

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

In the Matter

-of-

the Application for
a Freshwater Wetlands Permit
to Construct a Single Family Dwelling, Garage, Decks, and
Sanitary System at Elm Road and Orchid Drive,
Mastic Beach, Town of Brookhaven, County of Suffolk
within Wetland M-20, a Class I freshwater wetland,
Pursuant to Environmental Conservation Law Article 24 and
Part 663 of Title 6 of the Official Compilation of the Codes,
Rules and Regulations of the State of New York

- by -

ANTHONY PORCELLI, NAP ENTERPRISES, LLC,

Applicant.

PERMIT APPLICATION No. 1-4722-04544/00001

DECISION OF THE COMMISSIONER

October 22, 2004

DECISION OF THE COMMISSIONER

The attached hearing report of Administrative Law Judge ("ALJ") Helene G. Goldberger in the matter of the application of Anthony Porcelli, NAP Enterprises, LLC ("applicant"), for a freshwater wetlands permit, is hereby adopted as my decision.

The application is for the construction of a two-story single family home, with decking, garage, driveway, on-site sanitary system, and retaining wall, and the placement of fill ("project") on a parcel in Mastic Beach, Town of Brookhaven, Suffolk County, New York. The parcel is located entirely within New York State regulated freshwater wetland M-20, which is designated as a Class I wetland. Class I wetlands "provide the most critical of the State's wetland benefits" (section 663.5[e][2] of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ["6 NYCRR"]).

The hearing report reviews the regulatory standards that apply to the issuance of permits in Class I wetlands. For such wetlands, "the proposed activity must be compatible with the public health and welfare, be the only practicable alternative that could accomplish the applicant's objectives and have no practicable alternative on a site that is not a freshwater wetland or adjacent area" (6 NYCRR 663.5[e][2]). Furthermore, "the proposed activity must minimize degradation to, or loss of, any part of the wetland or [its] adjacent area and must minimize any adverse impacts on the functions and benefits that the wetland provides" (*id.*). A permit is to be issued for a Class I wetland "only if it is determined that the proposed activity satisfies a compelling economic or social need that clearly and substantially outweighs the loss of or detriment to the benefit(s) of the Class I wetland" (*id.*).

The hearing report sets forth the adverse environmental impacts that would result from the project, including its impacts on stormwater, pollution and flood control, wildlife habitat and open space, and potential degradation of groundwater and surface waters. The project, in light of these impacts, is not compatible with the public health and welfare nor is it compatible with the preservation of this portion of regulated freshwater wetland M-20. Applicant has not shown any compelling economic or social need for the project. Moreover, as the ALJ correctly notes, the issuance of a freshwater wetlands permit in this matter would create a precedent for similar applications that would lead to the further loss of wetland acreage.

The record in this proceeding demonstrates that the proposed project fails to meet the applicable regulatory standards for issuance of a permit and, accordingly, the application is denied.

For the New York State Department of
Environmental Conservation

_____/s/_____
By: Erin M. Crotty, Commissioner

Albany, New York
October 22, 2004

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

In the Matter

- of the -

Application of **ANTHONY PORCELLI, NAP ENTERPRISES, LLC**
for a freshwater wetlands permit to construct a single
family dwelling, garage, decks, and sanitary system
at Elm Road and Orchid Drive, Mastic Beach, Town of
Brookhaven, County of Suffolk within wetland M-20,
a Class 1 freshwater wetland, pursuant to
Environmental Conservation Law Article 24 and Part 663
of Title 6 of the New York Compilation of Codes,
Rules and Regulations.

DEC Project No. 1-4722-04544/00001

HEARING REPORT

- by -

_____/s/_____
Helene G. Goldberger
Administrative Law Judge

October 20, 2004

PROCEEDINGS

Background

On April 11, 2003, NAP Enterprises, LLC by Anthony Porcelli, principal, applied to the New York State Department of Environmental Conservation (Department or DEC) for a tidal wetlands permit to undertake a project that is comprised of a two-story dwelling with two wood decks, a driveway, and a retaining wall on the parcel located at Elm Road and Orchid Drive in Mastic Beach, Suffolk County. Exhibit 9. In response to this application, staff concluded that this proposed project was to be located in Class I freshwater wetland M-20, and not in a tidal wetland as the applicant had assumed. Ex.15. DEC determined that the application was complete on May 7, 2003. In a letter dated June 23, 2003, the applicant's consultant, Eileen Rowan of Cramer Consulting Group, agreed with staff that the entire parcel is located in a New York State regulated freshwater wetland. Ex. 16. In this same letter, Ms. Rowan requested instructions on how to proceed with the application. Id. On December 8, 2003, the Department staff informed the applicant that it had decided to deny the permit. Ex. 6. On January 6, 2004, John N. Prudenti, Esq., counsel for the applicant, requested a hearing for Mr. Porcelli and the matter was referred to the Department's Office of Hearings and Mediation Services (OHMS) where it was assigned to Administrative Law (ALJ) Judge Helene G. Goldberger. Exs. 7 and 4.

The hearing notice was published in the April 28, 2004 editions of the *South Shore Press* and the *Environmental Notice Bulletin*. Exs. 1, 2, 3. Pursuant to the notice, the legislative hearing was held on May 24, 2004 at the Knights of Columbus Hall in Mastic, New York. The applicant was represented by John N. Prudenti, Esq. and the Department staff was represented by Louise DeCandia, Assistant Regional Attorney.

Legislative Hearing

No members of the public appeared at the legislative hearing to give comments at this proceeding. The ALJ received one written comment by mail from a Mr. Peter J. McGlinchy. Mr. McGlinchy wrote that he is an owner of property on Orchid Drive, south of Elm Road, and that he supports the proposed project.

Issues Conference

As no intervenors filed petitions for party status, the issues conference was opened to a summary discussion of the

positions of the parties: the staff and the applicant. Issues Conference Transcript (IC TR), pp. 4-8. In addition, the parties identified a group of documents as issues conference exhibits. IC TR 8-11. Because the applicant did not have an expert witness available on this date, the adjudicatory hearing was adjourned. The parties agreed to set a hearing date during a conference call scheduled for June 8, 2004. IC TR 13. The issues conference was adjourned at 11:31 a.m. and the parties proceeded with the ALJ to a site visit.

The purpose of the site visit was to observe the location of the project. DEC staff members and the applicant pointed out the boundaries of the property and the staff noted the wetland plant species.

During the conference call held on June 8, Mr. Prudenti explained that although the applicant had still not been able to retain an expert witness, he wished to proceed to a hearing because this situation was not expected to change. We agreed to schedule the hearing for July 7, 2004 at 10:00 a.m.

Adjudicatory Hearing

The adjudicatory hearing was held on July 7, 2004 at the Knights of Columbus Hall in Mastic. The applicant was represented by Mr. Prudenti and Ms. DeCandia appeared on behalf of staff. By stipulation dated July 2, 2004, the parties agreed that all the issues conference exhibits would be offered into evidence in this proceeding. That list is annexed hereto as Appendix A.

Mr. Prudenti reiterated the applicant's position that it wished to proceed to hearing although it was not able to retain an expert. Adjudicatory Hearing Transcript (TR) at 5-6.

At the hearing, Mr. Prudenti submitted page 48 of the Town of Brookhaven Building and Zoning Ordinance which had been omitted from Ex. 18. TR 6. I included this document as part of that exhibit. TR 7. The proceeding then turned to the applicant to present his case. Mr. Prudenti stated that the applicant would rest on the exhibits presented by the parties.

On behalf of the Department staff, Ms. DeCandia presented Robert Marsh, a biologist with the Bureau of Habitat in DEC's Region 1 office. TR 9-10.

At the conclusion of the adjudicatory hearing, Mr. Prudenti requested the opportunity to file a closing brief. The hearing

transcript was received in the DEC OHMS on July 26, 2004. Because Ms. DeCandia has since left the Department, this matter has been reassigned to Assistant Regional Attorney Craig Elgut. In order to provide Mr. Elgut sufficient time to familiarize himself with the hearing record, it was agreed that post-hearing briefs would be post-marked by September 3, 2004. The envelope bearing the Department staff's closing brief bears a postmark of September 2, 2004. No brief was received from or on behalf of the applicant. Pursuant to 6 NYCRR § 624.8(a)(5), on September 10, 2004, I sent a letter to the parties informing them that the record had closed on September 7, 2004. On September 30, 2004, staff faxed to this office a signed stipulation by Mr. Prudenti indicating the applicant's decision to waive its opportunity to file a closing statement or brief.

FINDINGS OF FACT

1. The project site consists of 10,000 square feet of undeveloped land located on the southwest corner of Elm Road and Orchid Drive in Mastic Beach, in the Town of Brookhaven, County of Suffolk. Ex. 8, TR 15. A survey of the property identified as Exhibit 8 at the hearing is annexed hereto as Appendix B.
2. The entire project is comprised of a two-story single family home, decking, a driveway, on-site sanitary system, a retaining wall and fill which is to be located within freshwater wetland M-20 - a Class 1 freshwater wetland. Exs. 1, 8, 12, 14, 15, 16; TR 23-28.
3. A manmade mosquito ditch goes in a southeasterly direction through the property. TR 27-28; Exs. 13b, 13c, 13e, 13f and 17. The water in this mosquito ditch eventually flows into a tidal salt water marsh about 400 feet south of the property and then into the Moriches Bay. TR 27-28, 48-50; Exs. 14 and 17.
4. On a May 9, 2003 site visit, staff observed in the tree or canopy layer red maples (*acer rubrum*) and tupelos (*nyssa sylvatica*). The staff found four different species of wetland indicator shrubs: chokeberry (*aronia*), sweet pepperbush (*clethra alnifolia*), highbush blueberry (*vaccinium carymbosum*), and northern arrowwood (*viburnum recognitum*). In the herbaceous layer, staff noted soft rush (*juncus effusus*), common or giant reed (*phragmites australis*), spotted joe-pye weed (*eupatorium maculatum*), jewelweed (*impatiens*), swamp cabbage (*symplocarpos foetidus*) and cinnamon fern (*osmunda cinnamomea*). Ex. 12; TR 19-20. On a visit on May 21, 2004, the staff observed giant reeds, cinnamon fern, spotted touch-me-not, and skunk cabbage. TR 21; Exs. 13b, 13c, 13d, 13e, and 13f.

5. The chokeberry, highbush blueberry, soft rush, spotted joe-pye weed, and jewelweed occur in wetlands 67-99% of the time. Ex. 22.

6. In order for the applicant to develop this project, he would have to clear off all the vegetation. TR 30.

7. A soil sample taken by DEC staff revealed a combination of muck soils and glade soils that indicate wetland hydric soils. TR 22; Ex. 13g. Most of the lot is in standing water (twice a day) during high tide and during other times when the water table is high. The survey indicates that there are elevation changes on the property of over five feet in some locations. TR 31; Ex.

8. The Suffolk County Health Department requires a sanitary system be placed at a minimum of three feet above average ground water and that the house it serves not be in standing water. Therefore, to meet this requirement, Mr. Porcelli would have to bring in a substantial amount of fill. TR 30-31.

8. The project calls for the location of a septic system in the freshwater wetland. If permitted, the septic system will lead to an increase in nutrients within the freshwater wetlands. Such an increase can accelerate plant growth and algae blooms, resulting in the filling of the wetlands. In addition, pathogens and some viruses from the septic system effluent may travel over 100 feet through soils and contaminate surface waters. TR 31-32, 36.

9. The construction of the home, driveway, and retaining wall would all take place within a freshwater wetland. TR 32.

10. The Mastic Beach area is subject to storms and flooding. In removing vegetation, the proposed project will also take away the storm and flood water control benefits of this parcel. This vegetation helps to absorb a lot of water. The vegetation also holds soils in place, reducing erosion. TR 35-36. Any fill that is brought in would eliminate the locations on the site where water can sit, reducing the ability of the wetland to absorb water. TR 32-33. Also, the proposed structures would displace soft soils that absorb water. TR 33.

11. The loss of vegetation would also reduce wildlife habitat due to loss of food, shelter, and refuge. The site is located in an area that migratory songbirds and water fowl use. Deer, amphibians, reptiles and small mammals would lose this resource. TR 33-34, 36.

12. The wetland's ability to filter pollution would be lost as a result of this project. Wetlands absorb nutrients, oils, and pesticides from runoff before these contaminants reach groundwater and open water. TR 34-35, 36-37.

13. This wetland system is one of the larger unbroken wetland systems in the Mastic area. If this parcel is developed as proposed, that would result in a loss of open space. TR 34-35. The site's attributes for recreation, education and scientific research are limited because it is privately owned. The habitat provided by the wetlands does allow for such activities in nearby public areas. Finally, as undeveloped open space, this parcel provides a natural environment in the community that is an aesthetic enhancement.

DISCUSSION

The proposed project does not meet permit issuance standards; thus, I recommend that the requested freshwater wetland permit be denied.

The standards for issuance of permits for activities in freshwater wetlands are set forth in § 663.5 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR). A determination regarding permit issuance must be based upon a determination of compatibility and a weighing of need against benefits that will be lost as a result of the project. 6 NYCRR § 663.5(d).

The applicant's proposed activities in this Class I wetland: clearing vegetation, filling, introduction of sewage effluent, and construction are deemed incompatible with the wetland's functions and benefits by 6 NYCRR § 663.4(d)(20), (23), (38), and (42). Because all these activities are identified as "X" or incompatible, for a permit to be issued the activity must meet each of the weighing standards provided in 6 NYCRR § 663(e). For Class I wetlands, "the proposed activity must be compatible with the public health and welfare, be the only practicable alternative that could accomplish the applicant's objectives and have no practicable alternative on a site that is not a freshwater wetland or adjacent area." 6 NYCRR § 663.4(e)(2). In addition, for a Class I wetland, "the proposed activity must minimize degradation to, or loss of, any part of the wetland or its adjacent area and must minimize any adverse impacts on the functions and benefits that the wetland provides." Id.

The proposed activity is not compatible with the public health and welfare, as it will destroy a part of freshwater

wetland M-20, thus reducing that wetland's benefits of providing stormwater storage and flood protection, wildlife habitat, and water filtration in addition to the aesthetic values of open space.

As noted by staff in its closing brief, Mr. Marsh testified that the Mastic Beach area is subject to flooding during nor'easters or hurricanes and that by removing vegetation and installing structures, the wetland's flood protection values will be negatively affected. TR 35; staff closing brief (Br.), pp. 14-15, 18.

Staff demonstrated through Mr. Marsh that the site provides habitat to various species of wildlife and that this habitat will be lost if this project is permitted. TR 33; Br., p. 15, 19-20.

In addition, the placement of a septic system in a wetland could result in pathogens and other pollutants being transported to surface and groundwaters. TR 31-32; Br., pp.10-11. As noted by Mr. Marsh, these impacts are likely to be exacerbated in this circumstance due to the network of the mosquito ditch and the proximity to tidal waters. TR 37; Br., p. 11. As noted by staff in its closing brief, the wetland benefits of "protection of subsurface water resources and provision for valuable watersheds and recharging groundwater supplies" will be greatly diminished if this project is permitted. Environmental Conservation Law (ECL) § 24-0105(7)(c). TR 35; Br., pp. 16-17.

The aerial map for this area shows that this is a relatively undeveloped portion of Long Island and the destruction of this area of wetland would establish a precedent that could result in devastating cumulative environmental impacts for this Class I wetland. Ex. 17.

Section 663.5(e)(2) also provides that "Class I wetlands provide the most critical of the State's wetland benefits, reduction of which is acceptable only in the most unusual circumstances. A permit shall be issued only if it is determined that the proposed activity satisfies a compelling economic or social need that clearly and substantially outweighs the loss of or detriment to the benefit(s) of the Class I wetland."

As noted by the Department staff's testimony, the proposed construction of this single dwelling home by the applicant does not satisfy the abovementioned standard of "a compelling economic or social need . . ." TR 41-43. See also, 6 NYCRR § 663.5(f)(4)(ii).

The applicant did not testify or produce any witnesses and therefore I cannot make assumptions about the likelihood of on-site alternatives that would achieve his goals. As the Department's witness indicated, given the property's location in M-20, there would be little acceptable development that could occur. Placing a house on this property is not an acceptable result pursuant to the freshwater wetland regulations based upon the reduction in Class I wetland values without a demonstration of outweighing benefits. Moreover, there was no evidence indicating that a house could not be built in an area that would not affect this wetland or another. The project does not minimize impacts to the wetland and instead the hearing record establishes that its development would result in destruction of this segment of M-20. See, 6 NYCRR §§ 663.5(f)(4)(ii), (iii).

The applicant placed into evidence a letter from Thomas W. Cramer of Cramer Consulting that indicates that the subject parcel would be classified as a Class IV wetland based upon his inspection of the property. Mr. Cramer's inspection concludes that the vegetation on the site is largely comprised of common reed (*phragmites australis*). Ex. 22. In addition, Mr. Cramer concludes without any review of historic records that the site was likely disturbed in the past based upon development in the surrounding vicinity. Id. Unfortunately, Mr. Cramer did not testify and therefore, there was no ability on the part of this factfinder to learn of this expert's credentials or to hear in more detail the basis for his conclusions or his responses under cross-examination.

Mr. Marsh testified, on the basis of two inspections, that he observed a diverse vegetative community on the site and provided that the wetland was a Class I wetland. In addition, Mr. Marsh spoke to the site's propensity for containing standing water due to groundwater expressions and influences from the adjacent tidal waters of Moriches Bay. TR 21-22; Br., p. 13. Based upon Mr. Marsh's extensive experience and his position with the Department as well as the production of his field notes and sworn testimony, I am relying upon his conclusions and not those provided in Mr. Cramer's letter. In addition, as noted above, Mr. Marsh pointed out a number of the wetland species on the site visit that was taken by the parties and me on May 24, 2004.

The applicant placed into evidence the Town's zoning code and a map from the Suffolk County Department of Health Services stamped "permit for approval of construction for a single family residence only." Exs. 18 and 21. Based upon these exhibits and the statements of Attorney Prudenti, I understand the applicant is attempting to show that the property could be used for a one-

family dwelling, a place of worship, parish houses, schools or open farming, and has been approved by the local health department for these uses.¹ TR 46. However, these regulations have no bearing on whether or not the proposed project meets the freshwater wetland standards for permit issuance.

As emphasized by Department staff in its closing brief (pp. 4-5), the Legislature has placed great importance on the conservation of freshwater wetlands. See, ECL § 24-0103. In the statement of findings for this Act, it states that “[t]he freshwater wetlands of the state of New York are invaluable resources for flood protection, wildlife habitat, open space and water resources.” ECL § 24-0105(1). The law also recognizes that “[c]onsiderable acreage of freshwater wetlands in the state of New York has been lost, despoiled or impaired by unregulated draining, dredging, filling, excavating, building, pollution or other acts inconsistent with the natural uses of such areas.” ECL § 24-0105(2). “Other freshwater wetlands are in jeopardy of being lost, despoiled or impaired by such unrelated acts.” Id.

In this hearing, the staff has demonstrated that the issuance of a permit for the project proposed by the applicant would irreparably damage freshwater wetland M-20 and its many values. In contrast, the applicant has not presented any evidence that would demonstrate otherwise or that would establish a substantial need for this project in accordance with Part 663 standards. Finally, I agree with staff that issuance of a permit in this matter would create a precedent for other similar applications that if allowed would result in the destruction of this valuable state resource. See, Br., pp. 23-24; ECL §§ 1-0101(3)(c) (“[p]romoting patterns of development . . . which minimize adverse impact on the environment”) and 3-0301(1)(b) (“ . . . take into account the cumulative impact upon all . . . such resources in making any determination in connection with any . . . permit . . .”).

¹ In response to Mr. Prudenti’s cross-examination, Mr. Marsh explained that the applicant could use the land to farm certain crops. TR 46-48.

RECOMMENDATION

NAP Enterprises, LLC and Mr. Porcelli have not met their burden of proving that this project meets the requirements set forth in 6 NYCRR Part 663. Because the project would impair the wetlands' attributes of stormwater, pollution, and flood control, wildlife habitat and open space as well as potentially degrade groundwater and surface waters, it is not compatible with the public health and welfare or with M-20's preservation. There is no proposed mitigation for this project. In conclusion, I recommend that the application for a freshwater wetland permit be denied.

* * *

Appendix A: List of hearing exhibits
Appendix B: Survey of Lot 3346-3350 INCL. - June 30, 2002