The fourth standard for an area variance is found at 6 NYCRR 666.9(a)(2)(iv), which states that the Department will consider "whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the river corridor." The notice of permit denial states that residential structures have a number of potential environmental impacts to the river corridor, including increased nutrient loads from fertilizer and sanitary runoff; pesticides from lawn care; and oils and other harmful pollutants from vehicles. These impacts are multiplied as housing density increases. (DEC Exh. 1.11.)

At the hearing, Mr. Busiello testified that he did not believe the proposed subdivision would have an adverse impact on the physical or environmental conditions of the river corridor because of the property's distance from the river (t. 38) and the great drainage on the site for septic systems (t. 39). Applicant's second witness, Margaret Remhild did not address this standard in her testimony.

As set forth in more detail above, DEC Staff member Marsh testified that granting the requested area variance would not protect and enhance the aesthetic and natural ecological features of the river corridor (t. 75). Among the impacts he identified were: the loss of natural vegetation because of construction of the new house; the additional pollution from the septic system and fertilizers; and the loss of wildlife habitat (t. 77). He also discussed the increased housing density in the river corridor and negative impact on rural character if the variance were granted (t. 78) as well as the increased nutrients reaching the river corridor, which would negatively impact fish and wildlife (t. 78). Additional runoff from increased impervious surfaces would lead to less recharge to the aquifer, longer droughts, and increased flood risk (t. 80).

At the hearing, applicant's counsel questioned Mr. Marsh regarding DEC Staff's issuance of a SEQRA negative declaration (Exh. DEC 1.7) for the proposed subdivision, specifically, the negative declaration's conclusion that the proposal would not have a significant impact on the environment. Mr. Marsh stated that the language was standard language used by the permits division of DEC (t. 89).[4] Mr. Marsh concluded that this one lot subdivision would not have a huge adverse impact, but granting an area variance for such a small lot has the potential for cumulative impacts (t. 108-109).

In his closing brief, applicant's counsel argues that DEC Staff's SEQRA determination that the proposed subdivision will not have a significant impact on the environment demonstrates

[4] In his testimony, Mr. Marsh incorrectly states that DEC determined the proposed action to be Type II (under SEQRA), when in fact, the negative declaration (Exh. DEC 1.7) and the hearing notice both identify the proposed action as an unlisted action. However, this mischaracterization of the SEQRA status of the proposal is immaterial to the permit denial or the appeal. Mr. Marsh also incorrectly stated that the Town of Smithtown was the SEQRA lead agency when the negative declaration states that DEC was. This mistake also does not affect the above analysis.

that the proposal meets this fourth standard. He argues that no matter how slight any proposed project's impacts might be, the cumulative impacts analysis used by DEC Staff would demand its denial. With respect to Mr. Marsh's statements regarding the precedent granting this variance would have, counsel argues each project should be examined on its own, without regard to any precedent it might set. Counsel concludes that the negative declaration is the most important evidence in the record and that it should supersede the testimony of Mr. Marsh, who was not involved in issuing the denial.

DEC Staff counsel states that the SEQRA determination was separate and apart from the permit review process and only concluded that no environmental impact statement need be prepared, not whether the requested variance met permit issuance standards. DEC Staff counsel concludes that the record evidence supports the denial of the variance.

Based on the evidence in the record, the Commissioner should conclude that applicant has failed to show that the proposed subdivision will not have an adverse effect or impact on the physical or environmental conditions in the river corridor. Applicant's argument that DEC Staff's SEQRA negative declaration demonstrates the project meets permit issuance standards is without merit. The negative declaration sets forth impacts to vegetation, wildlife, and water quality; erosion potential, drainage, and flooding; air quality, noise, traffic, solid waste; and other impacts (Exh. DEC 1.7 at 3). This document concludes that a negative impact would be expected from the proposed construction of a new house, but that for the purposes of SEQRA, no environmental impact statement is necessary. The record demonstrates that these impacts, while not significant on their own, when combined with future, cumulative impacts from the precedent that would result from this variance demonstrate that the proposed project does not meet this standard for issuance of an area variance.

The fifth standard for the issuance of an area variance is found at 6 NYCRR 666.9(a)(2)(v) which states that the Department will consider "whether the alleged practical difficulty was self-created." The notice of permit denial notes that Mr. Busiello purchased the property after the relevant regulations were promulgated in 1986 and after the final boundaries of the river corridor were established in 1990. Therefore, he was on notice that the site was subject to regulation and, therefore, his difficulty is self-created. (DEC Exh. 1.11). On balance, Mr. Marsh concluded, the practical difficulties encountered by

applicant did not outweigh the potential environmental impacts on the river and river resources (t. 85). While the impacts of this single subdivision are probably not huge, the cumulative impacts from other subdivisions could be significant (t. 86).

At the hearing, Mr. Busiello did not testify regarding this standard nor did applicant's second witness, Margaret Remhild. DEC Staff member Marsh testified that because Mr. Busiello purchased the property in 2015, more than twenty years after the regulations went into effect, his difficulty was self-created (t. 84).

In his closing brief, applicant's counsel argues the difficulty was not self-created because the existing house was built on half the parcel, implying that subdivision was always contemplated. DEC Staff counsel notes that the property was included in the regulatory area before Mr. Busiello bought it and that the deed covenants provided him notice of this fact.

Based on the evidence in the record, the Commissioner should conclude that applicant's practical difficulty is self-created.

Other Matters

-- Economic injury

In addition to the considerations set forth above, 6 NYCRR 666.9(a)(2) also provides that an applicant may elect "to prove, by competent financial evidence, that the strict application of the subject provision(s) of this Part will result in significant economic injury." As DEC Staff counsel points out in her closing brief, applicant did not attempt to make such a showing and no economic injury is apparent.

Applicant has been using the property in its current configuration with one single family dwelling since he purchased it. The denial of the application will simply maintain the status quo, allowing applicant to continue to use the property for the same purpose and in the same manner as he has since purchasing the property. Although applicant would likely receive an economic benefit from the construction of a second single family dwelling where currently only one is authorized, the economic injury provision contained in 6 NYCRR 666.9(a)(2) is meant to protect an applicant from economic injury, not foster economic gain (see id. [providing that "whether the value [of a property] would be enhanced were a variance granted will

not be relevant"]; see generally Matter of Ifrah v Utschig, 98 NY2d 304, 309 [2002] [the Court, upholding the denial of an area variance, notes that the subject property "already contains a habitable single-family residence" and that "the benefit petitioner seeks . . . is his realization of a profit by constructing a second house on the subdivided vacant lot if the variances are granted"].

CONCLUSION

Applicant's property is located entirely within the boundaries of the Nissequogue Recreational River Corridor and applicant's proposal would create two lots that do not meet the two acre minimum lot size requirement set forth at 6 NYCRR 666.13(C)(note iii). Applicant has failed to demonstrate that the proposed project meets either the standards for issuance of a WSRR permit or the standards set forth under 6 NYCRR 666.9(a)(2) for an area variance.

RECOMMENDATION

DEC Staff’s denial of the application of Thomas Busiello for an area variance and a Wild, Scenic and Recreational Rivers System permit should be upheld.

EXHIBIT LIST

Matter of Thomas Busiello
Application No. 1-4734-01998/00003

Exhibit No.	Description
DEC 1	Index of application documents[5]
DEC 1.1	Notice of permit denial for earlier application
DEC 1.2	Variance request
DEC 1.3	EAF
DEC 1.4	Permit application
DEC 1.7	Negative declaration
DEC 1.8	Notice of complete application
DEC 1.9	Letter dismissing permit application
DEC 1.10	Hearing request
DEC 1.11	Notice of permit denial and receipt of hearing request
DEC 1.12	Hearing referral
DEC 1.13	Tree preservation and land clearing plan
DEC 2	Amster Resume
DEC 3	Documents recording deed for applicant purchasing the property dated October 23, 2015
DEC 4	Documents recording bargains and sale deed for property dated December 31, 2015
DEC 5	Documents recording a notice covenant to the deed by the property's prior owner stating the necessity to obtain a DEC permit before conducting a regulated activity dated July 12, 2006
DEC 6	Documents recording a notice covenant to the deed by the property's prior owner stating the necessity to obtain a DEC permit before conducting a regulated activity dated February 3, 2010
DEC 7	Marsh resume
DEC 8	Enhanced aerial photograph showing property and boundaries of the Nissequogue River corridor
A 1	Map showing property and boundaries of the Nissequogue River corridor
A 2	Two Suffolk County tax maps
A 3	Enhanced aerial photograph showing property
A 4	Erosion control plan for the property

[5] This list sets forth a total of 13 documents, but exhibit DEC 1.5 was not provided at the hearing and exhibit 1.6 is a duplicate of exhibit 1.4.