STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1010

In the Matter

-of-

Applications for a Freshwater Wetlands Permit and a Tidal Wetlands Permit pursuant to Environmental Conservation Law Articles 24 and 25

-by-

DAVID WATTS and EDITH WATTS,

Applicants.

DEC Project No. 1-4728-03015/00006

DECISION OF THE ASSISTANT COMMISSIONER

April 4, 2005

DECISION OF THE ASSISTANT COMMISSIONER[1]

David Watts and Edith Watts ("applicants") propose to construct a two story addition, remove a shed and expand the decking (the "proposed project") at an existing single family dwelling built on pilings at 115 Pacific Walk, Village of Saltaire, Town of Islip, Suffolk County, New York (the "property"). Applicants seek a freshwater wetlands permit and a tidal wetlands permit from the New York State Department of Environmental Conservation ("Department" or "DEC") for the proposed project.

The matter was referred to the Office of Hearings and Mediation Services, and assigned to Administrative Law Judge ("ALJ") Susan J. DuBois. No issues are in dispute concerning the application for a tidal wetlands permit. The issues identified for adjudication by ALJ DuBois all relate to the application for a freshwater wetlands permit. In her hearing report, a copy of which is attached, ALJ DuBois recommended that applicants' freshwater wetlands permit application be denied.

On December 1, 2004, pursuant to the direction of former DEC Commissioner Erin M. Crotty, the ALJ's hearing report was circulated as a recommended decision pursuant to section 624.13(a)(2)(ii) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").[2] A schedule was established for Department staff and applicants to submit comments on the recommended decision and to submit a reply to the other party's comments.

Based on a review of the record in this matter, including the submissions of the parties on the recommended decision, I concur with the ALJ's recommendation to deny applicants' freshwater wetlands permit application and hereby adopt the ALJ's hearing report as my decision in this matter, subject to my comments below.

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[1] By memorandum dated February 15, 2005, the Acting Commissioner of the New York State Department of Environmental Conservation delegated the authority to make this decision to the Assistant Commissioner for Hearings and Mediation Services.

[2] ALJ DuBois's hearing report and the recommended decision are the identical document.

BACKGROUND

Applicants' property in the Village of Saltaire ("Village") is located entirely within New York State-regulated freshwater wetland BE-19. The wetland is designated as Class II under New York's freshwater wetlands classification system. The existing dwelling on the property was constructed by Ms. Watts's parents in the early 1930's, and was modified in the mid-1960's and the mid-1970's.

At the adjudicatory hearing, the threshold issue was whether section 24-1305 of the Environmental Conservation Law ("ECL") exempts (that is, "grandfathers") the proposed project from the requirements of ECL article 24 ("Freshwater Wetlands Act"). ECL 24-1305 provides that the Freshwater Wetlands Act does not apply "to any land use, improvement or development for which final approval shall have been obtained prior to [September 1, 1975] from the local governmental authority or authorities having jurisdiction over such land use" (emphasis added). The term "final approval" is defined in ECL 24-1305 to mean:

> "(a) in the case of the subdivision of land, conditional approval of a final plat as the term is defined in section two hundred seventy-six of the town law, and approval as used in section 7-728 of the village law and section thirty-two of the general cities law;
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> "(b) in the case of a site plan not involving the subdivision of land, approval by the appropriate body or office of a city, village or town of the site plan; and
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> "(c) in those cases not covered by subdivision (a) or (b) above, the issuance of a building permit or other authorization for the commencement of the use, improvement or development for which such permit or authorization was issued or in those local governments which do not require such permits or authorizations, the actual commencement of the use, improvement or development of the land."

During the proceeding, applicants argued that the filing of maps depicting areas that are now within the jurisdiction of the Village (and a part of which includes what is now applicants' property) satisfied the "final approval" language of ECL 24-1305(a), thereby exempting the proposed project from the requirements of the Freshwater Wetlands Act. Specifically, applicants referenced two maps (one from 1911 and one from 1913) which were filed with Suffolk County prior to the incorporation of the Village, and a tax map that the Village adopted in 1918.

In addition, the ALJ considered whether any building permit had been previously issued to applicants for the existing dwelling that satisfied the "grandfathering" language of ECL 24-1305(c).

Matter of Village of Saltaire, Declaratory Ruling DEC 24-16 ("Declaratory Ruling 24-16"), which addressed whether ECL 24-1305 exempted certain properties within the Village from designation and/or regulation as freshwater wetlands under the Freshwater Wetlands Act, was also considered in the proceeding. Declaratory Ruling 24-16, which the Department issued on July 27, 1995, held that the Village failed to demonstrate that all of the lots in the Village were "grandfathered" pursuant to ECL 24-1305 from the permit requirements of the Freshwater Wetlands Act by virtue of maps filed in 1911 and 1913, and an earlier map known as the Partition Map of 1878.[3]

ALJ DuBois determined that the proposed project was not "grandfathered" pursuant to ECL 24-1305 and, accordingly, a freshwater wetlands permit would be required for the proposed project. The ALJ considered the proposed project in light of the permitting requirements of the Freshwater Wetlands Act which include compatibility and weighing standards (see 6 NYCRR 663.5[e] & [f]). Based on the evidence presented, the ALJ concluded that the proposed project does not meet the legal standards for a freshwater wetlands permit and that applicants' permit application should be denied.

SUBMISSIONS ON THE RECOMMENDED DECISION

As noted, the hearing report was circulated to Department staff and applicants as a recommended decision on December 1, 2004. Both Department staff and applicants filed comments on the recommended decision and a reply to the other party's comments.

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[3] The Village subsequently challenged Declaratory Ruling 24-16 pursuant to article 78 of the Civil Practice Law and Rules. The Village's petition was dismissed as untimely by Supreme Court, Suffolk County, and that dismissal was subsequently affirmed by the Appellate Division (see Matter of Incorporated Village of Saltaire v. Zagata, Sup Ct, Suffolk County, Cannavo, J., entered September 17, 1999, Index No. 1995-26039, aff'd 280 AD2d 547 [2d Dept 2001]), lv denied 97 NY2d 610 [2002]).

Department staff comments dated January 7, 2005 ("Department Staff Comments")

Department staff, in its comment letter dated January 7, 2005, stated that the hearing record "clearly and completely support[s] the conclusions reached by the [ALJ]" and requested that a decision be issued consistent with the recommended decision (Department Staff Comments, at 1).

Applicants' comments dated January 7, 2005 ("Applicants' Comments")

Under cover of a letter dated January 7, 2005, applicants submitted extensive comments on the recommended decision, reiterating arguments that they made during the adjudicatory hearing and in their post-adjudicatory hearing submissions.

As a threshold issue, applicants argue that the proposed project is exempt from the Freshwater Wetlands Act pursuant to the "grandfathering" language in ECL 24-1305. According to applicants, the Village Board of Trustees adopted a final plat that covered "land use, improvement or development" of the Village.

Specifically, applicants reference the map and the supplemental map that were filed with Suffolk County in 1911 and 1913, respectively, prior to the Village's incorporation in 1917. Applicants also state that the 1911 and 1913 maps were combined and formally adopted by the Village Board of Trustees as the tax map for the Village in 1918. The 1911 and 1913 maps, according to applicants, were readopted with each adoption of the Village Code (referencing building and zoning ordinances adopted in 1923 and 1973). Applicants contend that the approval of the 1918 tax map and the readoption of the 1911 and 1913 maps in the Village's building and zoning ordinances constitute "substantial evidence of the Village of Saltaire's approval of the subdivision plat" (Applicants' Comments, at 4) which would constitute an approval for purposes of Village Law § 7-728 and would satisfy the "grandfathering" language in ECL 24-1305(a).

Applicants concede that there was no Village Law § 7-728 or its equivalent with respect to planning board and subdivision procedures at the time of the Village's incorporation in 1917 and the Village's "first readoption of the existing plats" (Applicants' Comments, at 5). However, applicants maintain that "'final approval' of the Village Board [of Trustees] for 'land use, improvement or development' was clearly

obtained prior to the effective date of the Village Law sections by the adoption of the plats described . . . in the ordinances of 1923 and 1973 and of the identical plat in 1918, . . . as well as identical incorporation of the plat and adoption of zoning and building authorizations and restrictions based thereon in ordinances in intervening years. . .” (Applicants’ Comments, at 5).

Based on the foregoing, applicants argue that freshwater wetland BE-19, of which their property is a part, is controlled in its use and development by a final subdivision plat and, accordingly, is exempt from the Freshwater Wetlands Act.

Applicants state that the ALJ accorded “[i]nappropriate” weight to Declaratory Ruling 24-16 (Applicants’ Comments, at 8). Applicants contend that the declaratory ruling is incorrect in its reasoning and that it erroneously determined that: the Village Board of Trustees has no authority to give “final approval” in a manner that would satisfy ECL 24-1305; and final approval of land development by the Village does not exist because of the requirement in the Village Code that a building permit be obtained before work commences (see Applicants’ Comments, at 6-8).

Applicants further argue that, because the Village’s prior litigation challenging Declaratory Ruling 24-16 was time-barred, “[n]o significance can be given to the Court’s dictum that it would have supported the [Department] if it had reached the merits” (Applicants’ Comments, at 9).

Applicants also argue that their specific property is exempt pursuant to the “building permit” provision in ECL 24-1305(c). According to applicants, the Village’s adoption of the previously-referenced maps and the building and zoning codes (and their readoption) constitute an “authorization” of the residential use of the site, the original construction of the dwelling in the early 1930's, and the subsequent alterations. Applicants object to the determination in Declaratory Ruling 24-16 that ECL 24-1305(c) grandfathers “only a precise structure existing, permitted or authorized before 1975" (Applicants’ Comments, at 13). Applicants interpret subdivision (c) as providing an “exemption generally of authorized land uses and development” (Applicants’ Comments, at 13).[4]

[4] Applicants concede that no copies of pre-Freshwater Wetlands Act building permits or certificates of occupancy for their dwelling could be found in the Village or applicants’ own

Even if the "grandfathering" language of ECL 24-1305 did not exempt their property from the permitting requirements of the Freshwater Wetlands Act, applicants argue that they are entitled to a freshwater wetlands permit. They dispute Department staff's testimony regarding the proposed project's environmental impact, including its impact on wetland vegetation and regarding the presence of standing water on their property.

Applicants maintain that the proposed project meets the regulatory compatibility standard for issuance of a wetlands permit.[5] They emphasize the limited nature of any environmental impact from the proposed addition to the dwelling. Applicants refer to U.S. Army Corps of Engineers and Commonwealth of Virginia wetland regulations that would allow a greater wetland loss for similar projects. Applicants also criticize New York State's wetland regulations for providing the Department with control over the Village's land use, impeding the Village's efforts to address health issues such as Lyme disease and mosquito-borne diseases, and impairing local economic development.

Applicants argue that the proposed addition to the dwelling would provide more bed space to accommodate family gatherings, and would "add greatly" to the property's recreational values (Applicants' Comments, at 17-19).

Applicants also argue that Department staff are improperly applying "unwritten rules" with respect to permit applications associated with freshwater wetland BE-19. According to applicants, Department staff will not permit any enlargement of a footprint for an existing building, deck or walk in freshwater wetland BE-19 or any alteration involving an additional bedroom for such buildings (Applicants' Comments, at 26-27).

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files (see Applicants' Comments, at 14).

[5] Pursuant to the compatibility standard, a permit, with or without conditions, may be issued for a proposed activity "if it is determined that the activity (i) would be compatible with preservation, protection and conservation of the wetland and its benefits, and (ii) would result in no more than insubstantial degradation to, or loss of, any part of the wetland, and (iii) would be compatible with public health and welfare" (6 NYCRR 663.5[e][1]).

Applicants also contend that a number of the statements in the recommended decision are in error or need modification, and they propose various revisions and corrections.

Replies

By letter dated January 20, 2005, Department staff stated that applicants' comments on the recommended decision are "merely a representation of the arguments made by the applicants during the course of the hearing and in applicants' closing and reply briefs." Department staff indicates that it had previously responded to those arguments during the hearing and in its earlier briefs, and that it would "[stand] on the record that has been created in this permit matter."

Applicants in their reply dated January 21, 2005 again reject Department staff's conclusion that the hearing record supports the recommended decision. Applicants now argue that "no authority" should be given to Declaratory Ruling 24-16. They contend that the declaratory ruling: (a) was never judicially reviewed; (b) did not account for much of the evidence presented in the proceeding before ALJ DuBois that showed "final approval" of development pursuant to the Village's zoning and building ordinances; and (c) was based on an inaccurate view that the development rights of property owners were subject to the discretion of the Village Superintendent of Buildings regarding building permits.

DISCUSSION

Applicants, in their comments on the recommended decision and in their reply, have maintained that the proposed project is exempt from the Freshwater Wetlands Act and that, even if their property were subject to the requirements of that act, the proposed project satisfies the applicable standards for issuance of a freshwater wetlands permit.

I am not unsympathetic to applicants' desire to expand their dwelling to make it more suitable for family gatherings, and to add to the property's recreational values. However, any proposed project that may impact upon regulated freshwater wetlands or their adjacent areas must be considered in light of the public policy of the State to preserve, protect and conserve freshwater wetlands and the benefits derived from them (see ECL 24-0103).

Department staff state that applicants, in their comments on the recommended decision, simply repeated the arguments that they presented at the adjudicatory hearing and in their post-adjudicatory hearing submissions, and that those arguments are already addressed in the recommended decision. Based upon my review of the record, I agree that the recommended decision addressed applicants' arguments. However, in light of the comments that applicants submitted on the recommended decision, I provide this further discussion.

"Grandfathering" Language of ECL 24-1305

The Freshwater Wetlands Act, which is article 24 of the ECL, became effective on September 1, 1975 (see Laws of 1975, chapter 614). As a result, ongoing projects that had commenced prior to the effective date and involved lands subject to the act were required to terminate work until they satisfied applicable requirements of the Freshwater Wetlands Act.

In light of the impacts on ongoing projects, legislation was subsequently introduced in the State Legislature to amend the Freshwater Wetlands Act. The legislation proposed adding language to exempt or "grandfather" certain activities from the requirements of the act, thereby remedying the unfairness inherent in retroactive application of the Freshwater Wetlands Act to owners and developers who had obtained all previously needed authorizations.

This concern about the impact of the Freshwater Wetlands Act on ongoing projects is clearly reflected in the Bill Jacket on the proposed "grandfathering" legislation (see, e.g., Mem on New York Assembly Bill 11369, Bill Jacket, Laws of 1976, chapter 771; Budget Report on Bills (New York Assembly Bill 11369-A), July 14, 1976, Bill Jacket, id. ["grossly unfair to prohibit the development of projects because owners and developers had not secured a [freshwater wetlands] permit which became necessary after they had secured all previously required legal authorization"]; Department of Environmental Conservation Mem, July 12, 1976, id. [legislation to address projects where final approval received but on which work "has not yet been completed"]; Letter from the New York Conference of Mayors and Municipal Officials, July 7, 1976, id. [the bill would allow "planned construction which had received final authorization by local entities prior to this date to proceed without the expense and delay implicit in meeting the new [wetland] requirements"]; see also N.Y.S. Legislative Annual 1976, Mem of Assemblyman Gary A. Lee, at 212-3).

The "grandfathering" legislation as enacted added new section 24-1305 to article 24 of the ECL (see Laws of 1976, chapter 771, § 1).

Declaratory rulings issued by the Department have reiterated the limited purpose of ECL 24-1305 (see, e.g., Matter of 628 Land Associates, Declaratory Ruling DEC 24-11, Sept. 14, 1987, at 5 ["It is manifest from the terms of the statute and from its legislative history that its purpose is to alleviate the hardship that would otherwise result where a development proposal, having obtained all necessary local approvals prior to enactment of [the Freshwater Wetlands Act], is subjected to further review and approval under the Act"]). That the grandfathering language is to be interpreted narrowly has also been confirmed by judicial decision (see Matter of Biggica v. State, 70 AD2d 591, 591 [2d Dept 1979][contention that the grandfathering provisions of ECL 24-1305 "should be interpreted liberally is without any basis in either the language of the statute or in case law"]).

ECL 24-1305 provides that the Freshwater Wetlands Act "shall not apply to any land use, improvement or development for which final approval shall have been obtained prior to [September 1, 1975] from the local governmental authority or authorities having jurisdiction over such land use." As previously indicated, "final approval" is defined in ECL 24-1305 in terms of subdivisions of land (ECL 24-1305[a]); site plans (ECL 24-1305[b]); and building permits or authorizations, or where such permits and authorizations are not required, the actual commencement of the use, improvement or development of the land (ECL 24-1305[c]).

The burden of showing an exemption from the permit requirements of the Freshwater Wetlands Act rests on the person that seeks to benefit from that exemption (see 6 NYCRR 663.3(o)). In this proceeding, applicants argue that ECL 24-1305(a) and ECL 24-1305(c) exempt their project from the requirements of the Freshwater Wetlands Act.

As to their first argument, applicants insist that the Village's adoption of various maps satisfies the requirements of Village Law § 7-728 and that, therefore, the "grandfathering" language of subdivision (a) of ECL 24-1305 applies. As noted, applicants reference a 1911 and a 1913 map which were filed with Suffolk County prior to the incorporation of the Village in

1917.[6] Applicants also reference a 1918 tax map which combined the 1911 and 1913 maps, was formally adopted as a tax map by the Village Board of Trustees following the Village's incorporation, and was "filed and approved by the State Board of Tax Commissioners" (see Applicants' Comments, at 1).

Nothing, however, contained in the record indicates that these maps were the functional equivalent of an approval pursuant Village Law § 7-728. Notwithstanding applicants' reference to "plats," applicants have not shown that the Village Board of Trustees approved a plat in accordance with Village Law § 7-728. Furthermore, applicants provide no authority in support of the proposition that a tax map, such as the one approved by the Village Board of Trustees and filed in 1918, is the legal equivalent to a subdivision of land as contemplated by Village Law § 7-728 (cf. Matter of Shumway Group, Inc., DEC Declaratory Ruling 24-15, January 27, 1993 [rejecting argument that a subdivision was "grandfathered" pursuant to ECL 24-1305(a) merely because a map depicting the subdivision was filed in the county clerk's office, and holding that the filing was not the equivalent to an approval pursuant to Village Law § 7-728]). Accordingly, ECL 24-1305(a) does not exempt applicants' proposed project from the Department's regulatory jurisdiction under the Freshwater Wetlands Act.

However, a more fundamental flaw exists in applicants' argument. Nothing in the language of ECL 24-1305 supports applicants' position that, if a land use, improvement or development were "grandfathered" pursuant to ECL 24-1305(a), (or (b) or (c), for that matter), future expansions or modifications to that land use, improvement or development would similarly be exempt from the requirements of the Freshwater Wetlands Act.

Even assuming for purposes of argument that one or more of the maps that applicants reference somehow satisfied the requirements of Village Law § 7-728, applicants' "grandfathering" arguments would still fail. With respect to a subdivision, assuming that the referenced section of the Town Law, Village Law, or General Cities Law were satisfied, ECL 24-1305(a) may apply to the initial construction of a dwelling on an unimproved parcel in that subdivision (see, e.g., Matter of H.Q. Construction Corp., Declaratory Ruling DEC 24-09, October 24, 1984). Because applicants have an existing dwelling on their property, Department staff has concluded that ECL 24-1305(a) "is

[6] The record in this proceeding does not indicate what individual or entity filed the 1911 and the 1913 maps.

no longer applicable to the applicants' situation" (Department Staff's Closing Statement and Brief, May 12, 2004, at 34). I agree. The "grandfathering" language in ECL 24-1305(a), although it may be relevant to the initial construction of a dwelling based upon pre-Freshwater Wetlands Act approval, does not provide a blanket exemption for any activity on a property including but not limited to subsequent expansions, modifications or improvements to the dwelling.

In this proceeding, applicants are proposing a modification and addition to an existing dwelling some three decades after the effective date of the Freshwater Wetlands Act. The legislative intent and purpose of ECL 24-1305(a) was to address ongoing projects at the time of the adoption of the Freshwater Wetlands Act. The applicability of ECL 24-1305 is expressly tied to a land use, improvement or development "for which final approval shall have been obtained prior to [September 1, 1975]." It does not provide a "grandfather" for future activities, such as applicants' proposed project, which had never been proposed prior to September 1, 1975, the effective date of the Freshwater Wetlands Act.

Applicants also argue that the language of ECL 24-1305(c), which refers to "a building permit or other authorization for the commencement of the use, improvement or development for which such permit or authorization was issued," would "grandfather" the proposed project. However, applicants submitted no evidence that any building permit or other authorization for the proposed project had been issued prior to the effective date of the Freshwater Wetlands Act (September 1, 1975). Accordingly, the "grandfather" language of ECL 24-1305(c) does not apply.

The circumstance that applicants may have received a building permit for the initial construction of the dwelling or for other prior modifications does not establish an exemption for the proposed project. As set forth in Declaratory Ruling 24-16, if a lot in the Village has been previously improved pursuant to validly-issued building permits, this does not "grandfather" all future regulated activities on that lot (see Declaratory Ruling 24-16, at 13-14).[7] Accordingly, a freshwater wetlands permit

[7] I also do not accept applicants' apparent construction of ECL 24-1305(c) to establish a general exemption from the requirements of the Freshwater Wetlands Act for authorized land uses and development which they argue would apply to the proposed project. As noted, the "grandfathering" language of ECL 24-

would be required (id. at 13).

The applicability of ECL 24-1305 to properties in the Village was previously considered in Declaratory Ruling 24-16. I do not accept applicants' argument that Declaratory Ruling 24-16 should not be given authoritative weight in this proceeding. It provides a reasoned review of the applicability of ECL 24-1305 to the Village. Furthermore, the ALJ, in her discussion of Declaratory Ruling 24-16, notes that the Village was previously unsuccessful in challenging it. The Village's petition, pursuant to article 78 of the Civil Practice Law and Rules, was dismissed as untimely by Supreme Court, Suffolk County, and that dismissal was subsequently affirmed by the Appellate Division (see Matter of Incorporated Village of Saltaire v. Zagata, Sup Ct, Suffolk County, Cannavo, J., entered September 17, 1999, Index No. 1995-26039, aff'd 280 AD2d 547 [2d Dept 2001]), lv denied 97 NY2d 610 [2002]).

Although applicants argue that Declaratory Ruling 24-16 did not consider most of the evidence presented in this proceeding, a review of the declaratory ruling indicates otherwise. The 1911 map and the 1913 supplemental map, the adoption of a zoning code and building permits were considered in that ruling. In fact, Declaratory Ruling 24-16 evaluates the application of each subdivision of ECL 24-1305 with respect to the Village. Applicants argue that the zoning and building ordinances, which they conclude constituted "final approval," were not considered in the declaratory ruling. However, applicants failed to show in this proceeding that such ordinances satisfy the requirements of Village Law § 7-728 and, accordingly, ECL 24-1305(a).

Based on this record, I affirm the ALJ's determination

1305(c) refers to "the issuance of a building permit or other authorization for the commencement of the use, improvement or development for which such permit or authorization was issued or in those local governments which do not require such permits or authorizations, the actual commencement of the use, improvement or development of the land." Applicants appear to be basing their construction on the phrase "the actual commencement of the use, improvement or development of the land." However, that portion of ECL 24-1305(c) is only applicable where local governments do not require building permits or authorizations. Here, the Village requires a building permit for the proposed project, and no permit for the proposed project was issued prior to September 1, 1975.

that applicants have not satisfied their burden of proving an exemption from the Freshwater Wetlands Act for this proposed project. Furthermore, I do not find applicants' criticisms and collateral attack on Declaratory Ruling 24-16 to be compelling or to otherwise require that the declaratory ruling be revisited by the Department.

Wetland Compatibility and Weighing Standards

Because applicants' proposed project does not fall within the "grandfathering" language of ECL 24-1305, it is subject to the permitting requirements established by the Freshwater Wetlands Act. Applicants bear the burden of proof to demonstrate that the proposed project will comply with applicable laws and regulations for a freshwater wetlands permit (see 6 NYCRR 624.9[b][1]; see also 6 NYCRR 663.5[a]). The Department's regulations contain the standards that implement the Freshwater Wetlands Act (see, e.g., 6 NYCRR part 663 ["Freshwater Wetlands Permit Requirements"] and part 664 ["Freshwater Wetlands Maps and Classification"]).

The State freshwater wetland regulations categorize regulated activities as "usually compatible," "usually incompatible" or "incompatible" with a wetland and its functions and benefits (see 6 NYCRR 663.4[d] [listing various activities and their relative compatibility with freshwater wetlands and adjacent areas] ["§ 663.4(d) list"]). With respect to the proposed project, Department staff and applicants disagree concerning which regulated activities from the § 663.4(d) list apply.

Based on the record of this proceeding, I concur with the ALJ that the two activities that apply to this proposed project are: (a) activity item #14, "[e]xpanding or substantially modifying existing functional structures or facilities. . .," which is an activity "usually incompatible" with a wetland and its functions and benefits; and (b) activity item #23, "[c]lear-cutting vegetation other than trees, except as part of an agricultural activity," which is an activity "incompatible" with a wetland and its functions and benefits (see 6 NYCRR 663.4[d] [emphasis added]).

I have given consideration to Department staff's argument that the construction should be designated as item #42 ("[c]onstructing a residence or related structures or facilities"), rather than item #14 ("[e]xpanding or substantially modifying existing functional structures or facilities. . ."). I do not agree that item #42, based on this record, applies to the

proposed project as currently designed.

As previously stated, a permit, with or without conditions, may be issued for a proposed activity "if it is determined that the activity (i) would be compatible with preservation, protection and conservation of the wetland and its benefits, and (ii) would result in no more than insubstantial degradation to, or loss of, any part of the wetland, and (iii) would be compatible with public health and welfare" (see 6 NYCRR 663.5[e][1]). Based on this record, the proposed project is not compatible with Freshwater Wetland BE-19 and its functions and benefits.

Applicants are correct that the amount of vegetation to be removed and the overall potential impact of the proposed project is limited in extent. Notwithstanding the foregoing, the proposed project would result in adverse impacts to Freshwater Wetland BE-19 and its values, including but not limited to the loss of vegetation in the wetland. Accordingly, I concur with the ALJ's analysis that the proposed project does not meet the regulatory compatibility standard. Therefore, the proposed project must satisfy the regulatory weighing standard (see 6 NYCRR 663.5[e][2] & [f]). Pursuant to the weighing standard, the need for the proposed activity must be weighed against the benefits lost.

For a Class II wetland, such as freshwater wetland BE-19, the weighing standard provides that a permit may be issued "only if it is determined that the proposed activity satisfies a pressing economic or social need that clearly outweighs the loss of or detriment to the benefit(s) of the Class II wetland" (6 NYCRR 663.5[e][2] [emphasis added]).

I am sympathetic to the described family needs of this proposed project, and have given due consideration to the arguments that applicants have presented. In applying the weighing standard, both project need and the adverse impacts detailed in the record, including but not limited to the loss of vegetation in the wetland and the reduction in nutrient uptake and transpiration, have been considered. Based on the record and the applicable requirements of the Freshwater Wetlands Act, I concur with the ALJ's determination that the need for applicants' proposed project does not clearly outweigh the loss or detriment to freshwater wetland BE-19, and that the application must be denied.

Applicants argue, in their comments on the recommended decision and in their reply, that the proposed project would be

approvable under wetland regulations that the U.S. Army Corps of Engineers ("Army Corps") and the Commonwealth of Virginia have promulgated. I find no indication that applicants raised this argument during the hearing. More importantly, applicants have made no showing that the Army Corps or Commonwealth of Virginia regulations are relevant either to an interpretation or the application of New York's wetland requirements.

Although applicants argue that Department staff have applied "unwritten rules" to prohibit the expansion of building footprints or the addition of bedrooms to structures in State-regulated freshwater wetland BE-19, my review of the record indicates that Department staff have properly applied the wetland permitting requirements to this proposed project. It is not "unwritten rules" but the existing regulatory standards that do not allow the expansion of applicants' dwelling or the construction of the addition.

Finally, I have considered the revisions and additions that applicants propose to be made to the language of the recommended decision. My review of the record indicates that the statements and descriptions in the recommended decision are appropriate, and I decline to adopt applicants' proposed revisions or additions.[8]

[8] As an example, applicants in their reply dated January 21, 2005, contend that the ALJ's description of the vegetation on their property in Finding of Fact #1 of the Recommended Decision is incorrect. It appears that applicants propose to limit the description only to the vegetation that would be removed by the proposed project. However, Finding of Fact #1 is intended to provide a general description of applicants' property, and for that purpose the ALJ's wording is appropriate.

CONCLUSION

The record in this proceeding demonstrates that the proposed project is not "grandfathered" and, thus, applicants must comply with the Freshwater Wetlands Act and its permitting standards. The record further demonstrates that the proposed project fails to satisfy those standards and, accordingly, the application for a freshwater wetlands permit is denied.

For the New York State Department
of Environmental Conservation

By: Louis A. Alexander
Assistant Commissioner

Albany, New York
April 4, 2005

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