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

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 (ECL) and
Part 666 of Title 6 of the Official Compilation of Codes,
Rules and Regulations of the State of New York (NYCRR)

- by -

GREGORY AND CARISSA REDDOCK,

Applicants.

DEC Application ID No.: 1-4734-00593/00005

DECISION OF THE COMMISSIONER

July 26, 2017

DECISION OF THE COMMISSIONER

Gregory and Carissa Reddock (applicants) filed an application for a Wild, Scenic and Recreational Rivers System permit with the New York State Department of Environmental Conservation (Department or DEC) to subdivide a property they own at 287 River Road, Saint James, Suffolk County (property), into two lots, and to construct a second single family dwelling on the property. The 2.07 acre property is located entirely within the Nissequogue Recreational River Corridor. Presently, one single family dwelling with accessory structures is located on the property.

Department staff denied the application and applicants requested a hearing. Following a referral to the Department's Office of Hearings and Mediation Services (OHMS), the matter was assigned to Administrative Law Judge (ALJ) Richard A. Sherman, and an adjudicatory hearing was held on October 4, 2016.

An applicant for a Department permit bears the burden of proof to demonstrate that the proposed activity will be in compliance with all applicable laws and regulations administered by the Department (see 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]).

ALJ Sherman prepared the attached hearing report in which he notes that applicants' proposal would result in two lots that would be substantially smaller than the minimum lot size established by the Department's regulations (see 6 NYCRR 666.13[C][2][b], note iii ["(e)ach private dwelling . . . in a recreational river area must be on a lot of at least 2 acres"]). Accordingly, applicants were required to apply for an area variance (see 6 NYCRR 666.9[a][2]). The ALJ concludes that applicants failed to meet their burden to demonstrate that their proposal would satisfy the standards for the Department to grant an area variance.

I recognize and am sensitive to applicants' desire to subdivide their lot and construct a single family residence on the subdivided parcel. However, as discussed below, the Department's regulations governing development in river corridors, such as this one, clearly preclude the proposed subdivision and the granting of an area variance. Approving this subdivision request would adversely affect an important environmental resource that is specifically protected by New

York State statute and regulation (see title 27 of article 15 [Wild, Scenic and Recreational Rivers System] of the New York State Environmental Conservation Law and the implementing regulations that are set forth in 6 NYCRR part 666). Accordingly, I adopt the ALJ's hearing report as my decision in this matter, subject to my comments below.[1]

Background

The purpose of the Wild, Scenic and Recreational Rivers System Act (Act) is to preserve and protect selected rivers of the state, with their immediate environs. ECL 15-2701 sets forth the Legislature's statement of policy and legislative findings for the Wild, Scenic and Recreational Rivers System Act, and reads, in its entirety:

"1. The legislature hereby finds that many rivers of the state, with their immediate environs, possess outstanding natural, scenic, historic, ecological and recreational values.

"2. Improvident development and use of these rivers and their immediate environs will deprive present and future generations of the benefit and enjoyment of these unique and valuable resources.

"3. It is hereby declared to be the policy of this state that certain selected rivers of the state which, with their immediate environs, possess the aforementioned characteristics, shall be preserved in free-flowing condition and that they and their immediate environs shall be protected for the benefit and enjoyment of present and future generations.

"4. The purpose of this act is to implement this policy by instituting a state wild, scenic and recreational rivers system, by designating the initial components of that system and by prescribing the methods by which and standards according to which additional components may be added to the system from time to time."

Additionally, ECL 15-2707(2)(c)(2) states that, with regard to recreational rivers, "[m]anagement shall be directed at preserving and restoring the natural scenic and recreational qualities of such river areas." In furtherance of this

[1] A similar proposal to divide a parcel of property in this same river corridor was rejected by Commissioner decision in 2007 (see Matter of DeCillis, Decision of the Commissioner, August 28, 2007).

legislative mandate, the Department promulgated 6 NYCRR part 666, "establishing statewide regulations for the management, protection, enhancement and control of land use and development in river areas" (6 NYCRR 666.2[a]). The Department has established a two-acre minimum lot size to prevent overdevelopment and the impairment of natural resources within recreational river corridors (see 6 NYCRR 666.13[C][2][b], note iii).

Applicants purchased the property in 2005, which is approximately fourteen years after the Nissequogue Recreational River Corridor was established (see Hearing Report at 3 [Finding of Fact No. 2], 11). The property is located approximately 500 feet east of the Nissequogue River and approximately 900 feet west of the eastern boundary of the river corridor (see Hearing Report at 4 [Finding of Fact No. 4]; Hearing Transcript, at 52, 63; Hearing Exhibit 8). The property is improved with one single family dwelling and accessory structures (see Hearing Report at 4 [Findings of Fact Nos. 5 and 6]; Hearing Exhibit 2 [referencing 1-story frame dwelling, a frame cottage, and other improvements including a pool, patio, frame shed and other landscape features]).

"At Least" Two Acre Lot Requirement

To obtain a river system permit, applicants must demonstrate that their proposal is "consistent with the purposes and policies of the [A]ct and with the provisions of [6 NYCRR part 666]" (6 NYCRR 666.8[f][1]). Pursuant to 6 NYCRR 666.13(C)(2)(b), note iii, all private dwellings located in a recreational river area that are "more than 250 feet from the river or tributary bank . . . must be on a lot of at least 2 acres."

Region 1 Natural Resource Supervisor Robert F. Marsh testified to the benefit of the two acre requirement to river corridors. He testified that the two acre requirement is intended to maintain the rural character of river corridors (see Hearing Transcript, at 65). He noted that the two acre requirement

> "also provides additional wildlife habitat, reduces the amount of impervious surfaces on these lots, reduces the number of sanitary systems and the amount of lawns in the recreational river corridor, which will reduce nitrogen loading, which ultimately reaches the river" (Hearing Transcript, at 65).

Area Variance

The parties do not dispute that the proposal does not satisfy the two acre lot requirement. Accordingly, the hearing report and this decision consider whether applicants' proposal satisfies the requirements for an area variance from the two acre requirement as set forth at 6 NYCRR 666.9(a)(2).

The standard for granting an area variance reads, in pertinent part:

"in the case of a request for an area variance, the area or dimensional provision(s) to be varied or modified would cause practical difficulty for the applicant. 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. The department will also 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, which consideration will be relevant to the decision of the department, but will not necessarily preclude the granting of the area variance."

The ALJ, in his hearing report, addresses each of these factors in considering applicants' area variance request. In reviewing these factors, I concur with the ALJ's determination that applicants failed to meet their burden.

-- River Corridor Impacts (6 NYCRR 666.9[a][2][i]; 666.9[a][2][iv])

Where an area variance is required for a proposed project, the Department will consider the extent to which a change will be produced in the character of the river corridor (see 6 NYCRR 666.9[a][2][i]). The Act and the implementing regulations place the emphasis on preserving and protecting the natural character of the corridor.

Information about the size and nature of residential lots in the vicinity of a property proposed for subdivision is relevant to assessing the character of a neighborhood. Such information can assist in assessing whether an area variance may produce a change in the character of the river corridor (see 6 NYCRR 666.9[a][2][i]), or would have an adverse effect or impact on the physical or environmental conditions in the river corridor (see 6 NYCRR 666.9 [a][2][iv]). Applicants contend that their proposal will not have an undesirable change in the character of the neighborhood because 13 houses within 500 feet of the property are on parcels of one acre or less (see Hearing Report at 5 [citing applicants' closing brief]).

The character of a neighborhood, however, is only a part of a much broader analysis -- specifically, the impact of granting a variance on the character of the river corridor (Matter of DeCillis, Decision of the Commissioner, August 28, 2007, at 6). As stated in Matter of DeCillis, "[t]his distinction is significant given the Act's mandate to 'preserv[e] and restor[e] the natural scenic and recreational qualities' of recreational river areas" (id. at 6-7; see also ECL 15-2707[2][c][2]).

In this proceeding, Department staff considered various features in evaluating whether the proposed subdivision would diminish the qualities of the river corridor (see Hearing Report at 6-8; see also Hearing Transcript at 66-67 [testimony of Region 1 Natural Resource Supervisor Robert F. Marsh noting the loss of approximately a half-acre of hardwood forest and the proximity of the property to two areas of town-owned open space], 70-72 [Marsh testimony regarding added density and impervious surfaces], 73-76).

It is critical for the Department to consider the precedent and the potential for cumulative impacts that could result from the grant of this area variance that would create two nonconforming lots. Successive approvals of a similar nature would erode the "at least" two acre regulatory standard that has

been established for the protection, management and enhancement of a river corridor (see Matter of Wilson, Decision of the Commissioner, November 3, 2010, at 3-4; see also Hearing Report at 7). The precedent and potential cumulative impact that may result from the grant of the requested area variance in this matter support denial of the application and the variance request.

Applicants note that a Department-approved subdivision (Woods Edge) that includes lots of approximately one acre or less is located in this river corridor. The ALJ concludes, however, that the Woods Edge subdivision is distinguishable from applicants' proposed subdivision, and I concur. The ALJ notes that the Woods Edge subdivision is approximately twice as far from the Nissequogue River as applicants' property and "straddles the easternmost boundary of the recreational river corridor" (Hearing Report at 12). The ALJ holds that applicants failed to demonstrate that Department staff's denial of their application was inconsistent with the Department's approval of the Woods Edge subdivision (see Hearing Report at 12). Department staff indicated that it grants variances for undersized lots under certain conditions, but those conditions do not apply to applicants' proposal (see e.g. 6 NYCRR 666.13 [C][2], notes v & vi [allowing variances for clustering]).

With respect to the criteria set forth in subparagraphs 666.9(a)(2)(i) and (iv) of 6 NYCRR, staff presented credible testimony that granting the variance would negatively affect the character of the river corridor and would result in adverse environmental impacts.

-- Alternatives (6 NYCRR 666.9[a][2][ii])

Subparagraph 666.9(a)(2)(ii) of 6 NYCRR relates to whether the benefit sought by the applicant can be achieved by some feasible means other than an area variance. Here, as the ALJ notes, to achieve their objective of constructing a second dwelling, applicants must subdivide the property or pursue such other means, such as purchasing a conforming lot within the river corridor or purchasing a lot outside the river corridor (see Hearing Report at 9).

The ALJ concludes that applicants did not meet their burden to establish that the benefit they seek –- that is, the construction of a second single family dwelling –- cannot be achieved by some method, feasible for the applicants to pursue, other than an area variance (see id.; see also 6 NYCRR

666.8[f][3]; 6 NYCRR 666.9 [b][6][discussion of alternative site possibilities outside the river area required]).

-- Substantial Nature of the Variance (6 NYCRR 666.9[a][2][iii])

It is also clear that the variance requested is substantial (see 6 NYCRR 666.9[a][2][iii]). It represents a substantial deviation from the "at least" two-acre minimum lot requirement established under 6 NYCRR 666.13(C)(2)(b), note iii (see e.g. Hearing Report at 9-10; Hearing Transcript at 78). The property is currently in conformance with the acreage requirement and the subdivision would create two nonconforming lots, each of which would be approximately 50 percent smaller than the "at least" two acre lot minimum.

-- Self-Created Hardship (6 NYCRR 666.9[a][2][v])

Applicants' need for an area variance is self-created. While the regulations provide that this factor is not dispositive, it is relevant to the Department's determination (see 6 NYCRR 666.9[a][2][v]). Applicants purchased the property in 2005, approximately fourteen years after the Department established the Nissequogue Recreational River Corridor. Therefore, applicants are deemed to have had at least constructive, if not actual, notice that the site was subject to regulation under 6 NYCRR part 666.

Applicants purchased property that cannot be subdivided without an area variance. Accordingly, applicants' need for an area variance is self-created (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 [a]pplicants' purchase of the property"]).

Based on this record and the applicable legal requirements, the application for a wild, scenic and recreational rivers system permit, and the request for a variance under 6 NYCRR 666.9, are denied.

New York State Department of
Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: Albany, New York
July 26, 2017

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DEPARTMENT OF ENVIRONMENTAL CONSERVATION
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GREGORY AND CARISSA REDDOCK,

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DEC Application ID No.: 1-4734-00593/00005

HEARING REPORT

- by -

_____/s/_____
Richard A. Sherman
Administrative Law Judge

January 5, 2017

HEARING REPORT

SUMMARY

Applicants, Gregory and Carissa Reddock, applied to the Department of Environmental Conservation (DEC or Department) for 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). Applicants are the owners of a 2.07 acre property (property) located at 287 River Road, Saint James, Suffolk County, New York (tax map no. 800-80-1-44.1). The property is located entirely within the Nissequogue Recreational River Corridor. An existing single family dwelling is located on the property. Applicants propose to subdivide the property into two lots and construct a second single family dwelling and associated structures on the newly created vacant lot.

PROCEEDINGS

Department staff issued a notice of permit denial, dated May 19, 2016, advising applicants that staff had determined that the proposed subdivision of the property and construction of a second single family dwelling did not meet the standards for issuance of a WSRR permit.[1] Applicants requested a hearing on the permit denial and the matter was assigned to me on July 20, 2016.

After consultation with the parties, I scheduled a hearing on the application to commence on October 4, 2016. The Department published a notice of public hearing (hearing notice) on September 7, 2016 in the Environmental Notice Bulletin and applicants published the hearing notice on September 8, 2016 in The Smithtown News. In accordance with the hearing notice, I presided over a legislative hearing, issues conference, and adjudicatory hearing on October 4, 2016 at the Department's Region 1 Office, 50 Circle Road, Stony Brook, New York.

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 October 4, 2016. 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

[1] Applicants' project is an unlisted action under the State Environmental Quality Review Act (SEQRA) (ECL art 8; 6 NYCRR 617.2[ak]). The Department issued a negative declaration under SEQRA dated March 28, 2016 (see 6 NYCRR 617.7).

adjudication. The notice further advised that, on or before September 26, 2016, interested persons and organizations could file for party status and propose issues for adjudication. No filings for party status were received. Accordingly, only staff and applicants participated in the issues conference (see 6 NYCRR 624.4[b][3]).

As agreed upon by the parties, the issues identified for adjudication are the reasons cited by Department staff for denying the permit, as set forth in the May 19, 2016 notice of permit denial (denial notice). The denial notice states that the property is located entirely within the Nissequogue Recreational River Corridor, which is protected under the Wild, Scenic and Recreational Rivers Act (Act) (ECL article 15, title 27) and its implementing regulations (6 NYCRR part 666). The denial notice states that the proposal failed to satisfy the standards for issuance of a WSRR permit set forth under 6 NYCRR 666.13. Specifically, staff determined that the proposal does not meet the standard set forth at 6 NYCRR 666.13(C)(2)(b)(note iii), which requires that each dwelling in a recreational river area to be on "a lot of at least 2 acres." Staff further determined that the proposal does not satisfy the standards for an area variance set forth at 6 NYCRR 666.9(a)(2).

As set forth in the denial notice, Department staff cited the five considerations established under 6 NYCRR 666.9(a)(2)(i) – (v) as the bases for denying applicants' request for a variance. These provisions state that, in the case of a request for an area variance, 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" (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]).

- "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]).

Each of these considerations is discussed below.

Adjudicatory Hearing

As noted above, the hearing notice advised that interested persons and organizations could file for party status, and no filings for party status were received. Accordingly, only staff and applicants were parties to the adjudicatory hearing (see 6 NYCRR 624.5[a] and [b]).

The adjudicatory hearing was held on October 4, 2016. Donald J. King, Esq., appeared on behalf of applicants and called the following witness: Charles J. Voorhis, Certified Environmental Professional, Nelson, Pope & Voorhis, LLC. Kari Wilkinson, Esq., appeared on behalf of Department staff and called one witness: Robert F. Marsh, Natural Resources Supervisor, DEC Region 1. A list of the exhibits proffered at the hearing is appended to this hearing report.

At the close of the hearing, the parties accompanied me on a site visit. The parties were advised that they should not attempt to argue their respective cases during the site visit and that ex parte communications would not be allowed. The purpose of the site visit was to provide me with a better understanding of the physical layout and attributes of the site.

The parties timely filed their respective closing briefs via email, and this office received hard copies of applicant's brief on November 15, 2016 and Department staff's brief on November 18, 2016.[2] Neither party filed a motion seeking leave to respond. Accordingly, by letter dated November 22, 2016, I advised the parties that the hearing record was officially closed (see 6 NYCRR 624.8[a][5]).

FINDINGS OF FACT

1. Applicants own a 2.07 acre property (property) located at 287 River Road, Saint James, Suffolk County, New York (tax map no. 800-80-1-44.1) (exhibit 1, document 21[3] at 3 [Joint Application Form §§ 5, 8]; exhibit 2 at 1; exhibit 3).

2. Applicants purchased the property in 2005 (see transcript [tr] at 41 [Voorhis testimony noting that the Department determined that applicants purchased the lot in 2005 and that "[t]here's no dispute of that"], 79 [Marsh testimony that applicants purchased the lot in 2005]; exhibit 1, document 2 at 2 [the denial notice stating that "applicants purchased the lot in 2005"]).

3. The property is approximately 2.07 acres (tr at 61; exhibit 2, appendix at 1 [survey sheet 1 of 5 noting the acreage of the property]) and is located entirely within the Nissequogue Recreational River Corridor (river corridor) (tr at 37, 63-64; exhibit 2 [attached aerial photograph depicting property and surrounding area]; exhibit 8 [aerial photograph depicting the property, surrounding area, and WSRR boundary]).

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[2] Applicants' closing brief includes an attachment that was prepared by their witness, Mr. Voorhis. Applicants' counsel "request[s] that the memo of Charles J. Voorhis . . . be considered as part of this brief" (applicants brief at 6). As I reminded the parties by letter dated, October 24, 2016, "closing briefs are to address only matters and evidence raised at the hearing and are not themselves considered evidence." Accordingly, Mr. Voorhis' memorandum will be considered as argument herein, and not as part of the evidentiary record.

[3] Exhibit 1 was entered into the record on stipulation of the parties and includes numerous documents relating to the application and the request for a hearing. The first page of the exhibit is an index of the 22 documents that comprise the exhibit. Documents from this exhibit will be cited herein by exhibit number and document number (e.g., the second document of exhibit 1 is cited as "exhibit 1, document 2").

4. The property is located approximately 500 feet east of the Nissequogue River and approximately 900 feet west of the eastern boundary of the river corridor (tr at 52 [statement by applicants' counsel that exhibit 4, proffered by applicants, "shows the lot 500 feet from the river"], 63 [Marsh testimony that the river and associated wetlands are "approximately 500 feet to the west" of the property]; exhibit 4 [location map], exhibit 8 [aerial photograph depicting the property, surrounding area, and WSRR boundary]).

5. The property is improved with one single family dwelling and accessory structures (exhibit 2, appendix at 1 [survey sheet 1 of 5]; exhibit 8 [aerial photograph depicting the property]).

6. The improvements on the property include a two-car garage that is now used as living space (tr at 46 [Voorhis testimony that he was informed by applicants that the structure "is occupied by a relative"], 47 [Voorhis testimony regarding the certificate of zoning and occupancy for the garage]; exhibit 1, document 21 [attached photographs depicting a frame structure with two garage doors]; exhibit 2, appendix at 1 [survey sheet 1 of 5 (identifying the structure, located near the southern boundary of the property, as a "frame cottage")]; exhibit 3 [Smithtown Building Department Certificate of Zoning and Occupancy describing the structure as a "detached garage converted to recreation room" and stating that it is "non-habitable space"]).

POSITIONS OF THE PARTIES

Applicants argue that the proposed subdivision and construction of a second single family dwelling on the property is in conformance with the character of the neighborhood. Applicants assert that there are 14 houses within 500 feet of applicants' property that are on lots of one acre or less. Applicants also argue that the proposed project would have no impact on the environment and that the Department should grant a variance from the two acre minimum lot size. (Tr at 7-9.)

Department staff argues that applicants' proposal does not meet the two acre minimum lot size requirement under the governing regulations and that it fails to meet the requirements for an area variance. Staff notes that the property is already improved with a single family dwelling and argues that the lot size restriction does not cause practical difficulty for applicants. Additionally, staff argues that any gain that applicants would realize from the subdivision and development of a second dwelling on their property is outweighed by the potential impact of applicants' proposal on the Nissequogue River corridor. Therefore, staff asserts, denial of the application is appropriate. (Tr at 9-11.)

DISCUSSION

In accordance with 6 NYCRR 624.9(b)(1), applicants have the burden of proof to demonstrate that the proposed project will be in compliance with all applicable laws and regulations administered by the Department.

Pursuant to 6 NYCRR 666.8(f)(1), applicants must demonstrate that their "proposed land use or development is consistent with the purposes and policies of the act and with the provisions of [6 NYCRR part 666]." The provisions of part 666 at issue in this proceeding are 6 NYCRR 666.13(C)(2)(b)(note iii), which requires that all private dwellings "located more than 250 feet from the river or tributary bank . . . in a recreational river area must be on a lot of at least 2 acres," and 6 NYCRR 666.9(a)(2), which sets forth the criteria that the Department will consider in its determination whether to grant a request for an area variance.

The applicability of 6 NYCRR 666.13(C)(2)(b)(note iii) to applicants' proposal is not in dispute. Applicants' property is located "more than 250 feet from the river or tributary bank" and well within the WSRR boundary (see findings of fact ¶¶ 3, 4). Accordingly, because the proposal will result in two nonconforming lots (i.e., two lots of less than two acres, each with a private dwelling), applicants must seek an area variance from the two acre lot minimum under the provisions of 6 NYCRR 666.9(a)(2).

6 NYCRR 666.9(a)(2)(i): Change to Character of the River Corridor

The first basis cited by Department staff for its denial of the area variance is 6 NYCRR 666.9(a)(2)(i). This provision 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."

Applicants argue that the proposal will not have an undesirable change in the character of the neighborhood because there are already 13 houses within 500 feet of the property that are on parcels of one acre or less (applicants brief at 2-3). At hearing, applicants proffered evidence showing that there are 14 parcels[4] within 500 feet of the property that are of one acre or less (see tr at 44 [Voorhis testimony that existence of 14 homes on lots less than one acre supports his opinion that the proposed project would not change the character of the neighborhood]; exhibit 5 [tax map with nearby parcels of less than one acre highlighted in yellow]). Applicants further argue that "the aerial photo introduced into evidence [demonstrates] that the number of houses on small lots is beyond belief"[5] (applicants brief at 2-3).

Applicants' witness, Mr. Voorhis, characterized the vicinity of the property as "an existing residential area [with] numerous homes that front River Road" (tr at 31). He testified that the existing converted two-car garage will be replaced with a "new house located farther from the river, farther from the road, [and] will improve the aesthetics from River Road, in my

[4] Applicants provide no explanation with regard to why their closing brief states that there are only 13 parcels of less than one acre. The evidence proffered by applicants at the hearing, which was uncontroverted, indicates that there are 14 such parcels.

[5] Applicants do not specify the aerial photograph to which they are referring. Nevertheless, assuming that applicants' use of the term "small lots" is intended to equate to lots of one acre or less, the aerial photographs in evidence do show numerous residential structures on such lots in the vicinity of the proposed project (see exhibit 2 [attached aerial photograph], exhibit 8 [aerial photograph]; see also exhibit 5 [map depicting parcels of less than one acre that are within 500 feet of the property (note that parcels that are one acre or larger indicate the size of the parcel by its acreage followed by an "A")]).

opinion" (id. at 32). He further testified that "[t]he proposed project will not increase density, certainly not significantly, it's only one house" (tr at 43).

Department staff argues that the proposed project "will produce a change in the character of the river corridor resulting in a detriment to nearby properties" (staff brief at 11). Staff notes that, by regulation, the management of recreational river areas "is directed at preserving and restoring the natural, cultural, scenic and recreational qualities" of these areas (id. at 7 [citing 6 NYCRR 666.4(c)]), and argues that "it is imperative that this less populated river area, in an already densely populated Long Island, is preserved and protected" (id.).

Department staff's witness, Mr. Marsh, testified that the two acre minimum lot size for recreational river corridors "is meant to keep the rural character of the river corridors in place" (tr at 65). He further testified that "there is a very rural feel to the river corridor in this section, and by subdividing into smaller and smaller lots, it would change the overall character of the river corridor" (id. at 70). Mr. Marsh conceded that a "single subdivision to two [nonconforming lots] is not going to have a huge impact in and of itself, but when you look at the cumulative impacts of setting a precedent where more and more larger lots are going to be subdivided to these small sub-size lots, it would change the rural character of the area" (id. at 76-77).

The Act states that "many rivers of the state, with their immediate environs, possess outstanding natural, scenic, historic, ecological and recreational values" and that it is "the policy of this state that certain selected rivers . . . shall be preserved in free-flowing condition and that they and their immediate environs shall be protected for the benefit and enjoyment of present and future generations" (ECL 15-2701 [Statement of policy and legislative findings]). The Act further states that, with regard to recreational rivers, "[m]anagement shall be directed at preserving and restoring the natural scenic and recreational qualities of such river areas" (ECL 15-2707[2][c][2]). These provisions reflect the Act's emphasis on the preservation and restoration of the natural environment in river corridors that are selected for inclusion in the WSRR System.

Similarly, the Act's implementing regulations emphasize the environmental character of the river corridor. Pursuant to 6 NYCRR 666.2(e), the Department "shall give primary emphasis to 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." With regard to recreational rivers, 6 NYCRR 666.4(c) provides that "[m]anagement of recreational river areas will be directed to preserving and restoring their natural, cultural, scenic and recreational qualities." Further, the specific regulatory provision under consideration here, 6 NYCRR 666.9(a)(2)(i), expressly states that the Department will consider whether a proposed project will produce a change, not in the "character of the neighborhood," as applicants assert, but "in the character of the river corridor."

As the foregoing makes clear, applicants' emphasis on the character of the neighborhood, which tends to focus on the built environment, is misplaced. The built environment is, of course, part of the character of the river corridor, but the Act and the regulations place the emphasis on preserving and protecting the natural character of the corridor (see Matter of DeCillis, Decision of the Commissioner, Aug. 28, 2007, at 6 [holding that "[t]he character of a neighborhood,

however, is only a part of a much broader analysis; specifically, the impact of granting a variance on the 'character of the river corridor'"]).

Staff argues that it is not this variance alone that would create a change in the character of the river corridor, but rather it is the granting of similar variances to similarly situated property owners that is of concern (staff brief at 11). Staff notes that "there are numerous lots in the area that could benefit from the same type of subdivision" that is being sought by applicants here (id.).

Department staff's witness testified that the two acre lot requirement is intended "to keep the rural character of the river corridors in place. It also provides additional wildlife habitat, reduces the amount of impervious surfaces on these lots, reduces the number of sanitary systems and the amount of lawns in the recreational river corridor" (tr at 65). He further testified that "[t]here are many lots in this area that are two acres or larger" and that granting this area variance "would be a precedent set to allow additional subdivisions" (tr at 67). He also noted that "right across the street [from the property] there is an [8.5] acre lot" that if subdivided could result in "seven new dwellings on that lot" (id.).

The precedent that could be created by granting applicants' variance request was a recurring concern raised by staff during the hearing (see e.g. tr at 76-77 [Marsh testimony that "[a]gain, as I spoke to before . . . the single subdivision to two 1-acre [lots] is not going to have a huge impact in and of itself, but when you look at the cumulative impacts of setting a precedent where more and more larger lots are going to be subdivided to these small sub-size lots, it would change the rural character of the area"], tr at 81 [Marsh testimony that "the precedent for cumulative impacts as more development similar to this took place in the area would be substantial"]).

Counsel for applicants objected to Department staff's arguments and testimony concerning the precedent and cumulative impacts that may result from the grant of an area variance in this instance (tr at 67-69). Counsel argued that "what may occur or what may not occur is not relevant with respect to this application . . . Each application has to [be] taken on an individual basis, not what may occur with respect to other lots" (tr at 67-68).

I conclude that the arguments and evidence proffered by Department staff on the issue of whether a change will be produced in the character of the river corridor are persuasive. The Department's consideration of the precedent and potential cumulative impacts that may result from the grant of an area variance in this instance is properly before the Department, and applicants' objections on this point are without merit. 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]). Accordingly, the fact that this subdivision, standing alone, may not effect a significant change to the character of the river corridor is not determinative.

Mr. Marsh's testimony that the river corridor in this area has a rural character and that "subdividing [existing lots] into smaller and smaller lots . . . would change the overall character of the river corridor" (tr at 70) is supported by the record. There are large tracts of land in the immediate vicinity of applicants' property that are owned by the Town of Smithtown and are undeveloped (see tr at 64 [Marsh testimony that the area surrounding applicants' property includes "several large town-owned lots that are open space that were dedicated mostly as parts of other subdivisions or acquired by the town in the past for preservation"]; exhibit 5 [tax map with the town identified as the owner of several large parcels, including parcels of 15.1, 9.3 and 6.6 acres], exhibit 8 [aerial photograph depicting several large undeveloped lots]). Additionally, within 500 feet of applicants' property, there are three lots of two acres or more that contain single family dwellings, and three other lots that range from 1.5 to 1.8 acres and contain single family dwellings (see exhibits 5, 8). The potential for increased pressure to subdivide and build on these lots is a valid concern for the Department.

I conclude that applicants have failed to establish that their proposed subdivision and subsequent development of the property would not produce a change in the character of the river corridor.

6 NYCRR 666.9(a)(2)(ii): Can the Benefit Sought be Achieved without a Variance

Applicants argue that they cannot achieve their objective without the variance and that, if their application is denied by the Department, they "will be deprived of building on the second lot when thirteen . . . homes within a five hundred . . . foot area are [on] smaller [lots]" (applicants brief at 3). Applicants' witness testified that, because "applicant owns the subject property [and] the site has two existing dwellings . . . one being a cottage . . . [i]t's impractical to purchase other lots outside the corridor or conforming lots in view of these considerations" (tr at 37).

Staff argues that applicants "failed to offer any evidence that the economic benefit they wish to achieve by subdividing their property cannot be achieved by some other feasible method" (staff brief at 12; see also tr at 77-78 [Marsh testimony that, to meet their objective, applicants could either "purchase a lot outside the river corridor, or . . . purchase a lot that meets the 2-acre standards"]).

I note that Department staff's reference to "economic benefit" is far narrower than the regulatory provision which considers any "benefit" sought by an applicant. Here, applicants seek the benefit of a second single family dwelling on the property. Although a second dwelling is likely to entail an economic benefit for applicants, the regulation does not limit this consideration to economic benefit. I also note that, pursuant to 6 NYCRR 666.8(f)(3) the Department must consider whether a "reasonable alternative exists for modifying or locating the proposed activity outside of the designated river area."

Applicants' assertion that they should be allowed to subdivide the property and construct a second dwelling because other dwellings in the area are on nonconforming lots does not speak to this consideration. While the existence of nonconforming lots may have some relevance to the

other considerations set forth in the regulations, it is not relevant to the question whether applicants' objective may be achieved by some other method.

Similarly, applicants' assertion that the former two-car garage is an existing dwelling does not affect the analysis under this consideration. Applicants' property is a single lot and has one lawfully existing single family dwelling. The converted two-car garage is not a habitable dwelling (see exhibit 3 [Smithtown Building Department Certificate of Zoning and Occupancy describing the structure as a "detached garage converted to recreation room" and stating that it is "non-habitable space"]). To achieve their objective of constructing a second dwelling, applicants must subdivide the property or pursue some other means, such as purchasing a conforming unimproved lot within the corridor or purchasing an unimproved lot outside the corridor.

Although applicants' desire to avoid the costs of purchasing another lot is understandable, applicants proffered no evidence at hearing to demonstrate that other means of achieving their objective are not "feasible for the applicant[s] to pursue" (6 NYCRR 666.9[a][2][ii]). Further, as noted above, Department staff must consider whether a reasonable alternative exists for modifying or locating a proposed activity outside of the designated river area.

I conclude that applicants have not met their burden to establish that the benefit they seek, to construct a second single family dwelling, cannot be achieved by some method, feasible for the applicants to pursue, other than an area variance.

6 NYCRR 666.9(a)(2)(iii): Is the Requested Area Variance Substantial

Applicants argue that the variance is not substantial because there are numerous lots within 500 feet of the property that are similar in size to, or smaller than, the subdivision proposed by applicants (applicants brief at 3-4). At hearing, applicants' witness testified that he did not consider the variance to be substantial "since no increase in density will occur, again, assuming that the cottage is occupied" (tr at 38).

Staff argues that the variance is substantial as it would subdivide a conforming lot into two nonconforming lots that would be 50 percent smaller than the two acre lot minimum set by the regulations (staff brief at 12; see also tr at 78 [Marsh testimony that at "[a]pproximately 50 percent," the variance is substantial]).

The variance requested by applicants is substantial. Applicants seek an area variance. Accordingly, the determinative factor on this consideration is the extent that the area variance sought by applicants 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"]).

Here, the minimum residential lot size under 6 NYCRR 666.13(C)(2)(b)(note iii) is two acres. Applicants' request for a 50 percent reduction from this minimum lot size is substantial (see Matter of DeCillis, Decision of the Commissioner, Aug. 28, 2007, at 5). Neither the

existence of nonconforming lots in the vicinity of the property nor applicants' use of the former two-car garage for living space alters the fact that a 50 percent variance from the two acre minimum lot size is substantial.

I conclude that the area variance that applicants seek is substantial.

6 NYCRR 666.9(a)(2)(iv): Adverse Effect on Conditions in the River Corridor

Applicants argue that their proposal would not have an adverse impact on the river corridor and that the adverse effects cited by the Department are "utter nonsense" or "outrageous" (applicants brief at 4). Applicants' witness, Mr. Voorhis, testified that "the proposed project will minimize clearing to the maximum extent and will retain substantial natural area on the property" (tr at 25 [citing exhibit 2, appendix A, sheets 4, 5]). He further testified that he is "not aware of any known rare[,] threatened or endangered species that are expected to use the site" (id.). Mr. Voorhis opined that he "[does not] believe there are any significant adverse impacts expected with respect to wildlife" (id. at 25-26).

Department staff argues that applicants' proposed project "will have an adverse impact on the physical and environmental conditions in the river corridor" (staff brief at 13), and that the "natural and ecological features of the river and river area will not be protected and enhanced if the proposed subdivision is granted" (id. at 7). Staff cites a number of concerns, including potential adverse impacts to wildlife habitat and to a wildlife travel corridor (id. at 7-9). Staff's witness, Mr. Marsh, testified that applicants' property "sits at the point of where two areas of town-owned open space sort of meet coming towards the river . . . that serve as wildlife travel corridors, so by increasing development, there will be increased disturbances and reduction in the value of the wildlife habitat" (tr at 66-67).

Other issues of concern raised by staff were not specific to applicants' property but related more generally to increased development within the river corridor. Department staff's witness testified that the two acre lot minimum protects the river corridor because it "reduces the amount of impervious surfaces on these lots, reduces the number of sanitary systems and the amount of lawns in the recreational river corridor, which will reduce nitrogen loading, which ultimately reaches the river" (tr at 65). Mr. Marsh acknowledged that impacts to the river corridor from the subdivision of a single lot and construction of a single family dwelling may be minor, but testified that "the precedent for cumulative impacts as more development similar to this took place in the area would be substantial" (tr at 81; see supra at 7-8 [discussing the issue of cumulative impacts]).

Pursuant to 6 NYCRR 666.2(f), "[p]riority must be given to providing and maintaining wildlife travel corridors." Here, Department staff has established that applicants' property borders an area that is suitable for use as a travel corridor for wildlife. Accordingly, the construction of a second single family dwelling on the property is not conducive to providing and maintaining the wildlife corridor.

I conclude that applicants have failed to establish that the proposed variance will not have an adverse effect on the physical or environmental conditions in the river corridor.

6 NYCRR 666.9(a)(2)(v): Was the Alleged Practical Difficulty Self-Created

Applicants purchased the property in 2005 (findings of fact ¶ 2), long after the Nissequogue River was included in the Wild, Scenic, and Recreational Rivers System (tr at 79, lines 5-7 [Marsh testimony that the Nissequogue River was included in the WSRR System in 1991]). Accordingly, as applicants concede (see applicants brief at 4), applicants' need for a variance is self-created.

Applicants argue that the fact that their need for a variance is self-created is, "in and of itself," not fatal to their request for a variance (see applicants brief at 4). On this point, applicants' are correct, the regulations expressly state that the Department will consider "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]). Accordingly, this issue is to be considered by the Department, but is not determinative.

Nevertheless, the fact that the need for a variance is self-created is a proper consideration for the Department. I conclude that applicants' 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." Here, applicants did not attempt to make such a showing and no economic injury is apparent.

Applicants have been using the property in its current configuration, a two acre conforming lot with one single family dwelling, for over ten years. The denial of the application will simply maintain the status quo, allowing applicants to continue to use the property for the same purpose and in the same manner as they have since purchasing the property. Although applicants 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").

-- Woods Edge Subdivision

Applicants introduced evidence at hearing regarding a Department-approved subdivision, referred to as the "Woods Edge" subdivision, which is located to the east of the subject property and includes lots of approximately one acre or less (tr at 52; exhibit 6 [subdivision map of Woods Edge indicating lot sizes]; see also exhibit 2 [attached aerial photograph depicting part of the Woods Edge subdivision in the lower right corner], exhibit 8 [aerial photograph depicting the Woods Edge subdivision in the lower right corner and the WSRR boundary]; tr at 53 [staff acknowledgment that exhibit 6 depicts a "subdivision that was permitted by the DEC"]). Applicants argue that the Department's approval of the Woods Edge subdivision demonstrates that their proposed subdivision should also be approved and should not be viewed to be a detriment to nearby properties (applicants brief at 3).

Department staff argues that applicants have "fail[ed] to enter any substantive evidence into the record that the Woods Edge . . . subdivision was not fully supported by the regulations" (staff brief at 11). Staff's witness, Mr. Marsh, testified that since the WSRR regulations went into effect, there have been "a couple of subdivisions, but the ones in the immediate area had met the 2-acre or greater standard" (tr at 70). In its closing brief, staff notes that the regulations not only allow, but encourage clustering of residential structures without need for a variance, provided that the minimum cumulative density and other requirements are met (staff brief at 11-12 [citing 6 NYCRR 666.13(C)(notes v, vi)]).

The Woods Edge subdivision is readily distinguished from applicants' proposed subdivision. Woods Edge is approximately twice as far from the Nissequogue River as applicants' property and straddles the easternmost boundary of the recreational river corridor (see exhibit 8 [aerial photograph depicting the Woods Edge subdivision in the lower right corner]). There are also numerous parcels of less than one acre between the Woods Edge subdivision and the river, while no parcels of one acre or less exist between applicants' property and the river (see exhibit 2 [attached aerial photograph], exhibit 5 [applicants' exhibit denoting parcels of less than an acre within 500 feet of applicants' property], exhibit 8 [aerial photograph]).

Given the foregoing, applicants have failed to demonstrate that the Department's determination was inconsistent with the Department's approval of the Woods Edge subdivision (see Matter of Wilson v Iwanowicz, 97 AD3d 595, 596 [2d Dept 2012] [holding that "the petitioner failed to demonstrate that the determination was inconsistent with a prior DEC decision to issue a variance on essentially the same facts, and, in any event, the DEC articulated a reason for reaching a different result in denying the petitioner's request for a variance"]).

I also note that applicants did not proffer evidence demonstrating that a variance from the two acre minimum lot size was necessary in relation to the Department's approval of the Woods Edge subdivision. As staff noted, provided certain conditions are met, clustering of residential subdivisions is authorized and may result in lots of less than two acres within the corridor without the grant of a variance (staff brief at 11-12; see 6 NYCRR 666.13[C][notes v, vi]).[6]

[6] The subdivision map proffered by applicants shows the boundary line of the Woods Edge subdivision in bold (see exhibit 6). The subdivision map identifies six lots surrounding Celestial Court that are within the bold boundary line of the subdivision, and also shows that the subdivided parcel

CONCLUSIONS

Applicants' property is located entirely within the boundaries of the Nissequogue Recreational River Corridor and applicants' proposal would create two lots that do not meet the two acre minimum lot size requirement set forth at 6 NYCRR 666.13(C)(2)(b)(note iii). Applicants have failed to demonstrate, as they must, that their proposed project meets the standards set forth under 6 NYCRR 666.9(a)(2) for the Department to grant an area variance.

Applicants, Gregory and Carissa Reddock, did not demonstrate that the proposed project meets the standards for issuance of a WSRR permit.

RECOMMENDATION

The application of Gregory and Carissa Reddock for a Wild, Scenic and Recreational Rivers System permit should be denied.

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includes land to the north of the six lots (id.). Other exhibits in the record indicate that the land to the north of the six lots is now owned by the Town of Smithtown (see exhibit 5 [tax map depicting the Woods Edge subdivision and Celestial Court near the center right], exhibit 8 [aerial photograph depicting the Woods Edge subdivision in the lower right corner]).

EXHIBIT LIST

Matter of Gregory and Carissa Reddock
Application No. 1-4734-00593/00005

Exhibit No.	Description
1	Hearing Request Documents (includes: Notice of Permit Denial, Joint Application Form, and other materials related to the filing and processing of the application)
2	Environmental Analysis of Subdivision, prepared for applicants by Nelson, Pope & Voorhis, LLC, dated October 4, 2016
3	Building Department Certificate of Zoning and Occupancy for detached garage at the property, dated March 14, 1997
4	Location Map of property and surrounding area
5	Tax Map depicting property and surrounding area
6	Subdivision Map
7	Resume of Robert F. Marsh
8	Aerial Photograph of Property, WSRR Boundary and surrounding area