

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

-of-

the Application for a Tidal Wetlands Permit
pursuant to Article 25 of the
Environmental Conservation Law ("ECL")
and Part 661 of Title 6 of the Official Compilation
of Codes, Rules and Regulations of the State of
New York ("6 NYCRR")

- by -

NEIL HANRAHAN AND BARBARA MATO HANRAHAN,

Applicants.

Permit Application No. 1-4736-05617/00002

DECISION OF THE COMMISSIONER

May 16, 2006

DECISION OF THE COMMISSIONER

Neil Hanrahan and Barbara Mato Hanrahan ("applicants") filed an application for a tidal wetlands permit with the New York State Department of Environmental Conservation ("Department") to: raise and re-pile an existing single family residence at 346 Dune Road, Westhampton Beach, New York (the "property"); add a second floor to the residence; relocate the residence by a few feet to allow for a deck and stairs on its southern end; raise and re-pile the existing deck; relocate and reconstruct the residence's existing sanitary system; and remove an existing shed (the "project").

Administrative Law Judge ("ALJ") Molly T. McBride in her hearing report, a copy of which is attached, recommends that a permit be issued to applicants. The hearing report is hereby adopted as my decision in this matter subject to the following comments.

Department staff had denied the permit application on the ground that it failed to comply with various regulatory standards for permits on tidal wetlands and on adjacent areas (see 6 NYCRR 661.9[b][standards for permits on tidal wetlands] and [c][standards for permits on adjacent areas]).

As originally proposed, the new sanitary system was to be located within the boundaries of a tidal wetland on the property. Subsequently, applicants modified the project to move the proposed sanitary system from the tidal wetland onto the wetland's adjacent area. As a result of that change, no part of the project would be located within the boundaries of the tidal wetland. Accordingly, only the standards for permits on adjacent areas were at issue.

In her hearing report, the ALJ addresses the regulatory provisions that apply to the proposed project. She concludes that, except for the development restrictions in 6 NYCRR 661.9(c)(2), applicants met their burden of demonstrating that the permit application satisfied the applicable standards.

In particular, the record demonstrates that the existing sanitary system should be replaced.¹ The ALJ concludes, and I concur, that the new system would be a significant improvement compared to the existing system, would serve to

¹ Although the Hearing Report notes significant deficiencies and omissions in the stenographic preparation of the hearing transcript, the transcript still offers useable evidence with respect to the problems associated with the existing sanitary system (see Adjudicatory Hearing Transcript, September 12, 2005, at 19-20 [existing system has no septic tank]; id. at 22 [system provides no protection from releasing contaminants into marine waters]; id., September 13, 2005, at 57 [system is not filtering water properly and allows it to go directly into the wetland]).

protect the public health and welfare, and would not have an undue adverse impact on the tidal wetland.

Section 661.9(c)(2) of 6 NYCRR provides that no person can undertake any new regulated activity except in compliance with the development restrictions that appear in 6 NYCRR 661.6. Department staff argued that the project failed to comply with several of these restrictions, including the minimum 75-foot setback from the most landward edge of the tidal wetland for structures (see 6 NYCRR 661.6[a][1]), and the minimum 100-foot setback from the most landward edge of the tidal wetland for the proposed new sanitary system (see 6 NYCRR 661.6[a][2]).

The ALJ, however, concludes that a variance from these setback requirements should be granted pursuant to 6 NYCRR 661.11(a). Based upon my review of the record, I agree with the ALJ that the requirements for a variance have been satisfied and that a variance should be issued from the setback requirements set forth in 6 NYCRR 661.6(a)(1) and (2).²

Department staff also argued that the project fails to

² I note that the existing residence and sanitary system on the property also do not conform with the setback requirements (see, e.g., Hearing Report, at 8; Adjudicatory Hearing Transcript, September 12, 2005, at 95-96).

satisfy the requirement that any on-site sewage disposal cesspool, septic tank, leach field or seepage pit must meet a minimum requirement of two feet of soil between the bottom of such pool, tank, field or pit and the seasonal high ground water level, rock, hardpan, or other impermeable materials (see Department Staff's Closing Statement and Brief, at 13 [citing 6 NYCRR 661.6(a)(3)]). However, other information appears in the record indicating that applicants' proposed sanitary system would comply with the two-foot standard (see Adjudicatory Hearing Transcript, September 12, 2005, at 20-21, 50; see also Hearing Report, at 6 (Finding of Fact no. 9)). Based on my review of the evidence presented, no justification exists for any variance from the two-foot requirement. Accordingly, applicants' proposed sanitary system must comply with the two-foot requirement in 6 NYCRR 661.6(a)(3).

During the permit application review, applicants' consultant proposed, by letter dated January 5, 2004 ("January 2004 Letter"), several mitigation measures with respect to the project. These measures included: use of pervious materials for driveway construction; direction of runoff away from the wetland; running of leaders and downspouts on the residence into dry wells installed at the site to reduce storm water runoff; and removal of invasive phragmites in the wetland to the south of the project

and the replanting of that area with spartina alterniflora. Applicants also expressed their willingness to undertake "other reasonable mitigation measures" to reduce environmental impacts from the project (see January 2004 Letter, at 3). The extent to which Department staff offered any comments on the proposed mitigation measures or recommended any alternatives is unclear.

Based on my review of the record, I direct Department staff to issue a tidal wetlands permit to applicants, consistent with the hearing report and this decision, within thirty days of this decision. The permit shall provide for raising and re-piling the existing residence and adding a second story to it; slightly relocating the house to allow for a deck and stairs to the south of the structure that would be kept within the existing footprint; raising and re-piling the existing deck; reconstructing and relocating the existing sanitary system in the adjacent area; and removing the existing shed on the property (see Department Exh B; Applicants Exhs 2 & 4; see also description of modified project in Applicants' Brief dated December 9, 2005, at 16-17; Hearing Report, at 6 [Finding of Fact no. 9]).³

³ Department staff contend that, if a variance were granted and a tidal wetlands permit issued, a new precedent would be established "that could have significant cumulative impacts on future non-conforming development" (Department Staff's Closing Statement and Brief, at 17). Although I recognize Department

Although applicants present information on the footprints of neighboring homes in support of their proposed project, I have not relied on that information in this decision. A decision to grant a tidal wetlands permit necessarily focuses on whether an applicant has demonstrated compliance with the statutory and regulatory requirements of ECL article 25 and 6 NYCRR part 661, and generally reflects a case-by-case determination. Although setback requirements may be modified based on the location of structures on neighboring properties (see 6 NYCRR 661.6[a][1]), the record does not contain sufficient information on the location of those structures or their environmental impacts to be considered here.

I have, however, in the unique circumstances of this case, taken into account the information on the height of neighboring residences (see, e.g., Hearing Report, at 5 [Finding of Fact no. 7], 10). I note also that, except for the new sanitary system, the other modifications to the residence will occur within the existing structural footprint.

staff's concern, I disagree that such a precedent would be established here. This decision is based on the unique factors relating to this property, including the need to replace an existing deficient sanitary system with one that will be a significant improvement in handling the waste stream and that will reduce potential environmental impacts to the tidal wetland.

Because Department staff did not prepare a draft permit for this application, no specific permit language is before me. To assist in the preparation of the permit, in addition to the standard terms or conditions that are applicable to such a permit, Department staff should include three special conditions: one which provides for a variance from the development restrictions in 6 NYCRR 661.6(a)(1) and (2); one which reiterates the two-foot separation requirement that appears in 6 NYCRR 661.6(a)(3); and one which incorporates those mitigation measures listed in the January 2004 Letter that Department staff considers appropriate. Furthermore, if Department staff and applicants agree to implement any additional mitigation measures with respect to this project, those measures should also be incorporated into the permit.

For the New York State Department
of Environmental Conservation

/S/

By: _____
Denise M. Sheehan
Commissioner

Albany, New York
May 16, 2006

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

-of-

the application for a tidal wetlands permit,
pursuant to the
Environmental Conservation Law (ECL) Article
25 and Title 6 of the Official Compilation
of Codes, Rules and Regulations of the State of
New York (6 NYCRR) Part 661 by

Neil Hanrahan and Barbara Mato Hanrahan

PERMIT APPLICATION No. 1-4736-05617/00002

HEARING REPORT

-by-

/s/

Molly T. McBride
Administrative Law Judge

PROCEEDINGS

An application for permit from the New York State Department of Environmental Conservation (Department, DEC) was made on April 2, 2003 by Neil Hanrahan and Barbara Mato Hanrahan (Applicants), for a tidal wetlands permit to repile and relocate an existing single family home at 346 Dune Road, Westhampton Beach, New York. The applicants sought to relocate an existing single family home six feet north and add a second story to the home, add a 6' x 30.5' deck on the southerly end of the home, abandon the existing sanitary system and install a new sanitary system on the southwest side of the home. An existing shed would be permanently removed. The new sanitary system includes a retaining wall and placement of 390 yards of fill.

The Department denied the application on January 11, 2005 and a request for hearing was filed on January 18, 2005. The matter was assigned to Administrative Law Judge (ALJ) Molly T. McBride. A Notice of Hearing was published in the Environmental Notice Bulletin on August 10, 2005 and in the Southampton Press, western edition, on August 18, 2005.

The project, as proposed by applicants requires a tidal wetlands permit pursuant to ECL Article 25 and Part 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR). The new sanitary system would also require approval from the Suffolk County Department of Health.

Pursuant to ECL Article 8 (State Environmental Quality Review Act, SEQRA) and 6 NYCRR Part 617, the Department Staff determined that the proposed project is a Type II action (§617.5(c)(2)), replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site and consequently no further environmental review is required under SEQRA.

During the permitting process, a Notice of Incomplete Application was sent by the Department on April 15, 2003. The Applicants' representative, Aram V. Terchunian responded to that Notice by letter dated January 5, 2004 and the application was deemed complete by the Department on March 17, 2004. By Notice dated January 11, 2005 the Department issued a denial of the permit application. The Applicants note that during the nine month period of time between their submission in response to the notice of incomplete application and the denial, the Department did not contact the Applicants to discuss the project or indicate any objections to the project.

A legislative hearing, issues conference and adjudicatory hearing were held on September 12 and 13, 2005 in the Village of Westhampton Beach Village Hall. The Applicants appeared with their consultant Aram V. Terchunian and the Department was represented by Gail Rowan, Esq., Assistant Regional Attorney.

The legislative hearing was held first on September 12, 2005. No members of the public appeared and no one spoke at the hearing. The legislative hearing was then closed and the issues conference was convened. No other persons, agencies or organizations participated in the hearing process as parties or sought party status. After discussion, it was determined that the issues for adjudication were the reasons for permit denial as stated by Department Staff in the January 11, 2005 Notice of Permit Denial.

The adjudicatory hearing was commenced on September 12, 2005 at the conclusion of the issues conference. The adjudicatory hearing continued on September 13, 2005.

The following witnesses testified on behalf of the Applicants: Aram V. Terchunian and Neil Hanrahan. Karen Graulich, Regional Manager for Marine Habitat and Protection, testified on behalf of the Department.

The transcripts were received by the parties approximately 30 days after the close of the hearing. There were numerous errors in the transcript. After numerous discussions with the court reporting service and the parties, the parties agreed to submit errata sheets to correct the more significant errors in the transcripts. Closing briefs were submitted on December 12, 2005 and the hearing record closed on December 12, 2005, upon receipt of the briefs. The parties and I agreed that the number of errors in the transcript made the transcript unreliable as a record of the proceeding.

POSITION OF THE PARTIES

Applicants

The Applicants argue that they meet all requirements of the DEC regulations that apply to the proposed project and that the sanitary system, as proposed, is a significant improvement over the existing system that no longer is functioning. The Applicants argue that they are reconstructing an existing dwelling in the exact same footprint with no increased uses and therefore, the project falls within the Use Category of 661.5(b)(1), "continuance of lawfully existing uses..." which requires no permit from the Department. Applicants contend that Part 661 permit requirements, the basis for Department Staff's denial, are not applicable.

Department

The Department contends that the Applicants have not met the burden of demonstrating that the project meets the standards for tidal wetlands permit issuance. The Department's position is that 661.5(b)(25) is the proper Use Category, "Expansion or substantial modification of existing functional facilities and structures..." which is a presumptively incompatible use, permit required when the project is located on tidal wetlands and a "generally compatible, permit required" use when located on adjacent areas. As for the new sanitary system, the Department contends that it falls into Use Category 6 NYCRR 661.5(b)(45) which is also classified as presumptively incompatible use, permit required on tidal wetlands and "generally compatible, permit required" use when located on adjacent areas. Part 661 regulations do apply according to Department Staff and, when applied, the project does not meet permit issuance standards.

ISSUES FOR ADJUDICATION

The Applicants proposed issues for adjudication that were arguments as to why the Department's denial was wrong. Department Staff proposed the grounds for permit denial contained in the permit denial letter as issues for adjudication. At the close of the issues conference, it was ruled that the following issues required adjudication:

1) Section 661.9(c)(3), proposal will have an undue adverse impact on the present and potential values of the tidal wetland.

2) Section 661.9(b)(1)(i), proposal is not compatible with the policy of the act to preserve and protect tidal wetlands and prevent their despoliation and destruction.

3) Section 661.9(b)(1)(ii) and/or section 661.9(c)(1), proposal is not compatible with the public health and welfare.

4) Section 661.9(b)(1)(iii), proposal is not reasonable and necessary.

5) Section 661.9(b)(1)(iv) and section 661.9(c)(2), proposal does not comply with development restrictions.

6) Section 661.9(b)(1)(v), proposal does not comply with the use guidelines contained in Section 661.5.

FINDINGS OF FACT

1) Neil Hanrahan and Barbara Mato Hanrahan, Applicants, P.O. Box 883, Westhampton Beach, New York applied for a tidal wetlands permit to relocate an existing single family home six feet north and add a second story to the home, add a 6' x 30.5' deck on the southerly end of the home, abandon the existing sanitary system and install a new sanitary system on the southwest side of the home and relocate an existing shed. (The shed was later removed from the plan) The new sanitary system includes a retaining wall and placement of 390 yards of fill. The proposed project is located on Moriches Bay, in the Village of Westhampton Beach, Town of Southampton, County of Suffolk.

2) The existing home on the property is a 625 square foot, one story, single family residence with a deck on the north side, a 5'3" x 8'3" shed on the west side and a sanitary system on the east side consisting of a single cesspool.

3) The project, as proposed in the permit application, placed a portion of the new sanitary system on tidal wetlands on the property. No other portion of the project is on tidal wetlands.

4) The Applicants offered an amended proposal that moves the new sanitary system out of the tidal wetlands and onto adjacent area. The amended proposal was provided to the Department at the hearing.

5) The existing sanitary system is failing, the cesspool sits in tidal water and the shower drains directly onto the ground under the residence. A Department employee equated the existing system to allowing the sanitary system to drain directly into Moriches Bay.

6) The Applicants reside in the existing residence approximately 40% of the time and their other residence in Westhampton Beach 60% of the time. If the proposed changes to the residence are allowed, it will become the Applicants' primary residence.

7) The neighboring properties have homes substantially larger in size, in both footprint and height, than the proposed structure. The properties to the immediate east and west of the subject parcel have large private residences, much greater in size than the Applicants' proposed residence. At a site inspection held after the adjudicatory hearing, a paved basketball court was observed on the neighbor's property,

immediately adjacent to the Applicants' fence on the west side of their property.

8) The property is located on Dune Road in Westhampton Beach, on Moriches Bay. Moriches Bay is one of three major, protected, shallow, coastal bay areas on the south shore of Long Island, and constitutes one of the largest estuarine ecosystems in New York State. The wetlands and waterways of this highly productive bay support a variety of fish and wildlife species throughout the year.

9) The proposed sanitary system was to be placed in wetlands in the initial permit application submission. Applicants presented a modified plan that moved the system entirely out of the wetlands. The new system would require minimal excavation, fill in adjacent areas to allow for the system to be raised two feet above ground water and require a retaining wall would be necessary to contain and support the change in elevation. A septic tank, leaching rings, distribution pool and four cesspools complete the proposed system.

10) The Suffolk County Health Department has reviewed the plans for the new sanitary system and has not objected to them. Suffolk County Health Department can not approve the plans without Department approval. A representative of the County Health Department testified that the existing system is sitting in tidal waters and is in all likelihood failing.

11) By letter dated January 5, 2004 the Applicants offered several mitigation measures to reduce the impacts to the environment. These include using all pervious materials for driveway construction and to direct all runoff away from the wetland for natural recharge and to provide for storm water runoff. Applicants have offered to run leaders and down spouts into dry wells to further reduce storm water runoff from the home. The Applicants have offered to remove invasive phragmites in the wetlands to the south and replant the area with spartina alterniflora. The Applicants have also offered to undertake other reasonable mitigation measures to reduce the environmental impact and still achieve the permitted development of the upland area. Department Staff did not offer any comment on the proposed mitigation.

12) Department Staff has not offered any alternative to the Applicants that would allow for the failing sanitary system to be repaired or replaced or for the residence to be modified.

13) Department Staff and Applicants agree that there is no alternative location for the sanitary system that would meet all

setbacks contained in the regulations.

DISCUSSION

The first point to be addressed is whether a tidal wetlands permit is required for the project. Applicants contend that their project comes under the use category found at 6 NYCRR 661.5(b)(1), "The continuance of lawfully existing uses ...where such continuance does not involve expansion or significant alteration of the existing use." No permit is required for such a project. Department Staff, however, argues that this is not the applicable use category. I agree with Department Staff that section 661.5(b)(25) is the proper use category, "expansion or substantial modification of existing functional facilities and structures..." since the project calls for significant expansion of the existing residence. As this project is proposed to be located in the adjacent area, it is designated "Generally compatible, permit required". Since a permit is required, we then must look to the tidal wetlands permit issuance standards at 6 NYCRR Part 661 which Department Staff argues Applicants have not met.

6 NYCRR 661.9(b)(i-iv)

The Department's primary objection to the project relates to the location of the sanitary system. Department Staff was presented with the revised sanitary system plan, moving it into adjacent area and out of tidal wetlands, on the day of the adjudicatory hearing in this matter.⁴ Applicants' consultant, Aram Terchunian testified that he tried to discuss the revised plan with Charles Hamilton of Department Staff but that Mr. Hamilton would not discuss the modifications with him.

Generally, it would be unfair to expect Department Staff to comment on a project that is presented at hearing for the first time. However, Staff did not object to the timing of the modifications being presented. Also, the fact that Applicants previously attempted to present the plan to Staff and were denied the opportunity persuades me to allow them to revise the permit application to reflect the new sanitary system. As noted above, Department Staff denied the project due to its failure to meet tidal wetland permit issuance standards, including those found at

⁴The Suffolk County Health Department received it before that time, when the Applicants submitted their plan for the sanitary system to the County for approval. (The proposed system has been reviewed by the County but not yet approved, in part because it requires a DEC permit).

6 NYCRR 661.9(b)(i-iv). Since the project is no longer located on wetlands, the standards found at 661.9(b)(1)(i-iv) are not applicable.

6 NYCRR 661.9(c)(1-4)

Department Staff also allege that the permit issuance standards at 6 NYCRR 661.9(c)(1-4) have not been met. These govern projects on adjacent areas. Section 661.9(c)(1) allows for a permit to be issued if the project "is compatible with the public health and welfare"; section 661.9(c)(2) states that the project must comply with the development restrictions contained in section 661.6; section 661.9(c)(3) reads in relevant part, the proposal will not have an undue adverse impact on the present and potential values of the tidal wetland; and section 661.9(c)(4) states that the project must comply with the use guidelines.

I will address the requirements of section 661.9(c)(2) first. The Department dismissed the revised plan, relocating the sanitary system into adjacent area and out of wetlands, as still failing to meet the standards for permit issuance. Karen Graulich testified that neither the existing system nor the newest proposed system is "very good" and neither meets development setback restrictions at 6 NYCRR 661.6(a)(1 & 2). Sections 661.6(a)(1 & 2) require the residence to have a 75 foot setback from the most landward edge of any tidal wetlands and the sanitary system to have a setback of 100 feet landward from the most landward edge of any tidal wetland. The residence has a setback of approximately 30 feet and the sanitary system, as modified at the hearing, has a setback of significantly less than 100 feet. As stated above, the setback requirement can not be met on this parcel.

Section 661.11(a) of 6 NYCRR allows for the Department to grant an applicant a variance from any development restrictions:

"Where there are practical difficulties in the way of carrying out any of the provisions of section 661.6 of this Part or where in the department's judgment the strict application of the provisions of section 661.6 of this Part would be contrary to the purposes of this Part, the department shall have authority in connection with its review of an application for a permit under this Part to vary or modify the application of any provisions in such a manner that the spirit and intent of the pertinent provisions shall be observed, that public safety and welfare are secured and substantial justice done and that action pursuant to the variance will not have an undue adverse

impact on the present or potential value of any tidal wetland for marine food production, wildlife habitat, flood and hurricane and storm control, cleansing ecosystems, absorption of silt and organic material, recreation, education, research, or open space and aesthetic appreciation."

There was a debate between the parties prior to the hearing as to whether a variance was necessary. Applicants argued earlier in the process that they were seeking a variance yet also argued that a variance was not necessary. Department Staff seems to acknowledge the failing or failed septic system and its duty to protect the waters of New York State. However, it seems to ignore the fact that if the system is not replaced, there will be continued release of unfiltered waste water into the tidal wetlands on the parcel and into Moriches Bay. Both sides acknowledge that there is no location on the parcel where the sanitary system could meet setback requirements. The requirements of section 661.11(a) have been met and a variance should be granted.

Ms. Graulich noted that the Department is entrusted with many duties, including protecting wetlands and ensuring the safety and integrity of water bodies like Moriches Bay. Ms. Graulich testified that "any activity that would substantially degrade the water quality in Moriches Bay would adversely affect the biological productivity of this area and efforts should be made to control discharges of wastes from ...upland sources". (34)⁵ The existing sanitary system is clearly degrading the water quality in Moriches Bay. According to Ms. Graulich, "it is not filtering the water properly and is allowing the water to go directly into the wetlands and probably Moriches Bay". (57)

Department Staff says that the shortened setback could increase the opportunity for pathogens and contaminants to move into the water column with potential impacts to water quality, public health and commercial and recreational fisheries. However, the testimony at the hearing made it clear that the existing system is not functioning. It allows for no filtering of wastewater and the harmful results are obvious. The proposed system is superior in every way, except having the 100 foot setback from the wetlands. The proposed system appears to be far superior in protecting the public health and welfare as well as not having an undue adverse impact on the present or potential value of any tidal wetland for marine food production, wildlife habitat, flood and hurricane and storm control, cleansing

⁵Numbers refer to pages in the hearing transcript

ecosystems, absorption of silt and organic material, recreation, education, research, or open space and aesthetic appreciation. The new system with the septic tank, cesspools and leaching rings will all serve to filter the waste and protect the public health and welfare. The representative of the Suffolk County Health Department who testified agreed that the existing system is failing and that the new system would be far superior. It is in the best interests of the public health and welfare and will not have an undue adverse impact of the tidal wetlands to replace the failing and wholly inadequate sanitary system at this residence.

The permit was also denied by Department Staff for failing to meet the standards found at 6 NYCRR 661.9(c)(1) which require a project to be compatible with the public health and welfare. For the reasons noted above, the project is compatible with the public health and welfare.

Department Staff also objects that the project will not meet the standards of section 661.9(c)(3). Staff testified as to the impacts on marine food production, wildlife habitat, flood, hurricane and storm control, cleansing ecosystems, absorption of silt and organic material and recreation, open space and aesthetic appreciation. The majority of the objections were based on filling in wetlands, which is no longer proposed. Staff also noted runoff from storm water would be a concern. Applicants have proposed installing drywells to accept the runoff. As for marine food production and wildlife habitat impacts, the improved sanitary system would result in lessened impacts. Ms. Graulich also testified as follows: "Certainly, the shoreline has a lot of value for tourism and for people to spend their time out there and enjoy. The site does have value which will substantially change with the increase of the structure that would degrade the value of the wetlands and affect the value." (40) There is a residence on the lot now. The proposed project stays in the existing footprint. The major change that would be visible would be adding the second story to the structure. As for the issue of tourism and the shoreline, a site inspection revealed that this residence is surrounded by extremely large homes, hundreds and thousands of square feet larger than this proposed home. That is a reality that must be considered when examining impacts. Even if this project is permitted and the home is constructed, it will still be dwarfed by the far larger, neighboring homes. As for cleansing ecosystems, flood, hurricane and storm control and absorption of silt and organic material, those objections, as detailed by Department Staff, were related to the filling of wetlands from the sanitary system which has been removed from the project.

Department Staff acknowledges the failing or failed septic

system and its duty to protect the waters of New York State. However, if the system is not replaced, there will be continued release of unfiltered waste water into the tidal wetlands on the parcel and into Moriches Bay. It is in the best interest of the public health to protect the sensitive wetlands and Moriches Bay by having a fully functioning sanitary system. That can only occur if the system is replaced and it can only be replaced if a variance is granted.

As for the variance for the house and deck setback, the current structure does not meet the setback requirement and the proposed project would not lessen the setback. Also, the site visit clearly showed neighboring homes that were not meeting the setback requirements. Applicants submitted lot information for the neighboring parcels that supported this argument.

CONCLUSIONS OF LAW

1) 6 NYCRR 624.9(b)(1) states: "The applicant has the burden of proof to demonstrate that its proposal will be in compliance with all applicable laws and regulations administered by the department." 6 NYCRR 661.9(a) states: "The applicant shall have the burden of establishing that the applicable standards of this section will be met."

2) 6 NYCRR 661.9(b) identifies the standards for a tidal wetlands permit to be issued for a project located in tidal wetlands. The project, as described in the permit application, placed a portion of the project, the sanitary system, on tidal wetlands. Therefore, section 661.9(b)(1)(i-iv) would have been applicable. However, Applicants modified the project to remove it completely from the tidal wetland area. Therefore, 661.9(b)(1)(i-iv) are no longer applicable.

3) 6 NYCRR 661.9(c)(1-4) are applicable as the revised project is located in adjacent areas.

4) The Applicants have met their burden of demonstrating that the project meets the standard delineated in section 661.9(c)(1), "is compatible with the public health and welfare". The existing sanitary system is failing and as a result, the waste is not being filtered before release into the waters of Moriches Bay. The new system would be a significant improvement and will serve to protect the public health and welfare from the release of highly pollutive waste.

5) The Applicants have met their burden of demonstrating

that the project meets the standards delineated at section 661.9(c)(3) in that the project will "not have an undue adverse impact on the present or potential value of any adjacent or nearby tidal wetland for marine food production, wildlife habitat, flood and hurricane and storm control, cleansing ecosystems, absorption of silt and organic material, recreation, education, research or open space and aesthetic appreciation, taking into account the social and economic benefits which may be derived from the proposed activity".

6) The Applicants have not met their burden of demonstrating that the project meets the standards governing development restrictions referred to at section 661.9(c)(2). However, I recommend that pursuant to 6 NYCRR 661.11(a) a variance should be granted.

7) The Applicants have met their burden of demonstrating that the project meets the standards delineated at section 661.9(c)(4) and complies with the use guidelines contained in section 661.5 of this Part.

8) The Applicants have demonstrated that the standards for issuance of a tidal wetlands permit have been met if a variance is granted.

RECOMMENDATION

I recommend that the Commissioner grant the Applicants a variance pursuant to 661.11(a) and issue a tidal wetlands permit. I also recommend that the Commissioner direct that the tidal wetlands permit adopt the mitigation measures detailed in Mr. Terchunian's January 5, 2004 letter to the Department as permit conditions.