

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

- by -

**THOMAS M. DECILLIS, TRACEY A. DECILLIS,
THOMAS DECILLIS and LEEANN DECILLIS,**

Applicants.

DEC Project No. 1-4734-02009/00001

DECISION OF THE COMMISSIONER

August 28, 2007

DECISION OF THE COMMISSIONER

Thomas M. DeCillis, Tracey A. DeCillis, Thomas DeCillis and LeeAnn DeCillis ("applicants") filed an application with the New York State Department of Environmental Conservation ("Department") for a wild, scenic and recreational rivers system ("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 ("6 NYCRR"). Applicants propose to subdivide a parcel of real property consisting of 2.104 acres on the south side of Loft Road¹ and the west side of Croft Lane in the Town of Smithtown, Suffolk County ("site"), into two lots.

The matter was assigned to Administrative Law Judge ("ALJ") Maria E. Villa, who prepared the attached hearing report recommending that the application be denied. I hereby adopt the hearing report as my decision in this matter subject to my comments herein.

Factual and Procedural Background

The site is an "L" shaped parcel. A single family residence and detached garage are situated on the northern portion of the site. The southern portion of the site, roughly two-thirds of the parcel, is undeveloped and contains mature, mixed hardwoods and understory vegetation of shrubs and vines. Applicants propose to subdivide the site into two parcels of slightly more than one acre each, maintain the existing residence on the northern portion of the site and construct a new residence on the southern portion of the site.

The site is approximately 1,000 feet from the Nissequogue River and within the Nissequogue River recreational river corridor ("river corridor") (see ECL 15-2714[3][ee]). Pursuant to 6 NYCRR 666.13(C)(2)(b) and (K)(4), respectively, applicants must obtain a permit to construct a "private dwelling" within a recreational river corridor and to subdivide the site. Further, 6 NYCRR 666.13(C)(2)(b), note (iii), states that "[e]ach private dwelling . . . must be on a lot of at least 2 acres." Because applicants seek to subdivide a conforming lot that meets the acreage requirement and then construct a single family residence on the newly created non-conforming lot, they were required to apply for an area variance under the provisions of 6

¹Also referred to as "Loft Lane" in the record.

NYCRR 666.9(a)(2).

Department staff denied the application on the ground that the proposed project did not satisfy the standards for issuance of a rivers system permit. Applicants requested a hearing to contest staff's determination to deny the permit. The hearing was held on January 30, 2007. Upon receipt of final briefs from the parties on June 15, 2007, the hearing record closed.

Discussion

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]).

Policy and Legislative Findings

Section 15-2701 of the ECL, which sets forth the Legislature's statement of policy and legislative findings for the Wild, Scenic and Recreational Rivers System Act ("Act"), 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 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]).

Area Variance Standard

The standard for granting an area variance is set forth at 6 NYCRR 666.9(a)(2), which reads, in 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 her hearing report, thoroughly addressed 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] & [iv])

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 affect the character of the river corridor and would result in adverse environmental impacts (see, e.g., Hearing Transcript [testimony of Robert F. Marsh, regional manager of the Bureau of Habitat], at 93, 95-100).

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

With regard to subparagraph 666.9(a)(2)(ii) of 6 NYCRR (i.e., whether the benefit sought by the applicant can be achieved by some means other than an area variance), the ALJ properly rejected applicants' arguments as unpersuasive. Prior to issuance of a rivers system permit, and irrespective of the need for a variance, the Department is required to determine that "no reasonable alternative exists for modifying or locating the proposed activity outside of the designated river area" (6 NYCRR 666.8[f][3]).

Here, not only does the proposed construction of a new single family home require a rivers system permit (see 6 NYCRR 666.13[C][2][b]), the proposed construction would also eliminate a conforming lot and create two non-conforming lots. Yet the record is largely silent on whether applicants have sought to build elsewhere.² While there may be instances where locating

²Pursuant to 6 NYCRR 666.9(b)(6) applicants for a variance are required to include "a discussion of alternative site possibilities outside the river area." In response, applicants wrote "[u]nfortunately, there are no alternative site possibilities outside the [rivers system] regulated area" (Hearing Exhibit 11, at 3). This assertion is not supported with any documentation and appears to be premised on the fact that the applicants purchased the property "with the intention of subdividing it" and have "already taken title to the premises" (id.). The fact that applicants took title to the property with

the project outside the rivers system area is not practicable (e.g., constructing an addition on an existing residence), that is not the case here.

-- 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]). Although, as the ALJ notes, the construction of a single family home on a one-acre lot would not be inconsistent with the character of the surrounding neighborhood, the variance would nevertheless be a substantial deviation from the two-acre minimum lot requirement established under 6 NYCRR 666.13(C)(2)(b), note (iii). The site is currently in conformance with the two-acre requirement and the subdivision and subsequent construction of a new single family home would result in two residences on two substantially nonconforming lots of approximately one acre each.

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

In addition, 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, nearly 20 years after 6 NYCRR part 666 was promulgated.³ 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. Nevertheless, applicants purchased a site upon which a new residence could not be constructed without an area variance. Accordingly, applicants' need for an area variance is self-created (see Matter of Whelan, Commissioner's Decision, December 1, 1992, at 1 [holding that "the (applicants') difficulty is self-created as the restrictions imposed by Part 666 predate the Applicants' purchase of the property"]).

-- Significant Economic Injury (6 NYCRR 666.9 [a][2])

Finally, applicants' attempt to demonstrate

the intention of subdividing it does not address whether there are alternative sites available outside the regulated area.

³Part 666 of 6 NYCRR was promulgated in 1986. At that time, the two-acre lot requirement was set forth in 6 NYCRR 666.25(f)(2).

"significant economic injury" (6 NYCRR 666.9[a][2]) is without merit. Applicants offered testimony, without documentary support, to the effect that the estimated current market value of the site and residence is below applicants' purchase price in 2005. Applicants, however, provided no evidence that this difference was in any way tied to the rivers system regulatory scheme.

Further, for a variety of reasons, a given property may sell above, or below, its estimated market value. The consideration of "significant economic injury" is not intended to compensate an applicant for a declining real estate market or an inflated purchase price. Rather, it provides for consideration of "the effect of [the rivers system regulations] upon the value of the property in question" (*id.*). Here, the rivers system regulations are unchanged from the date of applicants' purchase of the site and, therefore, applicants' purchase price should have reflected the effect, if any, of the regulations on the value of the site.

Conditions Applied to Area Variance Requests

Department staff indicated that it grants variances for undersized lots under certain conditions (see Notice of Permit Denial [Hearing Exhibit 7], at 1). Staff took the position that the condition relevant to this application was whether the proposed subdivided lots would conform to the character of the immediate neighborhood. Department staff stated that "[t]o meet the requirements for [this] condition the applicant is required to average the lot size for all residentially developed lots in a 500' radius of the subject property. All proposed lots must meet or exceed the average" (*id.*).

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. If properly developed and applied, such information can assist in assessing whether an area variance may produce a change "in the character of the river corridor" (6 NYCRR 666.9[a][2][i]), or would affect or impact the river corridor (see 6 NYCRR 666.9[a][2][iv]).

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." This distinction is significant given the Act's mandate to "preserv[e] and restor[e] the natural scenic and recreational qualities" of recreational rivers and their environs (ECL 15-

2707[2][c][2]). The overall analysis must consider features (including but not limited to improved and unimproved lots, parks and other open space) in and beyond the immediate neighborhood, as well as features and values associated with the river corridor itself (see 6 NYCRR 666.1). In this proceeding, it is clear that Department staff considered such features in evaluating whether the proposed subdivision would diminish the qualities of the river corridor.

With respect to the condition set forth in the Notice of Permit Denial, it is not clear from the record why a radius of 500 feet was selected and why only "residentially developed" lots were considered in evaluating the character of the immediate neighborhood. Because the record does not provide a sufficient explanation why a 500 foot radius was selected, or why only "residentially developed" lots were evaluated, I do not rely on the referenced condition for purposes of my decision. Furthermore, I note that the ALJ determined that a change in neighborhood character, or a detriment to nearby properties, had not been established on this record (see Hearing Report, at 8).

Moreover, it is not clear whether these criteria (the 500 foot radius and the limitation to residentially developed lots) were developed for purposes of evaluating this specific application and variance request or whether these criteria are being applied to all subdivision requests relating to rivers system permit applications. If specific criteria are being applied as standards for all such subdivision requests, those criteria must be established by statute or regulation. If such criteria are being developed and applied on a case-by-case basis, the basis for their selection must be presented as part of the record.

Conclusion

Based on this record, the application for a wild, scenic and recreational rivers system permit, and the request for a variance from the wild, scenic and recreational rivers system use guidelines, are denied.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Alexander B. Grannis
Commissioner

Dated: August 28, 2007
Albany, New York

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STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
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In the Matter of the Application of

**THOMAS M. DECILLIS, TRACEY A. DECILLIS,
THOMAS DECILLIS and LEEANN DECILLIS**

for a
permit pursuant to Article 15, Title 27
of the New York State Environmental Conservation Law ("ECL")
(Wild, Scenic and Recreational Rivers System),
and Part 666 of Title 6 of the Official Compilation
of Codes, Rules and Regulations
of the State of New York ("6 NYCRR")
to subdivide a parcel of real property
consisting of 2.104 acres into two lots
on the south side of Loft Road and west side of Croft Lane in the
Town of Smithtown, County of Suffolk, New York

DEC Project No. 1-4734-02009/00001

HEARING REPORT

/s/

Maria E. Villa
Administrative Law Judge

July 27, 2007

PROCEEDINGS

Thomas M. DeCillis, Tracey A. DeCillis, Thomas DeCillis and LeeAnn DeCillis, referred to collectively hereinafter as "Applicants," submitted an application to Staff of the New York State Department of Environmental Conservation ("Department Staff") for a permit pursuant to Article 15, Title 27 of the New York State Environmental Conservation Law ("ECL")(Wild, Scenic and Recreational Rivers System ("Rivers System"), and the statute's implementing regulations at Part 666 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

Applicants proposed to subdivide a parcel of real property consisting of 2.104 acres into two lots on the south side of Loft Road¹ and the west side of Croft Lane in the Town of Smithtown, Suffolk County, New York. One of the lots would contain an existing single-family dwelling, and would be approximately 1.002 acres in size. The other lot would be approximately 1.102 acres, and Applicants propose to construct a new single-family dwelling there, as well as a driveway and septic system. Applicants would also add a horse paddock to the lot where the existing dwelling is located.

The parcel is located within the Nissequogue River recreational river corridor, and the proposed subdivision would require a variance from the requirement in 6 NYCRR Section 666.13(C)(2)(b), note (iii), that each private dwelling in a recreational river corridor be on a lot of at least two acres. Accordingly, Applicants sought an area variance pursuant to Section 666.9(a)(2).

Department Staff denied the application by letter dated November 17, 2005. By letter dated November 23, 2005, Applicants requested a hearing on the denial. The matter was assigned to Administrative Law Judge ("ALJ") Maria E. Villa, of the Department's Office of Hearings and Mediation Services.

The application was the subject of a combined notice of complete application and notice of public hearing that appeared in the Department's *Environmental Notice Bulletin* on August 30, 2006. That notice was also published in the August 31, 2006

¹

Although the application refers to "Loft Road," at various points throughout the record references to "Loft Lane" appear, and Exhibit 3D, the survey provided by the Applicant, refers to "Loft Road (Loft Lane)."

edition of the *Smithtown News*. The hearing was scheduled to commence on October 3, 2006, but was postponed to allow for receipt of additional information from Applicants, and a determination by Department Staff based upon that information. Notice of the postponement appeared in the September 27, 2006 edition of the *Environmental Notice Bulletin*.

Specifically, by letter dated September 15, 2006, Department Staff requested that Applicants provide further information concerning Applicants' area variance request. Applicants submitted that information in correspondence dated September 27, 2006. On December 1, 2006, Department Staff notified Applicants that the proposal failed to satisfy the area variance standards for permit issuance set forth in 6 NYCRR Section 666.9. Thereafter, a second combined notice of complete application and public hearing was published in the *Environmental Notice Bulletin* on December 20, 2006.

Pursuant to the notice, the legislative public hearing, issues conference, and adjudicatory hearing were held on January 20, 2007, at the Department's Region One offices in Stony Brook, New York. A site visit was also completed on that day. No petitions for party status were filed, and consequently, Applicants and Department Staff were the only parties to the hearing. Applicants were represented by Vincent J. Trimarco, Esq., of the Law Offices of Vincent Trimarco, 1038 West Jericho Turnpike, Smithtown, New York. Applicants called two witnesses: Ginny Watral, vice president of planning for the Freudenthal & Elkowitz Consulting Group, and Margaret Remhild, a real estate broker in the Town of Smithtown, and a principal of Long Island Tax Savers, a tax grievance firm. Department Staff was represented by Kari E. Wilkinson, Esq., Region One Assistant Regional Attorney, and offered the testimony of Heather Amster, Real Properties Supervisor in the Department's Region One office, and Robert F. Marsh, the Region One manager of the Department's Bureau of Habitat.

The parties requested an opportunity to file post-hearing briefs. The ALJ granted the request, and upon receipt of the transcript, a briefing schedule was established. Initial briefs were received on May 18, 2007, and reply briefs were submitted and the hearing record closed on June 15, 2007.

FINDINGS OF FACT

1. Applicants, Thomas M. DeCillis, Tracey A. DeCillis, Thomas DeCillis and LeeAnn DeCillis, purchased the subject property on or about March 16, 2005, for \$765,000. The property

is located on the south side of Loft Road and the west side of Croft Lane (SCTM #0800-154-2-46), in the Town of Smithtown, Suffolk County, New York.

2. The existing lot is approximately 2.104 acres.

3. The lot is located in the Nissequogue River recreational river corridor, approximately 1,000 feet from the Nissequogue River. There are other developed lots between the subject parcel and the River. In this stretch, the Nissequogue River is dammed to the east and is referred to as Mill Pond.

4. The southern two thirds of the property is naturally vegetated. The northern third of the parcel is cleared.

5. The vegetation on the southern two thirds of the lot consists of mixed hardwood, mature forest (red oaks, black oak, black cherry, and some red maple). There is an understory of mixed shrubs and vines including arrowwood, as well as species of greenbriar and some invasives, including multiflora rose.

6. The area around the subject parcel is developed with lots ranging from 0.7 to 2.4 acres in size. Blydenburg County Park is located to the east, and Caleb Smith State Park is north of the area.

7. The parcel is improved with a one and a half to two story single family dwelling. The dwelling has a footprint of approximately 1,140 square feet. In addition, there is a driveway and a two car garage on the parcel.

8. The proposed subdivision would increase housing density in the area.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

Article 15, Title 27 of the ECL provides that designated wild, scenic and recreational rivers, and their immediate environs, are to be preserved in a free-flowing condition and protected for the benefit and enjoyment of present and future generations. ECL Section 15-2701(3). According to Section 666.1 of 6 NYCRR,

"[m]any rivers of the State, and their immediate environs, possess outstanding natural, scenic, ecological, recreational, aesthetic, botanical, geological, hydrological, fish and wildlife, historical,

cultural, archaeological and scientific values. 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."

Section 666.8(f) provides that, before a Rivers System permit is issued, the Department must determine that

"(1) the proposed land use or development is consistent with the purposes and policies of the [Wild, Scenic and Recreational Rivers System Act] and with the provisions of this Part;

(2) the resources specified in Section 666.2(e)² of this Part will be protected and the proposed activity will not have an undue adverse environmental impact;

(3) no reasonable alternative exists for modifying or locating the proposed activity outside of the designated river area; and

(4) actions proposed to be undertaken by State agencies are designed to preserve, protect or enhance the resources and values of designated rivers."³

The use guidelines set forth at Section 666.13(C)(2)(b), note (iii), state, in pertinent part, that a permit is required for a residential structure located more than 250 feet from the recreational river or tributary bank, and that any private dwelling in a recreational river area must be on a lot of at least two acres. See Matter of Alexander Joachim, Decision of the Commissioner, at 12, 2007 WL _____, * ____ (May 31, 2007);

² Section 666.2(e) requires the Department, in its administration and enforcement of the regulations, to "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 the designated rivers and river areas."

³ It was undisputed that Section 666.8(f)(4) is not applicable to this proceeding.

Draft Environmental Impact Statement on Promulgation of Statewide Rules and Regulations for the New York State Wild, Scenic and Recreational Rivers System, at 13 (May 28, 1985) ("WSRR DEIS").

The regulations include variance provisions from allowable land uses that provide for either a use or an area variance. Section 666.9. Any such variance must be the minimum variance necessary to accomplish the purposes for which the variance is sought. Section 666.9(a).

Applicants requested an area variance, pursuant to Section 666.9(a)(2). Such a variance may be granted only if "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." Section 666.9(a)(2). 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."

Section 666.9(a)(2)(i)-(v).

The regulation goes on to state that

"[i]n addition to addressing the foregoing considerations, an applicant for an area variance has the option of seeking to prove, by competent financial evidence, that the strict application of the subject provision(s) of this Part will result in significant economic injury. Such evidence will be limited to the effect of such provision(s) upon the value of the property in question; whether the value would be enhanced were a variance granted will not be relevant. If the applicant demonstrates significant economic injury, the burden is on the department to establish that the strict application of the subject provision(s) is reasonably related to the purpose and policy of the act and this Part."

Section 666.9(a)(2).

Department Staff's December 1, 2006 denial letter stated that the proposed activity did not meet the standards for permit issuance pursuant to Article 15, Title 27 of the ECL and Part 666 of 6 NYCRR. Specifically, Department Staff cited to the table of use guidelines in 6 NYCRR 666.13(C)(2)(b), note (iii), which provides that "[e]ach private dwelling or mobile home in a recreational river area must be on a lot of at least 2 acres and have, when applicable, a shoreline frontage of at least 200 feet."

In a previous denial letter dated November 17, 2005, Department Staff stated that in the past, variances for undersized lots had been granted if one of two conditions were met: first, if the lot was already subdivided prior to the enactment of Article 15 and was in single and separate ownership; or, second, if the proposed subdivided lots conformed to the character of the immediate neighborhood. Department Staff contended that because the subject property was not yet subdivided, it could not satisfy the first condition. Department Staff asserted further that in order to meet the second condition, Applicants were required to average the lot size for all residentially developed lots in a 500' radius of the subject property. According to Department Staff, the average provided by Applicants of residential lots within a 500' radius of the subject property is 1.27 acres, and the average of the two proposed lots is 1.05 acres, which Department Staff contended

would not conform to the neighborhood's character, and thus would not meet the second condition's requirements.

Pursuant to Section 624.9(b)(1), Applicants have the burden of proof to demonstrate that their proposal will comply with all applicable laws and regulations administered by the Department. Section 624.9(c) provides that "[w]henever factual matters are involved, the party bearing the burden of proof must sustain that burden by a preponderance of the evidence."

DISCUSSION

Applicants contended that the proposed subdivision would conform to the character of the area, and that any physical or environmental impact on the Nissequogue Recreational River corridor would be negligible. Applicants observed that the area surrounding the proposed subdivision is almost completely developed, primarily with single family dwellings situated on lots smaller than the lots Applicants proposed. According to Applicants, 87% of the lots within a 500 foot radius of the subject parcel are less than two acres, and thus do not meet the two-acre requirement set forth in the use guidelines at 6 NYCRR Section 666.13(C)(2)(b), note (iii). In Applicants' view, the presence of four larger conforming lots, including the subject parcel, "significantly skews the average lot size of the neighborhood." Applicants' Post Adjudicatory Hearing Brief (hereinafter "Applicants' Brief"), at 7.

Specifically, Applicants noted that there are thirty-one lots developed with single-family dwellings within a 500 foot radius of the property. Applicants acknowledged that those lots have an average size of 1.27 acres, while the average of the two lots proposed would be 1.05 acres, but emphasized that only four of the thirty-one lots conformed to the 2.0 acre minimum size. Applicants noted further that fifty-five percent of the homes within a 500 foot radius of the subject parcel are on exactly one acre of land. Concluding that the four larger lots are atypical of the neighborhood and cannot be used to determine the area's true character, Applicants argued that the 1.0 acre lots are the most common size and are therefore characteristic. As a result, according to Applicants, the proposed subdivision would be consistent with lot sizes in the rest of the neighborhood.

Applicants emphasized that the subject parcel is approximately 1,000 feet from the Nissequogue River, and cannot be seen from the River. In addition, Applicants noted that every parcel between Applicants' property and the River is developed with single-family residences. Applicants went on to observe

that the proposed subdivision would be well within both the minimum acreage requirements pursuant to the Town of Smithtown zoning laws, as well as Suffolk County Department of Health standards for sanitary flow.

Applicants pointed out that Suffolk County owns a parcel of land south of Applicants' property. According to Applicants, portions of that parcel are closer to the River than Applicants' property, and includes County office buildings, a police station, and storage structures, as well as a leach field assigned to Suffolk County Sewer District No. 22. In light of the existing development in the area, Applicants argued that if the proposed subdivision were allowed, "[f]or all intents and purposes, the River Corridor would remain unchanged." Applicants' Brief, at 10.

In response, Department Staff maintained that the proposed subdivision would alter the character of the neighborhood by eliminating conforming lots and increasing housing density. According to Department Staff, "[t]he conforming lots are a major factor which determine the character of the area, without them, the character of the area will drastically change." Department Staff's Reply Brief, at 1.

Applicants' argument that one-acre lots are more representative of neighborhood character than the two-acre lots required by the regulations is valid. The area between the subject parcel and the Nissequogue River is developed with houses on lots primarily of slightly more than one acre. On this record, a change in neighborhood character, or a detriment to nearby properties, has not been established.

Nevertheless, Department Staff's assertions with respect to increased housing density are relevant to the potential environmental impacts that would result if the subdivision were allowed. Applicants maintained that the construction of one additional home in an area already developed with single-family dwellings on similar sized lots, as well as existing streets and public utilities, would not result in any appreciable adverse physical or environmental impact. In Applicants' view, there would be no significant increase in housing or population density, and Applicants argued that their witness's testimony established that any environmental impact would be inconsequential.

With respect to this factor, Applicants did not effectively refute Department Staff's evidence to the contrary. In this proceeding, the regulations require Applicants to demonstrate

that the proposal will be consistent with the purposes and policies of the Wild, Scenic and Recreational Rivers System Act, and will not have an undue adverse environmental impact. Section 666.8(f)(1) and (2). Applicants must also show that recreational river resources will be protected. Section 666.8(f)(2). Although Applicants argued that the increased density as a result of the proposed subdivision would be insignificant, the impact on river resources and the environment must be evaluated in light of the express language of the regulations and the statute that gives priority to the preservation and protection of those resources. On this record, the increase in density is not warranted in light of the corresponding environmental impacts.

The WSRR DEIS discussed the potential impact on the residential construction industry in designated river areas on Long Island. WSRR DEIS, at 25. The WSRR DEIS states that

"[t]he Long Island rivers pose an interesting political problem. As open space and "wild" values become more scarce, these values become more valuable to citizens and local governments. Therefore, rivers that in other parts of New York might not be considered appropriate additions to the Rivers System, on Long Island have been fiercely protected.

At the same time that these rivers and their accompanying river areas are valued for addition to the Wild, Scenic and Recreational Rivers System, these river areas are also highly valued for commercial and residential development. These river areas are seen as representing some of the last available developable land in Suffolk County. Most of the development activity which might have taken place in these river areas will not now take place. It is difficult to make an accurate assessment of the economic cost of losing development activity for which there is presently zoning but which will not now take place due to the Rivers System regulations. In addition, in computing that economic benefit foregone one must also compute as an offset the community costs which might have accompanied the development.

A rough gauge of economic value is the price of an acre of land. Much of the land along

the Rivers System rivers in Long Island is zoned for development at one dwelling unit per acre. When the regulations increase the minimum lot size from one acre to two acres on a recreational river . . . and force the development back from the river proper, the regulations increase the cost of development.

However, the legislature has already made the judgment that the public values associated with the protection of the rivers and their river areas are so important that those public values outweigh the economic dislocation of reduced development opportunity."

Id. at 25-26. As this language makes clear, the detriment associated with decreased development in an area surrounding a recreational river such as the Nissequogue was considered at the time the regulatory scheme was enacted. Despite this detriment, a determination was made that protection of the recreational river corridor and the values associated with that protection take precedence over increasing density in a situation such as this one, where an applicant seeks to subdivide an existing, conforming parcel.

Applicants did not effectively refute Department Staff's evidence in this regard. Department Staff provided credible testimony by its witness, Robert Marsh, that the variance sought would have an adverse impact on physical and environmental conditions in the river corridor. As Department Staff's witness testified, placing two homes on the parcel where there is only one home at present will double the density, with a corresponding increase in traffic, noise and light pollution, and would lower the aesthetic and scenic qualities of the area. Tr. at 96, 97, 100. Mr. Marsh stated that the two-acre minimum lot size restriction "helps protect the River and the River resources from a myriad of impacts from high density development." Id. at 93.

Mr. Marsh testified that two-thirds of the lot is naturally vegetated, and that most of that vegetation would be cleared if a new single family dwelling were placed on the subdivided lot. Tr. at 96. According to Mr. Marsh, wildlife habitat would be lost if this vegetation were removed. Id. He went on to state that sanitary effluent from the additional dwelling would reach groundwater, and could potentially reach surface water nearby. Id. Mr. Marsh noted that lawns attract nuisance wildlife, and lead to the use of fertilizers and pesticides which can run off

to surface waters. Id. The witness testified that fertilizer can also give a competitive advantage to invasive species, and ornamental gardens can introduce such species, which then spread to natural areas. Id. at 97-98.

According to Mr. Marsh, the mouth of the Nissequogue River is a productive shellfishery which has been closed to harvesting because of pollution from native wildlife, livestock such as horses, and sanitary systems. Id. at 96-97. He went on to observe that the Nissequogue is breeding trout waters for native species of brook trout. Id. at 98. The witness testified that as impermeable surfaces increase, there is a corresponding increase in temperature in water runoff, which can potentially raise the River temperature and lead to fish kills. Id. Impervious surfaces also increase the amount of recharge that flows directly to the River, according to the witness. Id. at 100. Mr. Marsh testified that the use of fertilizers and pesticides, as well as the increase in sanitary effluent, increases the amount of pollutants discharged to groundwater and ultimately to Long Island's sole source aquifer. Id. at 99-100.

With respect to recreational features, Mr. Marsh stated that additional houses and traffic could reduce wildlife in the area. Id. at 100. Mr. Marsh maintained that the area was currently low density changing to higher density development, and that if further subdivision were allowed, there would be "a negative impact on the cultural and historical implications of the area." Id. at 101. The witness testified further that the scientific features of the River and River area would not be protected and enhanced, stating that "[s]tudents use the River as a living laboratory By reducing water quality and changing the flora and fauna in the River, it could negatively impact this living laboratory for students." Id. at 102.

Some of the testimony offered was speculative, including testimony concerning decreased property values if the variance were granted. Tr. at 103. There was no foundation for this evidence, and accordingly it is not accorded any weight. Nevertheless, Applicants did not effectively rebut the majority of Department Staff's evidence, primarily because Department Staff's witness was more qualified than the witness Applicants offered. Although Applicants' witness, Ginny Watral, has prepared environmental assessment forms and impact statements, as well as permit applications submitted to the Department, she does not have a scientific background. Tr. at 32. Applicant's witness did not specifically address the proposal's effect on the protection and enhancement of the natural, scenic, ecological, recreational, aesthetic, botanical, geological, hydrological,

fish and wildlife, historical, cultural, archaeological and scientific features of the Nissequogue River in this location. Section 666.2(e). As a result, her testimony is afforded less weight than the testimony offered by Robert Marsh, Region One's manager of the Bureau of Habitat, who did address the impact on those features.

Department Staff also disputed Applicants' characterization of the potential for further subdivision and the cumulative impacts to be anticipated if such subdivision took place. Department Staff contended that if the subdivision at issue were permitted, and the remaining four lots which meet the two-acre minimum requirement were similarly subdivided, an additional five houses could be constructed. Department Staff's Reply Brief, at 1. Department Staff argued that if the variance were granted, the owners of the remaining four parcels of two acres or more that presently meet the acreage requirements would seek to subdivide their properties, with corresponding detrimental cumulative impacts on the River corridor. According to Department Staff, "the extraordinary value of real estate on Long Island would not preclude the tearing down of existing homes to make way for a doubling of density with newer and significantly larger homes, as has been the trend all across Long Island." Id.

Department Staff noted that the Nissequogue River was included in the Wild, Scenic and Recreational Rivers Act "in the same state of development as it exists today." Department Staff's Reply Brief, at 2. Department Staff emphasized that none of the 31 parcels Applicants identified within a 500 foot radius of the subject parcel have been subdivided since the statute was enacted. According to Department Staff, granting an area variance "for pure economic gain" to the detriment of the River and the River corridor would be inconsistent with the purpose and policies of the legislation. Id. Department Staff argued further that granting the requested variance would create a precedent for future determinations.

Applicants countered that Department Staff's concern was unfounded and not a proper basis for denial of the application, and moreover, that further subdivision applications were unlikely. In support of this argument, Applicants observed that three of the four two-acre minimum parcels contain single-family residences located near the center of the property, and that even if the existing homes were demolished, and all of the properties were subdivided, the number of houses would increase by only four. Applicants contended that such an increase would be insignificant.

The arguments by both parties on this point are essentially speculative. While it is possible that owners of other nearby lots may in the future seek to subdivide their parcels, Department Staff's arguments concerning the precedent-setting nature of the application are not compelling. The potential for further subdivision of nearby lots was not established by record evidence.

Applicants' arguments with respect to achieving the benefit sought by some other means than the proposed subdivision are not persuasive. Department Staff asserted that rather than subdivide the parcel, Applicants had the option of improving or expanding the existing dwelling, adding a horse paddock and corral, repairing the two car garage, renting the property, or building a new home on the lot. In response, Applicants pointed out that most of the alternatives advanced by Department Staff would have the same adverse environmental impacts as the proposed subdivision.

For example, Applicants noted that they would not be required to obtain a permit from the Department in order to completely clear the existing vegetation from the property. In this regard, Applicants emphasized that Department Staff's witness testified concerning the detrimental effect of clearing vegetation on birds and wildlife in the area. According to Applicants, "the granting of this subdivision would have no effect on the trees themselves, or any birds or wildlife which utilize said trees, since each one could be removed without the benefit of a permit or subdivision approval from the DEC." Applicants' Brief, at 12.

Citing to the testimony of Department Staff's witness that increasing impermeable surfaces would increase the temperature of water runoff to surface waters, potentially raising water temperature and killing off native trout species, Applicants contested the alternatives offered by Department Staff which would involve expanding the existing dwelling or building a new home on the subject parcel. Applicants asserted that "[c]learly, it would be possible without the granting of this area variance for the Applicants to construct a large addition onto the existing residence, or demolish the relatively small house and build a much larger one." Applicants' Reply Brief, at 4.

Similarly, Applicants maintained that Mr. Marsh's testimony concerning increased pollution as a result of additional horses inhabiting the parcel was undercut by Department Staff's suggestion that the property value be increased by adding a horse paddock and corral. Id. at 5. Applicants went on to note that an

area variance would not be required for Applicants to create a larger backyard and lawn which would increase the use of pesticides and fertilizer, or a larger home which would also lead to such an increase. Id. According to Applicants, Department Staff did not establish that the proposed subdivision would increase the use of fertilizers and pesticides any more than other site improvements that could be undertaken without granting the variance application. Applicants made similar arguments with respect to creating ornamental gardens on the parcel or removing existing vegetation.

Applicants concluded that

"the area variance and subdivision sought will have no more of an adverse environmental impact on the resources of the river corridor than any of the alternatives suggested by the Department. Clearly, the environmental concerns raised by the Department with respect to this application will not be resolved simply by denying the Applicants' request."

Applicants' Reply Brief, at 6. Applicants went on to assert that Department Staff failed to explain how river resources would be protected even without granting the area variance.

Although Applicants' arguments in this regard are directed toward several of the environmental impacts that Department Staff's witness enumerated, Applicants did not effectively rebut Department Staff's evidence with respect to the impacts of increased density brought about by subdividing the parcel. As discussed previously, the statute and regulations were enacted despite the recognition that imposition of a minimum lot size would hinder development. Moreover, Applicants failed to respond to Department Staff's argument that there are other properties outside the River corridor that would allow for subdivision and development. Tr. at 103-104.

Applicants offered no evidence that the environmental impacts Mr. Marsh described would not occur if the property were subdivided. Rather, Applicants argued that if the variance were denied, Applicants could undertake activities which would result in those same impacts, without approval from Department Staff. While this may be true, this proceeding is concerned with a Rivers System permit application and associated variance, which must be evaluated in light of the Rivers System statute and regulations to determine whether the proposed activity will

comply with those provisions. The fact that the regulations impose a minimum lot size, but do not prohibit activities such as clear cutting, does not render the regulation meaningless. Furthermore, it does not alter the Department's obligation to give effect to the regulation's express language.

Applicants' arguments with respect to significant economic injury also fail. At the hearing, Applicants offered the testimony of Margaret Remhild. Ms. Remhild is a licensed real estate broker, and testified that she has had occasion to value properties on many occasions during the twenty-four years that she has worked as a broker. Tr. at 41. Ms. Remhild stated that the current market value of the property, which Applicants purchased in 2005 for \$765,000, is approximately \$600,000 to \$700,000 without the benefit of the proposed subdivision. Tr. at 44. No evidence was offered as to the reason for the decline in value between 2005 and the present.

Ms. Remhild testified further that if the subdivision were approved, the lot where the existing house is located would be worth approximately \$500,000 to \$550,000, and the new vacant building lot would have a value of approximately \$375,000 to \$400,000, based upon current sales. Tr. at 48. Applicants argued that this testimony established that the proposed subdivision would be necessary in order for Applicants to gain a reasonable return on their property.

Department Staff challenged Applicants' witness, and observed that Ms. Remhild failed to provide any documentary evidence to support her testimony concerning recent sales. Department Staff pointed out that Applicants failed to demonstrate proof of income and expenditures associated with the parcel, or proof of estimated market value absent the granting of a variance. Department Staff concluded that, as a result, Applicants failed to establish any basis for their contentions with respect to a reasonable return on their investment.

Department Staff's witness, Heather Amster, testified as to the value of the subject parcel. Applicants challenged this testimony, pointing out that the witness relied primarily upon data relating to home sales in 2004. According to Applicants, "because the real estate market changes and fluctuates quickly and regularly, the market conditions of 2004 cannot, in any way, be compared to the market conditions of today." Applicants' Brief, at 13. Applicants pointed out that Department Staff's witness had not visited the neighborhood until the day of the hearing, while Margaret Remhild, Applicants' witness, viewed the subject parcel and visited the surrounding area.

Applicants' arguments that denial of the variance request would result in significant economic injury are unpersuasive. The regulation expressly provides that the evidence offered in support of a claim of significant economic injury as a result of the strict application of the regulatory provisions "will be limited to the effect of such provision(s) upon the value of the property in question; whether the value would be enhanced were a variance granted will not be relevant." Section 666.9(a)(2). As a result, the testimony of Applicants' witness with respect to the increased value of the parcel if subdivided has no bearing on the determination to grant a variance in this circumstance.

Applicants also failed to offer the necessary evidence, including supporting documentary evidence, to substantiate their offer of proof concerning potential economic injury. In Matter of Whelan, the Commissioner held that an applicant's showing with respect to "significant economic injury" was insufficient, in a factual context similar to this case. Commissioner's Decision, at 1-2; 1992 WL 406383, * 1-2 (Dec. 1, 1992). The Commissioner noted that the requisite showing "should include proof of income and expenditures associated with the property, its estimated market value absent the granting of the variance and a basis to establish a reasonable return on investment." Id. In addition, the Commissioner observed that the applicant failed to provide documentary support for the testimony offered. Id. The offer of proof by Applicants in this case is deficient in these same respects.

Moreover, Applicants' witness is a real estate broker, not a licensed appraiser, and indicated that her testimony went to market value, not reasonable return. Tr. at 48. Consequently, her testimony is not afforded significant weight with respect to this factor. In addition, Applicants did not provide evidence to demonstrate that the reduction in actual return would be due to denial of the variance, rather than economic factors such as a depressed real estate market. Matter of Whelan, ALJ's Hearing Report, at 6, 1992 WL 406383, * 6 (requiring such a demonstration where actual return would be less than reasonable return). Although, as Applicants contend, Department Staff's evidence with respect to value was not compelling, it is Applicants' burden to establish significant economic injury by offering competent financial evidence.

In this case, Applicants' witness testified that the parcel is worth some \$65,000 to \$165,000 less than at the time of purchase in 2005, and that if subdivided, the two lots combined would be worth \$875,000 to \$950,000, the variance provisions at issue in this proceeding are not intended to provide applicants

with the means of increasing property value. The regulation refers to "significant economic injury." In this case, Applicants have not carried their burden to demonstrate that such injury will result, or is significant.

Moreover, in response to a comment on the proposed increase in minimum lot size, and concerns that such an increase would exclude moderate income families from residing in river areas, the *Final Environmental Impact Statement for Statewide Wild, Scenic and Recreational Rivers System Regulations Part 666* ("FEIS") states that

"[i]n areas of the state with very high land values, such as Long Island, the Commenter's prediction of the affect [sic] of these regulations upon housing prices along the regulated rivers is probably correct. However, if there are *existing* lots in the river area which are undersized property owners will be permitted to apply to a variance to build upon these parcels."

FEIS, at 21-22 (Jan. 1986) (emphasis supplied). As this response to comments makes clear, the variance provisions are intended to allow owners of existing undersized lots in a recreational river corridor to apply for a permit to build. While the regulation is not expressly limited to such circumstances, on this record, Applicants' arguments that they will be deprived of a reasonable return on their property unless a variance is granted are not persuasive.

This is particularly true when any such detriment is self-created, as is the case here. Applicants purchased the property in 2005, and had constructive, if not actual notice of the provisions of the Rivers System statute and regulations. Although Section 666.9(a)(2)(v) indicates that a self-created practical difficulty will not preclude granting a variance, such a circumstance is a factor relevant to the Department's determination. Matter of Joachim, ALJ's Hearing Report, at 18, 20; 2007 WL _____, * __ (ALJ found that ensuring that the river corridor was protected against inappropriate development outweighed any economic injury the applicant might incur, especially since hardship was self-created).

Furthermore, the commentary in the WSRR FEIS is relevant to the inquiry as to whether the variance requested is substantial, another factor the Department must take into account. 6 NYCRR § 666.9(a)(2)(iii). In Matter of Whelan, the Commissioner adopted

the ALJ's analysis and determined that subdividing a 0.37 acre lot into two .18 acre lots would be a substantial variance within the meaning of the regulation. Decision of the Commissioner, at 1, 1992 WL 406383, * 1. The ALJ reasoned that the "substantial" inquiry is intended "to answer the questions: (1) how much does the proposed lot size differ from the regulatory requirement of two acres?, and (2) is the difference substantial?" Matter of Whelan, ALJ's Hearing Report, at 7, 1992 WL 406383, * 7.

In this case, Applicants proposed to subdivide a 2.104 acre lot into one 1.002 acre parcel and one 1.102 acre parcel. Each parcel would therefore be approximately half the size of the original parcel, and would amount to a variance of approximately fifty percent from the two-acre requirement set forth at Section 666.13(C)(2)(b), note (iii). Such a difference is substantial, and Applicants did not offer any evidence to the contrary, other than to point out that there are many other one acre lots within a 500 foot radius. As discussed above, this fact is not compelling, because Applicants' parcel is not an existing one acre lot on which they propose to build.

An applicant for an area variance has the burden to establish that the area or dimensional provisions to be varied or modified would cause the applicant practical difficulty. In construing the phrase "practical difficulty," the Court of Appeals stated that "'the basic inquiry at all times is whether strict application of the ordinance in a given case will serve a valid public purpose which outweighs the injury to the property owner.'" Matter of Sasso, 86 N.Y.2d 374, 381 (1995) (citing Matter of De Sena, 45 N.Y.2d 105, 108 (1978)). On balance, the important public values associated with the protection of recreational rivers such as the Nissequoque outweigh the disadvantage to Applicants.

The record supports Department Staff's permit denial, because of the credible evidence as to the magnitude of the variance requested, the self-created nature of the hardship, Applicants' failure to show significant economic injury or that the benefit could not be achieved by some other means, and the detrimental environmental impacts to be anticipated if the variance were granted. These factors are more compelling than Applicants' evidence with respect to the lack of adverse impacts on neighborhood character.

RECOMMENDATION

Applicants failed to meet their burden to show that they are entitled to an area variance. The permit application should therefore be denied.