

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
625 BROADWAY  
ALBANY, NEW YORK 12233-1010

In the Matter of

-of-

the Application for a  
Permit and Variance to Construct a Parking Lot  
in a Wild, Scenic and Recreational Rivers System Corridor,  
pursuant to Environmental Conservation Law  
Article 15, Title 27 (Wild, Scenic and Recreational Rivers System),  
and Part 666 of Title 6 of the Official Compilation of Codes,  
Rules, and Regulations of the State of New York

-by-

**JARAL PROPERTIES, INC.,**

Applicant.

DEC Case No. 1-4730-01220/00001

DECISION OF THE ASSISTANT COMMISSIONER

December 31, 2009

## DECISION OF THE ASSISTANT COMMISSIONER<sup>1</sup>

Jaral Properties, Inc. (“Applicant”) submitted an application to the New York State Department of Environmental Conservation (“Department”) for a permit and a use variance pursuant to title 27 of article 15 of the New York State Environmental Conservation Law (“ECL”) (Wild, Scenic and Recreational Rivers [“WSRR”] System), and the act’s implementing regulations at part 666 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”).

Applicant proposes to modify and expand its existing commercial Best Western Hotel property at 1830 Route 25, Town of Riverhead, Suffolk County, New York. The expansion would include the construction of a new hotel and office building, as well as an addition to the existing restaurant and paved parking areas. With respect to the proposed parking areas, a portion, comprising approximately 26,200 square feet and which would contain 64 parking spaces and an associated landscaped area (the “64-space parking area” or “project”), would be located on a four-acre vacant parcel of land abutting Route 25. That parcel is situated within the Peconic River Corridor. Pursuant to ECL 15-2714(3)(gg), the Peconic River is classified as a recreational river, and the 64-space parking area would be subject to the WSRR System Act and regulations. Accordingly, a WSRR permit is required for the construction of the 64-space parking area.

Department staff denied the application for a permit and use variance, and applicant requested a hearing on the denial. Following referral to the Office of Hearings and Mediation Services, the matter was assigned to Administrative Law Judge Maria E. Villa. ALJ Villa prepared the attached hearing report in which she recommended that the application for a permit application and use variance be denied. I adopt the hearing report as my decision in this matter subject to the following comments.

The ALJ, in the hearing report, addresses the standards for a WSRR permit and a use variance as related to this project. As discussed by the ALJ, before a WSRR permit can be issued to a private applicant, the Department must determine that:

- (1) the proposed land use or development is consistent with the purposes and policies of the [Wild, Scenic and Recreational Rivers System] act and with the provisions of [Part 666];
- (2) the resources specified in section 666.2(e) of [Part 666] will be protected and the proposed activity will not have an undue adverse environmental impact; [and]
- (3) no reasonable alternative exists for modifying or locating the proposed activity outside of the designated river area (see 6 NYCRR 666.8[f][1]-[3]).

Applicant has conceded that the project does not meet the standards for permit issuance (see Matter of Jaral Properties, Inc., Issues Ruling of ALJ Kevin J. Casutto, April 3, 2007, at 3, 5).

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<sup>1</sup> By memorandum dated December 8, 2009, Commissioner Alexander B. Grannis delegated decision making authority in this proceeding to Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services. A copy of the memorandum is enclosed with this decision.

ALJ Villa's hearing report details where the project fails to satisfy the applicable standards for permit issuance.

As discussed in the hearing report, the principal environmental impact of the 64-space parking area relates to clearing of forested area involving approximately four acres of naturally vegetated open space, with the consequent loss of wildlife habitat. This reduction in the amount of naturally vegetated area and consequent loss of habitat, as well as the commercial development of this parcel, would not protect the natural, scenic, recreational, ecological, and scientific qualities of the Peconic River corridor (see, e.g., Hearing Transcript, at 157-159, 161). The project would not protect the Peconic River corridor for the benefit and enjoyment of present and future generations and therefore would contravene one of the WSSR System Act's express policies (see ECL 15-2701[3]; see also ECL 15-2707[2][c][primary management objectives for recreational rivers]).

Applicant failed to demonstrate that no reasonable alternative exists for modifying the project or locating the project outside the designated river area (see 6 NYCRR 666.8[f][3]). In addition, applicant did not effectively address Department staff's proposed alternative of moving the 64-space parking area to another location on applicant's property that is outside the Peconic River corridor.

With respect to the use variance, the ALJ concludes that the variance cannot be granted because applicant's hardship is self-created (see 6 NYCRR 666.9[a][1][iv]) on the ground that applicant purchased the parcel for the 64-space parking lot subsequent to the passage of the WSSR System Act. I concur. Although applicant, in support of its application, notes the presence of commercial development in the immediate vicinity of the subject parcel, that fact is not dispositive (see Matter of DeCillis, Decision of the Commissioner, August 28, 2007, at 6-7 [noting that the "overall analysis" must consider features not only "in and beyond the immediate neighborhood," but the features and values associated with the river corridor]).

In this proceeding, applicant also raised equal protection concerns. The essence of a violation of the constitutional guarantee of equal protection is that all persons similarly must be treated alike (see Bower Associates v Town of Pleasant Valley, 2 NY3d 617, 630-631[2004][“a violation of equal protection arises where *first*, a person (compared with others similarly situated) is selectively treated and *second*, such treatment is based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person” (emphasis in original)]).

Applicant referenced other projects in the local area where commercial development was allowed or expanded after the WSSR System Act was enacted to support its contention that similarly situated applicants had been treated differently. Prior permits are not, however, necessarily controlling, because each application must be evaluated on its own merits. The ALJ reviewed the record with respect to these projects and identified specific differences in terms of site conditions and mitigation measures from the project under consideration in this proceeding (see Hearing Report, at 5-6; see also Hearing Transcript, at 170-171). Applicant failed to establish that its project is similarly situated to the other projects referenced. Furthermore, the record demonstrates that Department staff appropriately applied relevant permit and use variance

standards in considering the application. Applicant's equal protection argument is not supported on this record and is rejected.

Accordingly, the application of Jaral Properties, Inc. for a WSSR permit and a use variance is denied.

For the Department of Environmental  
Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Louis A. Alexander  
Assistant Commissioner

Dated: Albany, New York  
December 31, 2009

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
Office of Hearings and Mediation Services  
625 Broadway, First Floor  
Albany, New York 12233-1550

In the Matter of the Application

of

**JARAL PROPERTIES, INC.**

for a Permit and Variance to Construct a Parking Lot  
in a Wild, Scenic and Recreational Rivers System Corridor,  
pursuant to Environmental Conservation Law (“ECL”)  
Article 15, Title 27 (Wild, Scenic and Recreational Rivers System),  
and Part 666 of Title 6 of the Official Compilation of Codes,  
Rules, and Regulations of the State of New York  
(Regulation or Administration and Management of the  
Wild, Scenic and Recreational Rivers System in New York State  
Excepting Private Land in the Adirondack Park).

DEC Case No. 1-4730-01220/00001

**HEARING REPORT**

-by-

/s/

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Maria E. Villa  
Administrative Law Judge

December 15, 2009

## PROCEEDINGS

Jaral Properties, Inc. (“Jaral” or the “Applicant”) submitted an application to staff of the New York State Department of Environmental Conservation (“Department Staff”) for a permit and a use variance pursuant to Article 15, Title 27 of the New York State Environmental Conservation Law (“ECL”) (Wild, Scenic and Recreational Rivers (“WSRR”) System), and the statute’s implementing regulations at Part 666 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”).

The Applicant seeks to construct an approximately 26,200 square foot paved parking lot, consisting of 64 parking spaces and associated landscaped area, at its existing commercial Best Western hotel property at 1830 Route 25, Town of Riverhead, Suffolk County, New York. The parking lot would be situated on an approximately four-acre vacant parcel of land, abutting Route 25. Pursuant to ECL Section 15-2714(3)(gg), the Peconic River is classified as a recreational river. The proposed project would be located within the Peconic River Corridor, and therefore, a WSRR System permit is required.

The project was determined to be an unlisted action pursuant to the New York State Environmental Quality Review Act (“SEQRA”), ECL Article 8 and Part 617 of 6 NYCRR. Department Staff, as lead agency, issued a negative declaration. By letter dated February 7, 2006, Department Staff denied the application. On February 27, 2006, the Applicant requested a hearing on the denial.

A legislative hearing to receive public comment on the application was held on December 12, 2006. Administrative law judge (“ALJ”) Kevin J. Casutto conducted the legislative hearing, which took place at the Applicant’s hotel. No members of the public appeared to comment on the proposal, and the following day, an issues conference was held at the same location. No applications for party status were received. Consequently, the Applicant and Department Staff are the only parties to this proceeding. ALJ Casutto determined that the issues for adjudication were whether the project complies with the permitting standards at Section 666.8 of 6 NYCRR, the use guidelines at Section 666.13, and the use variance standards at Section 666.9. Matter of Jaral Properties, Inc., Issues Ruling, at 6; 2007 N.Y.Env. LEXIS 29, \* 10 (April 3, 2007).

The proceedings were adjourned *sine die* to allow for further discovery. Following ALJ Casutto’s departure from the Office of Hearings and Mediation Services in February of 2009, the matter was re-assigned to ALJ Maria E. Villa, who conducted the adjudicatory hearing on April 14, 2009.

At the hearing, the Applicant was represented by Anthony H. Palumbo, Esq., of Goggins & Palumbo, Mattituck, New York. The Applicant called the following witnesses: Charles Bowman and William Bowman, Ph. D., both of Land Use Ecological Services, Inc., and Albert Salvatico, the president of Jaral Properties, Inc., which owns the subject parcel. Department Staff was represented by Kari Wilkinson, Esq., of the Department’s Region 1 office. Department Staff’s witness was Robert Marsh, the Department’s Regional Manager of the Bureau of Habitat, Division of Fish, Wildlife and Marine Resources. Because of inaccuracies in the transcript, the

parties submitted proposed corrections, and closing briefs were to be served on or before August 26, 2009. The Applicant's closing brief dated August 21, 2009 was filed on August 26, 2009, and Department Staff's closing brief dated August 26, 2009 was filed on August 31, 2009. The post-hearing reply briefs were timely filed on September 18, 2009, and the record of the hearing closed on that date.

#### FINDINGS OF FACT

1. The proposed project is located at the Applicant's existing commercial Best Western Hotel property at 1830 Route 25, Town of Riverhead, Suffolk County, New York. The Applicant has owned the Best Western Hotel property since February, 2004.
2. The Applicant purchased the parcel which is the subject of this application in 2005, for approximately \$975,000. The subject parcel is approximately four acres in size, and is located within the Peconic River recreational river corridor.
3. The Applicant proposes to construct a parking lot of 64 parking spaces, with associated landscaping, on the subject parcel. An area that is currently forested would be cleared to allow construction of the parking lot.
4. The subject parcel is greater than 500 feet from the Peconic River, and the River is not visible from the subject parcel. State Route 25, a four-lane divided highway, is located between the subject parcel and the Peconic River, as is a portion of the track for the Long Island Rail Road.

#### DISCUSSION

Before a WSRR permit can be issued to a private applicant, the Department must determine that:

- (4) the proposed land use or development is consistent with the purposes and policies of the [Wild, Scenic and Recreational Rivers System] act and with the provisions of [Part 666];
- (5) the resources specified in section 666.2(e) of [Part 666] will be protected and the proposed activity will not have an undue adverse environmental impact; [and]
- (6) no reasonable alternative exists for modifying or locating the proposed activity outside of the designated river area.

Section 666.8(f)(1)-(3) of 6 NYCRR. The Applicant bears the burden of proof to demonstrate, by a preponderance of the evidence, that the application meets the standards for permit issuance. See Section 624.9(b)(1) and (c).

#### Consistency With the Purposes and Policies of the WSRR Act

The Applicant proposes to modify and expand its existing commercial Best Western Hotel property. The expansion would include the construction of a new hotel and new office

building, as well as an addition to the existing restaurant and paved parking areas. The proposed hotel, office building, restaurant addition and the majority of the parking areas would be located outside the WSRR corridor. According to the Applicant, the Town of Riverhead requires a total of 464 parking spaces to serve the proposed expansion at the Hotel property, and approximately 64 of those parking spaces would be situated within the WSRR corridor. The parcel where these 64 parking spaces would be located is greater than 500 feet from the Peconic River, and the River is not visible from the subject parcel.

Department Staff took the position that the proposed project was not consistent with the purposes and policies of the Act, because the hotel is a commercial use<sup>2</sup> which is prohibited in a recreational river corridor, pursuant to Section 666.13(K)(3) of 6 NYCRR. Citing to ECL Section 15-2709(2), Department Staff reasoned that the proposed expansion of the hotel would be prohibited, noting that “[t]he Act allows existing land uses within the respective classified river areas to continue, but they may not be altered or expanded except as permitted by the respective classifications.” Department Staff’s Brief, at 6-7.

The Applicant contended that Department Staff’s denial of the permit was not supported by substantial evidence, and was irrational, arbitrary and capricious. The Applicant pointed out that the Department “had granted numerous applications for use variances in the area and that very significant commercial projects were built within the Wild, Scenic and Recreational River boundary.” Applicant’s Brief, at 2. At the hearing, the Applicant introduced testimony and exhibits in connection with permits that the Department issued in connection with other nearby parcels, including the Tanger Outlets shopping center, which borders the subject property, and commercial properties within close proximity to the subject parcel. Those projects included:

1. a permit to construct a water theme amusement park on a 27.6 acre parcel (Splash Splash);
2. a permit to construct a new 1,500 square foot office building and 5,000 square foot storage building (Terry Contracting Materials);
3. a permit to construct a mini-storage facility consisting of five metal buildings, a public bathroom, a septic system, drainage leaching pools, parking area and landscaping (Jul-Bet (Dollar Storage));
4. a permit to renovate an existing commercial lot for use as a lumberyard with two new buildings, asphalt parking and landscaping (Riverhead Building Supply);
5. a permit to construct a new building and renovate an existing concrete manufacturing facility (Nicolia’s Ltd. (Ready Mix));
6. a permit to construct a 6,000 square foot metal storage building with a surrounding 28,000 square foot gravel area and relocate a drainage swale at an existing retail lumber home center (84 Lumber);
7. a permit to construct an addition to an existing building (Lighthouse Insurance);
8. a permit to expand an existing mobile home community by 82 sites, including a community pool, parking area and paved roads (Stark Mobile Homes);

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<sup>2</sup> “Commercial use” is defined in the regulations to mean “any use involving the offer for sale or rental, sale, rental or distribution of goods, services or commodities or the provision of recreation facilities or activities for a fee, but not including the manufacturing of goods or commodities.” Section 666.3(k).



9. a permit to operate a solid waste management facility processing a maximum of 200 tons per day of municipal solid waste, ten tons per day of recyclables and 750 tons per day of construction and demolition debris (Kroemer Avenue Associates);
10. a permit to construct a 19,950 square foot addition to an existing 3,024 square foot building (Kroemer Avenue Associates); and
11. a permit to construct a wireless communications monopole antenna (Dynamic Radiator).

In addition, the Applicant offered testimony concerning the construction of Tanger Outlets I and II. The access road to Tanger Outlets I is located within the River Corridor, although this portion of the shopping center is not. Tanger Outlets II is entirely within the River Corridor. At the hearing, Department Staff acknowledged that the Department's files did not contain any documentation concerning the issuance of permits for the construction of the Tanger I access road or the Tanger II Outlets. Tr. at 80.

The Applicant introduced documentary evidence concerning the permit issued in 2003 for Kroemer Avenue Associates to operate a waste management facility. In that case, Department Staff determined that the permit should be issued because the proposed project was located in an area of existing industrial and commercial uses, and was over 1,000 feet from the River. Tr. at 182; Exhibit 17. The Splish Splash water park permit was issued prior to the recreational river corridor boundary lines being established at this location, but the Applicant maintained that the permit was issued despite Department Staff's belief that the project would fall within those boundaries.

The Applicant argued that the sole basis for Department Staff's denial of the permit application at issue here was the fact that the project is a prohibited use pursuant to Section 666.13, which the Applicant contended was an erroneous interpretation of the statute and regulations. Applicant's Brief, at 13. As a result, the Applicant maintained that Department Staff's determination was arbitrary and capricious.

In response, Department Staff argued that the permits referenced by the Applicant were issued on a site-specific basis, and asserted that the Applicant failed "to consider the existing site conditions of the permitted properties as these conditions vary from site to site." Department Staff's Reply, at 2. Department Staff's witness testified that in some instances, the permits in question "were for existing commercial buildings that were knocked down and rebuilt or expansions of existing commercial buildings on cleared areas." Tr. at 170-171. Department Staff took the position that the Stark Mobile Home complex was a residential use that is permitted in a recreational river corridor, and asserted that the cell tower installation at Dynamic Radiator constituted a public utility use, which is also allowable. Tr. at 51-52; 84-85. The Applicant disputed this characterization, pointing out that the property owner receives lease payments for the space occupied by the tower. Tr. at 85-86.

According to Department Staff's witness, Robert Marsh, none of the permits that were issued were for new buildings on an entirely naturally vegetated lot. Tr. at 171. The Applicant's witness, Dr. Bowman, described the site as a pine and oak forest, with mature trees that "certainly provide some habitat to migratory and resident song birds." Tr. at 118-119. Dr.

Bowman went on to observe that the parcel “has some habitat value but that habitat value is also limited by the development that has occurred in the surrounding area.” Tr. at 119. Despite this qualification, it is undisputed that the subject parcel consists of a forested area, including mature trees, and is therefore distinguishable in that respect from the site conditions where development was permitted in the vicinity of the project.

Mr. Marsh went on to testify that Kroemer Avenue Associates and Jul-Bet Enterprises had both applied for permit modifications or additional permits, and were denied. Tr. at 171-172. Department Staff argued that the Applicant “should not be issued a permit based on previously issued permits, even if these permits were issued contrary to the Act and Regulations.” Department Staff’s Reply, at 2. Consequently, Department Staff contended that the Applicant’s arguments, which Department Staff asserted were grounded in the doctrine of estoppel, were meritless.

The Applicant responded that “the existence of all the other permits for much larger projects is not necessarily an estoppel argument, it is purely proof that similarly situated applicants were treated differently than Jaral Properties, Inc. Those applications and the interposed arguments relate to Equal Protection, not estoppel.” Applicant’s Reply, at 3. According to the Applicant, Department Staff’s denial violated the Equal Protection Clause of both the State and federal constitutions, because of the disparate treatment afforded to permit applicants that were similarly situated. Department Staff maintained that an administrative hearing is not the proper forum for the constitutional arguments the Applicant advanced.

The Applicant’s equal protection claim can be considered here. See Matter of Roberts v. Coughlin, 165 A.D.2d 964, 965-66 (3<sup>rd</sup> Dept. 1990) (challenge to application, not facial validity, of agency directive should be considered initially by the agency, allowing for development of requisite factual record). Prior permits are not necessarily controlling, because each permit application must be evaluated individually. Nevertheless, the Applicant offered considerable evidence and testimony as to neighboring parcels where commercial development was allowed or expanded after the WSRR statute was enacted. Most noteworthy was the development that took place in connection with the Tanger Outlets, which is immediately adjacent to the Best Western Hotel property. No documentation could be located in the Department’s files concerning the permits issued for the shopping mall.

As Department Staff’s witness testified, the principal environmental impact at the subject parcel if the project were to go forward relates to clearing of forested area, with the consequent loss of wildlife habitat and reduction of naturally vegetated open space. A four-acre area would be cleared to create a paved parking area. The July 14, 2004 Kroemer Avenue Associates permit required plantings and mandated a restrictive covenant preserving the wooded area and natural vegetation in perpetuity. Exhibit 16. Similarly, Mr. Marsh’s comments on the February 10, 2003 permit issued to Kroemer Avenue Associates indicated that cutting natural vegetation would not be permitted. Exhibit 17. That limitation was also included in the letter from Roger Evans, the Department’s Deputy Regional Permit Administrator, to the permittee. Id. The negative declaration for the permit for Nicolía’s Ltd., an existing concrete batch mixing plant, stated that “[d]isturbance to vegetation would be insignificant.” Exhibit 19. The limit of clearing and ground disturbance for the Lighthouse Insurance Agency construction follows the

edge of the woods on the property. Exhibit 20. Riverhead Lumber Supply involved the renovation of an existing commercial lot. Exhibit 22. The permit application indicates that 0.6 acres of vegetation, but no mature forest, would be removed as part of the project. *Id.* With respect to the Terry property, the documentation submitted at the hearing does not indicate what vegetative clearing, if any, took place as part of the project, or what the site conditions were prior to the construction. Exhibit 23. The 84 Lumber permit required a restrictive covenant that would preserve undisturbed and in perpetuity an area of natural vegetation on the property. Exhibit 24. The Jul-Bet permit modification refers to maintenance of vegetation “[f]or areas not currently wooded.” Exhibit 25.

These exhibits confirm the testimony of Department Staff’s witness, Mr. Marsh, that the permits issued were not for new development on naturally vegetated, forested lots, as is the case with this application. Moreover, his testimony that other permit applications for expansion of existing facilities have been denied was unrebutted. The Applicant’s arguments concerning the development of the Tanger Outlets, and the lack of documentation concerning the Department’s role in that development, are speculative, and not sufficient to support the Applicant’s claim of disparate treatment. For example, the terms of the permits for the Tanger Outlets, if any, are unknown. It is the Applicant’s burden to demonstrate that similarly situated applicants were treated differently, and on this record, that burden has not been met. Moreover, even assuming, as Applicant asserts, that prior permits were issued that did not conform to the requirements of the statute and regulations, that circumstance is not a sound basis to disregard the permit standards and variance criteria in this instance. Each permit application must be evaluated individually.

Department Staff went on to argue that the project would not protect the river area for the benefit and enjoyment of present and future generations, in contravention of one of the statute’s express policies. *See* ECL Section 15-2701(3) and Section 666.1 of 6 NYCRR. Department Staff’s witness offered testimony that the project would “remove a lot of vegetation within the river corridor . . . [and] add commercial development within the river corridor.” Tr. at 154. The witness went on to acknowledge that “there is already commercial development within the river corridor, but by allowing additional development, it will further reduce open space, promote urbanization, and further alter the existing character of this section of the river corridor.” *Id.*

Department Staff’s witness testified further that the proposed project would not provide for the protection and enhancement of the interests of landowners in the enjoyment and use of their properties in designated river areas, as required by Section 666.2(a) of 6 NYCRR. According to the witness, “by allowing continuous development of this nature, it will continue to degrade the aesthetics and reduce naturally vegetated open space within this portion of the corridor.” Tr. at 155. The witness went on to testify that the project, as proposed, would not help ensure that recreation and other uses are consistent with the intent of the act, as set forth in Section 666.2(c) of the regulations. He stated that

[w]here the project would take place would require removal of any natural vegetation. It would disturb wildlife habitat. It would reduce open space in the area. It could potentially reduce hunting and bird watching opportunities in the area.

With less naturally vegetated open space you are going to fewer species and lesser numbers.

Tr. at 155.

The Applicant countered that Department Staff's witness acknowledged that the environmental impacts associated with the proposed project would be very small, and confined only to the area of the proposed parking lot. Applicant's Brief, at 9; Tr. at 186. Nevertheless, this argument overlooks the witness's statements concerning cumulative impacts immediately following the testimony the Applicant relied upon, and thus is not persuasive.

### Protection of Resources

As noted above, Section 666.8(f)(2) requires that a permit may not be issued unless an applicant can demonstrate that the resources specified in Part 666.2 will be protected, and the proposed activity will not have an adverse environmental impact. Those resources include "the protection and enhancement of the natural, scenic, ecological, recreational, aesthetic, botanical, geological, hydrological, fish and wildlife, historical, cultural, archaeological and scientific features of designated rivers and river areas." Section 666.2(e).

According to Department Staff's witness, Robert Marsh, the reduction in the amount of naturally vegetated area and consequent loss of habitat, as well as the increase in commercial development, would not protect the natural, scenic, ecological, and scientific qualities of the Peconic River corridor. Tr. at 157-158, and 161. The witness stated that the reduction in wildlife habitat "would potentially impact hunting and bird watching opportunities and lessen the quality for hikers and boaters just from the reduction of the natural area," and that the aesthetic and botanical qualities would be similarly affected due to the replacement of upland forest with a parking lot and building. Tr. at 158-159. The witness went on to state that the historical character of the river corridor would be further altered if the project were permitted, because

[s]lowly over the years some of the farm fields and natural vegetation have been converted to commercial or residential development. This section of the river is still somewhat sparsely developed with a good amount of naturally vegetated space left. By allowing this project the historical character of the area will continue to be changed from rural and natural to a commercially developed river corridor."

Tr. at 161. Although Mr. Marsh acknowledged that "[t]he amount of clearing and disturbance alone may not have major impact on the fish and wildlife qualities . . . when you look at the cumulative impacts of the existing development and potential further development within the corridor, the potential impacts become quite significant." Tr. at 160. According to the witness, the Peconic River is already adversely affected by excess nutrients and pollutants from storm water and groundwater inputs, and by allowing additional commercial development, such as buildings, parking lots, landscaping and lawns, "there is the threat for additional nutrients

through fertilizers and pollutants and through pesticides, oils and other car related chemicals to reach the river.” Tr. at 160.

In this regard, the Applicant offered the testimony of William Bowman, Ph. D., of Land Use Ecological Services. Dr. Bowman testified that, based upon his observations during his visit to the site, there would not be substantial environmental impacts if the project were permitted. Tr. at 120. According to the witness, “it may be quite possible to mitigate impacts to the river” by employing measures to contain stormwater on the site as part of the drainage plan, and screening the area between the parking lot and the street with plantings. Tr. at 120.

The Applicant did not effectively rebut Mr. Marsh’s testimony, which was more detailed and credibly summarized the effects of destruction of habitat in this forested area, as well as the issue of cumulative impacts. Accordingly, the Applicant failed to demonstrate that the application satisfies this permit issuance standard.

#### Alternatives to the Proposed Project

The Applicant has the burden of showing that no reasonable alternative exists for modifying the project or locating the project outside the designated river area. Section 666.8(f)(3). Department Staff argued that the Applicant failed to satisfy this permit issuance test, citing to the evidence and testimony at the hearing. The Applicant’s witness indicated that there were a number of conceptual designs. Tr. at 105. Only one of those designs was submitted to the Department, and the Applicant’s witness did not effectively respond to Department Staff’s question as to whether 65 existing parking spaces north of the pool area would be converted into a lawn area if the project were approved. *Id.* at 105-106. Mr. Marsh, Department Staff’s witness, stated that it would be possible to move the entire proposed project (i.e., the 64 parking spaces) outside the WSRR boundary. Tr. at 162; Exhibit 10.

During Department Staff’s review of the permit, and in the denial letter, the possibility of locating the additional parking spaces in the northwest corner of the hotel property was suggested to the Applicant (see Exhibits 6, 10). At the hearing, Department Staff also suggested that, as an alternative to the parking area, the subject property could be developed for a river-related use, such as a bait and tackle shop, a kayak and canoe rental facility, hiking trails or picnic benches. Tr. at 164-165.

The use variance application indicates that “the total number of parking spaces required by the Town of Riverhead on the entire site is 464 . . . the parking proposed is the minimum relief necessary to provide the parking required by the Town of Riverhead.” Exhibit 8, at 1. According to the use variance application, “[p]er Town of Riverhead regulations and for safety reasons, [the proposed] parking area must be adjacent to the proposed office building. Relocation of the parking area to the northwest corner of the lot would not be permissible by the Town of Riverhead, and would also destroy the existing buffer between the hotel and Tanger Outlet Centers and the Long Island Expressway.” *Id.*, at 1-2. This statement responds to Department Staff’s proposal to relocate the parking to the northwest portion of the property, but does not address Department Staff’s proposal that the existing parking spaces north of the pool area remain, rather than be converted into a lawn area. Moreover, based upon the site plan

submitted with the application, even if the additional 64 parking spaces were not permitted, there would still be parking spaces adjacent to the proposed office building (see Exhibit 4A). The Applicant bears the burden of demonstrating that no reasonable alternative exists, and on this record, that showing has not been made.

The Applicant took the position that Department Staff's proposed alternatives were speculative and conclusory, arguing that the Town of Riverhead zoning requirements would prohibit any feasible alternatives. The Applicant's witness, Mr. Salvatico, testified that based upon his familiarity with the Town codes and his experience, he was not aware of any alternative that would allow the Applicant to profit from its acquisition of the property, and obtain a return on the Applicant's \$975,000 purchase price. Tr. at 104. Nevertheless, the witness acknowledged that "[a]t this point, there is no agreed upon plan" (Tr. at 100) for developing the subject parcel, and that due to current economic conditions, it is highly unlikely that the Applicant would proceed with constructing the additional hotel building to the rear of the property. Tr. at 106, 111.

As noted above, the Applicant has the burden of demonstrating that there is no reasonable alternative to the proposed project, either by modifying the proposal or locating the project outside the river area. Department Staff's suggestion that the Applicant might operate a bait and tackle shop or provide kayak rentals in lieu of the parking area would not meet the Applicant's objectives. Nevertheless, the Applicant did not effectively address the possibility advanced by Department Staff of relocating the proposed parking area to another area of the property outside the river corridor. While the Applicant argues that this would not offer an appropriate return on the Applicant's \$1 million investment, it is undisputed that the Applicant did not confer with Department Staff prior to its purchase of the subject parcel. Tr. at 104, 105. The applicable statutes and regulations were in existence prior to the Applicant's purchase, and therefore the Applicant had, at least, constructive notice of those requirements. The Applicant has failed to show that its proposal meets this permit issuance requirement.

#### Use Variance

In his issues ruling, ALJ Casutto noted that the Applicant does not dispute that the project, as proposed, does not meet the permit standards set forth at Section 666.8 of 6 NYCRR, or the use guidelines pursuant to Section 666.13. Matter of Jaral Properties, Inc., Issues Ruling, at 3, 5; 2007 N.Y. Env. LEXIS 29, \* 5, 7-8 (April 3, 2007). Accordingly, the remainder of this hearing report will address whether the proposal complies with the standards, set forth at Section 666.9(a)(1), for a use variance. As discussed below, the project does not meet those standards, and the Commissioner should deny the Applicant's request for a use variance.

Section 666.9 of 6 NYCRR authorizes the Department to grant a variance from the WSRR regulations, provided that certain requirements are met. The regulation states that "[n]o variance may authorize any development or improvement prohibited by the act." Section 666.9(a). That provision goes on to provide that the Department

may vary or modify any provision of this Part relating to allowable land uses or development so long as it is the minimum variance necessary and only if:

- (i) in the case of a request for a use variance, the provision(s) to be varied or modified would cause unnecessary hardship for the applicant. In order to prove such unnecessary hardship the applicant must demonstrate that:
  - (i) the provisions to be varied or modified deprive the applicant of all economic use or benefit from the property in question, which deprivation must be established by competent financial evidence;
  - (ii) the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the river corridor;
  - (iii) the requested use variance, if granted, will not alter the essential character of the river corridor; and
  - (iv) the alleged hardship has not been self-created.

Section 666.9(a)(1)(i)-(iv). The regulation states further that an applicant for a use variance may be required to provide financial evidence, a discussion of alternative site possibilities outside the river area, and a discussion of proposals for environmental impact reduction and/or mitigation. Section 666.9(b)(5)-(7).

Prior to the hearing, by letter dated April 7, 2009, Department Staff advised the ALJ and the Applicant's counsel that

[i]n the interest of fairness, this letter is to make known a change in Department staff's interpretation of the Wild, Scenic and Recreational River regulations as it pertains to this application and future applications. Department staff has reviewed the handling of the above Wild, Scenic and Recreational River application [the instant application] and has determined that it has erroneously interpreted the statute and regulations with regard to the availability of the relief that is afforded to commercial applications. It is Department Staff's position that an applicant may not apply for relief from the Wild, Scenic and Recreational River regulations through the submittal of an application for a use variance for commercial development in the recreational river corridor.

Exhibit 12. The ALJ requested clarification of Department Staff's position. Exhibit 13. By letter dated April 8, 2009, Department Staff stated that "[t]he commercial use proposed by Jaral Properties, Inc. does not meet the land use classification for recreational rivers set forth in the WSRRA because it constitutes an impermissible expansion and development of land in such an

area as it is not for agricultural, forest management or stream improvement purposes.” Exhibit 14 (citations omitted). Department Staff stated that its determination “was developed over a period of time between Region 1 and Albany program staff subsequent to the issues conference and legislative hearing in this case.” Id.

The Applicant argued that Department Staff had taken the position that “use variances cannot and will not be granted under any circumstances.” Applicant’s Brief, at 10. Department Staff countered that “use variances may be granted when the use is not prohibited by the Act. This does not prohibit the Department from granting all variances, only those for uses which are prohibited by the Act.” Department Staff’s Reply, at 2. Department Staff noted further that Section 666.13(K)(3) prohibits commercial development in a recreational river area. According to Department Staff, a use variance cannot be granted for a use prohibited by the Act, asserting that “[t]he Applicant’s proposal to construct a building and parking area is a commercial use and an impermissible development of land in a recreational river area, therefore, a variance cannot be granted.” Department Staff’s Brief, at 12.

“The variance provisions distinguish between development or improvement specifically prohibited by the WSRR Act (see ECL article 15, title 27) and those activities prohibited by the implementing regulations of Part 666.” Matter of Joachim, Decision of the Commissioner, at 8, 2007 N.Y. Env. LEXIS 34, \* 9 (May 31, 2007). As noted in Matter of Joachim,

[a]n examination of the WSRR Act reveals only a limited number of specified prohibitions. As relevant here, in “recreational river areas,” the statute provides that “the lands may be developed for the full range of agricultural uses, forest management pursuant to forest management standards duly promulgated by regulations, stream improvement structures for fishery management purposes, and may include small communities as well as dispersed or cluster residential developments and public recreation areas” (ECL 15-2709[2][c]). In contrast, the Department’s regulations implementing the WSRR Act set forth a number of prohibited activities.

Id. at 9, fn. 4; 2007 N.Y. Env. LEXIS 34, \* 10, fn. 4.

The language of the statute does not support the conclusion that all commercial development in a recreational river area is prohibited by the WSRR Act, because there is no such express prohibition in the provision dealing with recreational river areas. In contrast, other sections of the statute specifically prohibit certain activities in wild and scenic river areas (see Section 15-2709(2)(a), stating that in wild river areas “no new structures or improvements, no development of any kind and no access by motor vehicles shall be permitted other than forest management pursuant to forest management standards duly promulgated by regulations,” and Section 15-2709(2)(b), which provides that in scenic river areas “[t]here shall be no mining, excavation or construction of roads”).



The Commissioner's decision in Matter of Joachim is instructive in this regard, although the applicant in that case sought an area variance for a residential structure, rather than a use variance for commercial development, as is the case here. Matter of Joachim, at 1, 2007 N.Y. Env. LEXIS \* 1. The Commissioner determined that because the applicant's proposal to construct a residence within 150 feet of a recreational river bank was prohibited by the use guidelines in the regulations, but not the WSRR Act, the variance application could be considered. *Id.* at 9, 2007 LEXIS \* 10. Specifically, the Commissioner noted that

[t]he variance provisions distinguish between development or improvement specifically prohibited by the WSRR Act (see ECL article 15, title 27), and those activities prohibited by the implementing regulations of Part 666. No variance may authorize any development or improvement prohibited by the WSRR Act (see 6 NYCRR 666.9[a]). Where development or improvement is limited or prohibited solely by the regulations in Part 666, the Department can issue a variance. The land use and development guidelines set forth in section 666.13 are applicable solely to activities covered by Part 666 and not to those prohibited by and referenced in the WSRR Act.

*Id.* at 8-9; \* 9-10. Upon reviewing the record, the Commissioner concluded that the application failed to satisfy the requirements for an area variance.

The Commissioner may elect to follow the reasoning of Matter of Joachim, which considered an application for an area variance, in evaluating the Applicant's application for a use variance. Because the Applicant seeks a variance for a commercial use, which is not specifically disallowed under ECL Section 15-2709(2)(c), the Applicant's use variance may be considered here. Accordingly, the discussion that follows addresses the standards for a use variance in the context of this application.

The Applicant contended that if the permit were denied, the Applicant would be deprived of all use or economic benefit from the property in question, and that the hardship was not self-created, in light of the numerous permits for commercial uses that were issued to other surrounding properties. Mr. Salvatico, the property owner, offered general testimony that the parcel would be of considerably less value than the purchase price, and that there are access issues that would affect the parcel's marketability. *Tr.* at 112-113. That testimony, while credible, was not supported by documentary evidence. Similarly, the testimony of Charles Bowman indicated only that residential development would not be allowed on the subject parcel, due to re-zoning in the Town of Riverhead. *Tr.* at 124-125. Mr. Salvatico testified further that, given the current economic climate, it was unlikely that the additional hotel building would be built in the rear of the property, and acknowledged that there were approximately fifteen conceptual plans that had been developed, although only one such plan was submitted as part of the application. *Tr.* at 105-107. The regulation requires that the Applicant's deprivation of all use or economic benefit must be established by competent financial evidence, and on this record, that requirement has not been satisfied.

While Mr. Salvatico testified credibly that the parcel would be of “dramatically less value than what we paid for it,” if the permit were denied, he acknowledged that he had not inquired of the Applicant’s environmental consultants or Department Staff as to the requirements for developing the parcel prior to purchase. Tr. at 112, 104-105. The use variance application states that the hardship was “not created as a result of any action by the property owner. As stated this site is zoned commercial by the Town of Riverhead. Subsequent to zoning of the lot, the NYSDEC adopted the WSRR Act, creating the hardship that is the subject of this variance request.” Exhibit 8. This statement overlooks the fact that the Applicant’s acquisition of the property post-dated the enactment of the statute, as well as the Town’s zoning of the subject parcel. The Applicant’s reliance on the fact that there is commercial development on neighboring properties is not sufficient to satisfy this use variance requirement.

The Applicant maintained that a denial of the requested permit, and Department Staff’s selective application of the WSRR Act, would constitute an unconstitutional taking as a matter of law, requiring just compensation. Department Staff responded that this proceeding is not the proper forum for a constitutional argument, and reiterated that the Applicant has commercial use of one-third of the property. As discussed above, at the hearing, Department Staff’s witness contended that permitted uses remained a possibility for the subject parcel, including residential development, river related commercial development (such as bait and tackle shops or kayak and canoe rentals), or picnic benches and hiking trails. Tr. at 164-65. These alternatives are either untenable, given the testimony that residential uses are not permitted by the Town of Riverhead’s zoning laws, or appear unlikely to meet the Applicant’s objective of developing the hotel property to include “higher grade amenities,” as Mr. Salvatico testified. Tr. at 96. The Applicant emphasized that these suggestions were impractical, and would not offer the Applicant any reasonable return on the property’s \$975,000 purchase price. Department Staff countered that the Applicant had not applied for a permit for any alternatives to the proposed project. Tr. at 105.

The Applicant’s takings argument is not properly considered in this proceeding. See Spears v. Berle, 48 N.Y.2d 254, 261 (1979); Wozniak v. NYSDEC, 117 A.D.2d 673, 674 (2d Dept. 1986). Even if such an argument could be considered, as noted above, there is only limited evidence in the record to support a claim that the Applicant has been deprived of all reasonable economic use or benefit of the parcel.

According to the Applicant, the hardship was unique, because “it will not apply to a substantial portion of the river corridor. In fact, it will only effect [sic] a few hundred feet of the river corridor and it cannot even be seen from the river.” Applicant’s Brief, at 9. Department Staff countered that both the Applicant’s and Department Staff’s witnesses had testified that a number of other applicants are similarly situated. Tr. at 165. The hardship in this case is not unique. The Applicant seeks to commercially develop a parcel of property in the river corridor, and there is credible evidence that the Department has received applications for such development and will likely receive such applications in the future.

While it could be argued, in light of the proximity of other development, the presence of a highway between the subject parcel and the river, and the fact that the parcel cannot be seen

from the river, that the project would not alter the essential character of the recreational river corridor, the regulation requires that an applicant satisfy all of the tests for a use variance. The Applicant in this case has not demonstrated that the hardship was not self-created, which is an essential element for entitlement to such a variance. Moreover, the presence of commercial development in the immediate vicinity of the subject parcel is not necessarily dispositive, because the character of the immediate neighborhood

is only a part of a much broader analysis; specifically, the impact of granting a variance on the “character of the river corridor.” This distinction is significant given the Act’s mandate to “preserv[e] and restor[e] the natural scenic and recreational qualities” of recreational rivers and their environs. The overall analysis must consider features (including but not limited to improved and unimproved lots, parks and other open space) in and beyond the immediate neighborhood, as well as features and values associated with the river corridor itself.

Matter of DeCillis, Decision of the Commissioner, at 6-7; 2007 N.Y. Env. LEXIS 52, \* 11-12 (August 28, 2007) (evaluating application for an area variance for subdivision of residential parcel). The WSRR Act is intended to preserve the natural and scenic qualities of recreational rivers, and granting a use variance in this case would not be consistent with the Act.

#### CONCLUSION AND RECOMMENDATION

The Applicant has conceded that the proposal does not meet the standards for permit issuance, and in addition, the Applicant did not show that the proposal satisfies the permit issuance standard that no reasonable alternative exists for modifying or locating the proposed activity outside the River corridor (6 NYCRR Section 666.8(f)(3)). In addition, a use variance cannot be granted because, in this case, the hardship is self-created. See Section 666.9(a)(1)(iv). It is undisputed that the Applicant did not consult Department Staff before purchasing the subject parcel.

The proposed project does not satisfy all of the permit issuance standards, pursuant to Section 666.8 of 6 NYCRR. Moreover, the Applicant failed to demonstrate that it is entitled to a use variance pursuant to Section 666.9, or that Department Staff’s permit denial violates the Applicant’s right to equal protection. The Applicant’s takings argument cannot be considered in this forum. Accordingly, the permit application should be denied.