

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
Pursuant to Article 24 of the Environmental
Conservation Law and Part 663 of Title 6 of the
Official Compilation of Codes, Rules and Regulations
of the State of New York ("6 NYCRR")

- by -

VINCENZO ANZISI,

Applicant.

Permit Application No. 1-4720-03455/00001

DECISION OF THE COMMISSIONER

December 17, 2008

DECISION OF THE COMMISSIONER

Vincenzo Anzisi (the "applicant") filed an application for a freshwater wetlands permit with the New York State Department of Environmental Conservation (the "Department") for the construction of a single-family residence and associated activities on property located at 445 Idaho Street, Village of Lindenhurst, Suffolk County (the "project"). The project is located entirely within the boundaries of Class I freshwater wetland BW-4.

Department staff made a determination to deny the application and the applicant requested a hearing. Following referral to the Office of Hearings and Mediation Services in 2008, the matter was assigned to Administrative Law Judge ("ALJ") Susan J. DuBois. The attached hearing report of ALJ DuBois, which recommends denial of the application, is adopted as my decision in this matter.

In proceedings conducted pursuant to the Department's Part 624 permit hearing procedures, the applicant bears the burden of proof to demonstrate that its proposal will be in compliance with all applicable laws and regulations administered by the Department (see 6 NYCRR 624.9[b][1]). Whenever factual matters are involved, the party bearing the burden of proof must sustain that burden by a preponderance of the evidence unless a higher standard has been established by statute or regulation (see 6 NYCRR 624.9[c]).

To receive a freshwater wetlands permit from the Department, an applicant is required to demonstrate that a proposed project is compatible with the policy of the Freshwater Wetlands Act to preserve, protect and conserve freshwater wetlands and prevent their despoliation and destruction (see Environmental Conservation Law 24-0103). Here, because applicant's proposed project would result in the permanent loss of part of a Class I freshwater wetland, the Department may issue a permit in only the most unusual circumstances and the project must satisfy stringent permit issuance standards designed to protect this natural resource (see 6 NYCRR 663.5[e][2]).

As the ALJ's hearing report details, applicant failed to establish by a preponderance of the evidence that the proposed project could satisfy the standards for permit

issuance. For example, the applicant did not present evidence that contested Department staff's evidence concerning the values of this Class I wetland or the adverse environmental impacts of the proposed project on the wetland (see, e.g., Hearing Transcript, at 65-73 [Department staff discussion of, among other things, the proposed project's impact on wetland wildlife habitat, stormwater and flood control, and wetland filtration capability]).

In sum, the record in this proceeding demonstrates that applicant failed to carry his burden of establishing that the proposed project would comply with all applicable laws and regulations administered by the Department. Accordingly, the application for the proposed project is denied.

For the New York State Department
of Environmental Conservation

/s/

By:

Alexander B. Grannis
Commissioner

Albany, New York
December 17, 2008

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1550

In the Matter

- of -

the Application for a
Freshwater Wetlands Permit pursuant to
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and part 663 of title 6 of the
Official Compilation of Codes, Rules
and Regulations of the State of New York

- by -

VINCENZO ANZISI,

Applicant.

Permit Application No. 1-4720-03455/00001

HEARING REPORT

- by -

/s/

Susan J. DuBois
Administrative Law Judge

PROCEEDINGS

Vincenzo Anzisi (the Applicant), P.O. Box 3400, South Farmingdale, New York 11735, applied for a permit from the New York State Department of Environmental Conservation (DEC or the Department) for construction of a house, a driveway and a cleared yard at 445 Idaho Street in the Village of Lindenhurst, Town of Babylon, Suffolk County, New York. The application is DEC Application Number 1-4720-03455/00001.

The project would require a freshwater wetlands permit pursuant to Environmental Conservation Law (ECL) article 24 and part 663 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR part 663). The project site is within freshwater wetland BW-4.

Pursuant to ECL article 8 (State Environmental Quality Review Act, SEQRA) and 6 NYCRR part 617, the staff of the Department of Environmental Conservation (DEC Staff) determined that the proposed project is a Type II action (see, 6 NYCRR 617.5[c][9]) and that the project is not subject to review under SEQRA.

A notice of complete application was published in the South Bay's Newspaper on August 8, 2007 and in the DEC's Environmental Notice Bulletin (an internet publication) on August 1, 2007. DEC Staff received a comment from the Town of Babylon Department of Environmental Control, opposing the application. DEC Staff had received an earlier (July 30, 2007) letter from the Mayor and Deputy Administrator of the Village of Lindenhurst, also opposing the application.

On November 28, 2007, DEC Staff denied the application. On December 1, 2007, the Applicant requested a hearing on the denial. DEC Region 1 referred the application to the Department's Office of Hearings and Mediation Services (OHMS) on March 10, 2008 to schedule a hearing. At approximately the same time that the Anzisi application was sent to OHMS, DEC Region 1 also referred for hearing the application of Francesca Scaduto for a freshwater wetlands permit for construction of a house on 425 Idaho Street, Lindenhurst which is the lot next door to 445 Idaho Street. When I contacted Mr. Anzisi about arrangements for the hearing, he asked whether the hearing would be on both projects. On April 7, 2008, a conference phone call took place among both Applicants, the Administrative Law Judges (ALJs) assigned to both hearings, and Kari Wilkinson, Esq., Assistant Regional Attorney in DEC Region 1. During the conference call, both Applicants stated they favored having a joint hearing on the two applications. The applications remain separate applications, with separate hearing reports and decisions, but the hearing was

on both applications and the record in both matters includes the same transcript, exhibits and briefs.

The notice of complete application for Application No. 1-4720-03455/00001 identifies the applicant as Angelo Anzisi, and this name appears as the name of the applicant on other correspondence sent by DEC Staff concerning this application. The notice of permit denial was addressed to Angelo Anzisi and refers to the name and address of Ms. Scaduto's project. On July 7, 2008, I wrote to Ms. Wilkinson and Vincenzo Anzisi, with a copy to Ms. Scaduto, and confirmed that the correspondence that DEC Region 1 included with the hearing referral that I received all pertains to the application of Vincenzo Anzisi, Application No. 1-4720-03455/00001, 445 Idaho Street. No one contested this statement. Vincenzo Anzisi had informed me on March 19, 2008 that Angelo Anzisi is his father, who had applied to DEC for a permit at a site on a nearby street.

The notice of hearing was published on June 4, 2008 in the Environmental Notice Bulletin and on June 18, 2008 in the South Bay's Newspaper.

The hearing took place on July 31, 2008 at the West Babylon Public Library, 211 Route 109, West Babylon, New York. The hearing took place before ALJ Susan J. DuBois (the undersigned), who was assigned to the hearing on the Anzisi application, and ALJ Richard A. Sherman, who was assigned to the hearing on the Scaduto application. No persons, organizations or government agencies requested party status to participate in the hearing, and the parties to the hearing were the applicants and DEC Staff.

The Applicant represented himself in the hearing and testified. Ms. Scaduto also represented herself and testified. DEC Staff was represented by Ms. Wilkinson. One witness testified on behalf of DEC Staff: Robert F. Marsh, Regional Manager of the Bureau of Habitat, DEC Region 1.

One person presented a comment at the start of the hearing, over the objection of the Applicant who objected on the basis that the person had arrived after the public comment (also known as legislative hearing) portion of the hearing had been closed. The comment was allowed by the ALJs, and was presented by Douglas Madlon, Deputy Administrator of the Village of Lindenhurst. Mr. Madlon stated that the Village supported DEC's denial of the application and that the project site is very close to Santapogue Creek. Mr. Madlon stated that the Village had dealt with flooding from this stream for years and that further development as close to the stream as the proposed project would have a

serious effect on storm water runoff. The Village of Lindenhurst did not request party status to participate in the adjudicatory portion of the hearing and no Village employee presented sworn testimony.

The ALJs and representatives of the parties made a site visit on July 31, 2008, immediately prior to the adjudicatory portion of the hearing.

Following a problem with mail delivery of the transcript, the transcript was received at the Office of Hearings and Mediation Services (OHMS) on October 6, 2008. A written closing statement submitted by both Mr. Anzisi and Ms. Scaduto was also received at OHMS on October 6, 2008. The written closing statement by DEC Staff was received by OHMS on October 7, 2008. On October 8, 2008, ALJ Sherman notified both Applicants that the hearing record was closed.

POSITIONS OF THE PARTIES

The Applicant

The Applicant stated that other homes in the immediate area of the site, including 440 Idaho Street immediately across the street from his site, are along Santapogue Creek and some are closer to the creek than his proposed house. He stated that prior to purchasing the site, he had contacted the Village of Lindenhurst, the Suffolk County Clerk's office and DEC and was told by each of those agencies that there were no restrictions on either his site or that of Ms. Scaduto.

DEC Staff

DEC Staff stated that, in order to meet the standards for issuance of a permit, the Applicant would need to show that his proposal would satisfy a compelling economic or social need and that this need clearly and substantially outweighs the loss or detriment that the project would cause to the wetland. DEC Staff stated that the wetland is a Class I wetland (afforded the greatest protections under the law) and the project would adversely affect the entire wetland system.

ISSUES FOR ADJUDICATION

The proposed project would involve constructing a single family dwelling, clearing vegetation, grading, and filling within

a regulated freshwater wetland, all of which are identified by 6 NYCRR 663.4(d) as incompatible with freshwater wetlands. The issues identified for adjudication were whether the proposed project meets the weighing standards set forth in 6 NYCRR 663.5(e) (2).

FINDINGS OF FACT

1. The site of the proposed project is a lot located at 445 Idaho Street, in the Village of Lindenhurst, Town of Babylon, Suffolk County, New York. The lot is designated as Suffolk county Tax Map #0103-016-04-48 and is owned by Vincenzo Anzisi (the Applicant). It is approximately 101 feet by 107 feet in size (Exhibit [Ex.] 2).

2. The site is on the south side of Idaho Street. Santapogue Creek is located immediately east of the site, and no additional lots lie between the site and the creek. 425 Idaho Street, owned by Francesca Scaduto, is located immediately west of the site. 440 Idaho Street, on which a house was constructed while the Applicant was considering purchasing land in the area, is immediately across Idaho Street from the site. Vermont Street is south of Idaho Street. A larger lot on the north side of Vermont Street, which lot also borders the creek, is located immediately south of both 445 and 425 Idaho Street (Ex. 9). A house exists on this lot on Vermont Street (Exs. 4 and 9).

3. Santapogue Creek runs approximately from north to south in the area of the site and has wetland along much of its length. The wetland is designated on the New York State Department of Environmental Conservation (DEC) Freshwater Wetlands Map for Suffolk County as wetland BW-4 (Ex. 3). All of the Applicant's site is within wetland BW-4. Wetland BW-4 is a Class I wetland (Ex. 2; Transcript [Tr.] 48 - 61).¹ Of the four classes of wetlands described under 6 NYCRR parts 663 and 664, Class I wetlands provide the most critical of the State's wetland benefits (see, 6 NYCRR 663.5[e] and 664.4[a]). The majority of Ms. Scaduto's lot is in wetland BW-4 (Ex. 1; Tr. 48 - 61).

4. In the early 2000's, the Applicant was considering purchasing 440 Idaho Street, which was for sale. He did not

¹ The hearing transcript contains two sets of page numbers. This report's citations to the transcript correspond to the page numbers that appear at the far right and above line "1" on the pages of transcript text.

purchase the property, but later noticed that 440 Idaho Street was being cleared and fill was being brought in. The Applicant then contacted the owner of 445 and 425 Idaho Street who no longer lived in New York State and was considering selling the parcels. The Applicant contacted Ms. Scaduto about whether she might be interested in purchasing one of the lots. The Applicant purchased the site on November 13, 2006 from Stephany Haas Cameron, Administratrix of the Estate of Johanna Haas, and Ms. Scaduto purchased 425 Idaho Street from the same seller on the same date (Tr. 22 - 24; Ex. 2).

5. On March 8, 2007, the Applicant submitted an application to DEC Region 1 for a freshwater wetlands permit. In November 2007, DEC Region 1 denied the application. The Applicant requested a hearing.

6. On April 24, 2007, Robert F. Marsh, Regional Manager of the Bureau of Habitat, and Daniel Lewis, a DEC employee, visited 445 and 425 Idaho street and marked the boundary of the wetland with four flags. The Applicant then submitted a survey that depicted the location of the flags. The vegetation was a deciduous swamp woodland, dominated by red maples (*Acer rubrum*) with some tupelo trees. The larger trees on the lots were over twelve to fourteen inches in diameter. The shrub layer was *Clethra* sp. and the understory was mostly cinnamon fern (*Osmunda cinnamomea*), plus other plants consistent with a wetland community. The soil at the two lots was hydric soil, with approximately 12 inches of organic muck over gray mineral soil. Standing water was present on both lots and water marks existed around the bases of several trees (Exs. 2, 6 and 7; Tr. 51 - 62).

7. Mr. Marsh returned to the site on July 21, 2008 with Mr. Lewis and another DEC employee and took photographs of a soil core taken on 445 Idaho Street and the vegetation on 445 and 425 Idaho Street. At the time of this visit, the soil in the wetland portion of 425 Idaho Street was so wet that it would not hold together as a sample in an auger (Ex. 8; Tr. 55 - 59, 78 - 82).

8. The proposed project would involve clearing of most of the site, although the Applicant proposes to leave an approximately 30 by 100 foot area along the rear (south) side of the lot as undisturbed wetland (Ex. 2, Tr. 37). The project would require grading and placement of an unknown amount of fill (Tr. 35, 61). It would also include construction of a two-story, one-family house with a footprint of 30 by 45 feet and construction of driveway (Ex. 2). It is unclear whether or how the house would be connected to the sewer (Ex. 2 [two surveys included in this exhibit]; Tr. 32 - 35).

9. Wetland BW-4 provides benefits in the form of storm water control, groundwater recharge, open space, and habitat for fish, turtles and migratory song birds. These benefits would be lost on the majority of the site if the project were permitted, and would be degraded on the portion of the site that would be left as wetland (Tr. 69 - 72). Clearing and filling of wetland on the site would reduce the ability of the overall wetland to hold storm water and could contribute to flooding in the area (Tr. 66 - 69).

10. The need for the project is solely the Applicant's intention to build a house and live in the Lindenhurst area, near where he works. The Applicant is a school teacher in a school in the Lindenhurst area (Tr. 29).

11. The lot across the street, at 440 Idaho Street, was cleared at some time in the early 2000s, a house was constructed on that lot and Idaho Street was extended to provide access to that house's driveway. In connection with DEC's review of that project, Mr. Marsh delineated the wetland boundary at 440, 425 and 445 Idaho Street and at the end of Idaho Street, prior to the Applicant's ownership of 445 Idaho Street. DEC determined that the clearing and construction for 440 Idaho Street were in the adjacent area of wetland BW-4, not in the wetland itself. DEC issued a permit for construction at 440 Idaho Street and later modified the permit to allow a larger driveway that the Village of Lindenhurst required for fire access (Tr. 22, 73 - 80).

DISCUSSION

Part 663 of 6 NYCRR (Freshwater Wetlands Permit Requirements) identifies the procedural requirements for approvals of various regulated activities in and adjacent to freshwater wetlands, and sets forth the standards for issuance of freshwater wetlands permits. Section 663.4 identifies whether activities require a permit, require a letter of permission, or are exempt from either requirement, and also states whether the activities are usually compatible, usually incompatible, or incompatible with freshwater wetlands or adjacent areas.

The proposed project includes clearing vegetation, placing fill, grading, and constructing a residence. All of these activities are identified in Part 663 as requiring a permit and being incompatible with wetlands (denoted as "P(X)" on the list

of activities, 6 NYCRR 663.4[d] items 23, 20, 25 and 42, respectively).²

If a proposed activity requires a permit and is identified in subdivision 663.4(d) as incompatible with freshwater wetlands, the project must meet the weighing standards set forth in 6 NYCRR 663.5(e)(2). For such activities in a Class I wetland, the standards read as follows: ".the proposed activity must be compatible with the public health and welfare, be the only practi[ca]ble 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" and "the proposed activity must minimize degradation to, or loss of, any part of the wetland or is [sic, probably "its"] adjacent area and must minimize any adverse impacts on the functions and benefits that the wetland provides."

In addition, the standards in 6 NYCRR 663.5(e)(2) provide 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."

In the present case, the Applicant did not present evidence that contested DEC Staff's evidence concerning the values of the wetland or the impacts of the proposed project. The Applicant's testimony and evidence concerning minimization of impacts was limited to his proposal to leave the rear 30 feet of his lot as wetland.

The Applicant's case relied primarily on three things: his desire to have a house in the area of the site and that he could afford on his income as a teacher; his claim that the Village of Lindenhurst, the Suffolk County Clerk's office and DEC had all

² DEC Staff cited item 23 ("Clear-cutting vegetation other than trees, except as part of an agricultural activity") but not item 22 ("Clear-cutting timber"). Item 22 is listed as P(N), meaning permit required, usually incompatible. It appears that both of these items would apply to the proposed project because trees would need to be cut in addition to cutting vegetation other than trees. The addition of item 22 would not change the fact that the project involves four activities that require a permit and are incompatible with freshwater wetlands.

told him, prior to his purchase of the site, that there were no "restrictions on the property;" and the argument that other people have houses as close or closer to Santapogue Creek than the Applicant's proposed house. In addition, the Applicant presented testimony and asked questions of DEC Staff that suggested that his site was wet because others might have removed soil from it in the past and because his neighbor to the rear had built a wall that directed runoff onto his site.

The evidence in the record does not demonstrate that the Applicant has shown a "compelling economic or social need that clearly and substantially outweighs" the loss of wetland benefits that would occur. Although building a house at an affordable price near one's job is a very reasonable goal, it is not a "compelling economic or social need that clearly and substantially outweighs" filling in a portion of a Class I wetland that is valuable for storm water control and prevention of flooding.

With respect to the need for the project, the Applicant was essentially arguing that the project is "the only practicable alternative which could accomplish the applicant's objectives." Even with regard to this portion of the standards, the Applicant did not demonstrate that the proposed construction on this site is the only practicable alternative for achieving his goal of owning a house in the area near where he works. He presented no evidence that identified the school where he works, nor the location or nature (i.e., rental, ownership or with a relative) of his current home. He also presented no evidence concerning how much it would cost to build his proposed project (including the land cost) as compared to the cost of buying an existing house. DEC Staff suggested there might be other, non-wetland lots in the area on which a house could be built, but did not prove that this is so. At the same time, the Applicant did not present proof, other than a general assertion about the scarcity of vacant lots, that other building sites or existing houses are not available.

The Applicant testified that, prior to purchasing the site, he contacted the Village of Lindenhurst, the Suffolk County Clerk's office and DEC "to see if there were any restrictions on the property" and all three agencies told him there were no restrictions (Tr. 23). Ms. Scaduto testified that the former owner of her lot told Ms. Scaduto there were "no restrictions on either parcel." Ms. Scaduto also testified that she and Mr. Anzisi contacted DEC and the Village of Lindenhurst and were told by both agencies that there were no restrictions. She testified the Village of Lindenhurst stated that "all we needed to do was

extend the road and a house would probably be able to be built" (Tr. 39).

Even if this testimony is accepted as true, it does not support a conclusion that a permit should be issued to the Applicant. Although not stated in terms of a legal theory, the Applicant is essentially making an argument about equitable estoppel. Black's Law Dictionary, 8th Edition (2004) defines equitable estoppel as "[a] defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way." The Applicant argued that a DEC employee told him there were no restrictions on the lot and the Applicant suggested, although he did not specifically state, that DEC should be bound by that statement and should allow his project to be built.

Estoppel, however, cannot be invoked against a government agency to prevent it from discharging its statutory duties (Schorr v New York City Dept. of Hous. Preserv. and Dev., 10 NY3d 776 [2008], New York State Med. Transporters Assn., Inc. v Perales, 77 NY2d 126 [1990]). The Court of Appeals' decision in Wedinger v Goldberger (71 NY2d 428,440-441 [1988]) refused to equitably estop DEC from enforcing a freshwater wetland designation that was absent from an earlier version of its wetlands map for Richmond County, a more formal DEC statement than the conversation relied on by the Applicant in the present hearing.

Even if equitable estoppel applied to DEC's jurisdiction or decision in this hearing, the evidence in the record does not support a finding that a DEC representative told the Applicant, prior to his purchase of the site, either that construction of a house on the site did not require a freshwater wetlands permit or that, if one were required, a freshwater wetlands permit would be issued for the Applicant's project. The record also does not support a finding that Ms. Scaduto was told similar information.

The testimony provided by the Applicant and Ms. Scaduto in support of their position was very general and was not persuasive. It is also contrary to evidence concerning the Village's and DEC's actions prior to and after the Applicant's purchase of his lot.

Initially, the Applicant could not remember the name of the DEC employee with whom he spoke about whether there were restrictions on the property, and he said he had not written down

the DEC employee's name. Later, during Ms. Scaduto's testimony, he said he remembered that the DEC employee's name was Karen Westerland (Tr. 35 - 36, 42 - 43). Mr. Marsh identified this name as being the name of a DEC employee (Tr. 86).³ Ms. Scaduto testified that she had written down the name of the DEC employee with whom she had spoken, but that she didn't bring the name with her to the hearing. She did not remember the DEC employee's name, but when Mr. Anzisi mentioned Karen Westerland, Ms. Scaduto said the name sounded familiar (Tr. 42 - 43). It is surprising that she did not know the name or bring the name to the hearing with her, in view of how important this interaction was to her case.

Prior to purchasing their lots, neither the Applicant nor Ms. Scaduto had obtained anything in writing from DEC about a lack of restrictions on the lots. There is almost no testimony or other evidence concerning what the Applicant or Ms. Scaduto asked the person they spoke with at DEC, or what that person's response was, other than asking were there any restrictions and DEC saying there were none. In response to a question from Ms. Wilkinson, about whether Mr. Anzisi had requested anything in writing from Ms. Westerlind when he spoke with her, Mr. Anzisi testified, "She said she had nothing available. The person that I spoke to said they had nothing available because the property was never delineated, there was nothing on the properties" (Tr. 43).

The Applicant offered no evidence concerning the identity of any Village of Lindenhurst representative with whom he spoke, nor any specifics about what was asked or the response.

The Applicant testified that, in the early 2000s, he "went to Lindenhurst Village to find out what the situation was with [440 Idaho Street] and I was told the issue with the property was that the road needed to be extended and that it was not allowed to be extended by the State" (Tr. 22).

The Applicant testified that he applied to DEC for a permit because the owner of 440 Idaho Street told him he might need to do so before beginning work. The Applicant testified that, in response to his application, DEC Staff told him the wetland at his site had never been delineated before and that someone had to

³ The transcript reports the name as "Karen Westerland" both in the testimony of the Applicant and that of Mr. Marsh. A person named Karen Westerlind works in the DEC Region 1 office, in the Division of Environmental Permits.

come out and check the property (Tr. 24). This testimony is partially contradicted by Mr. Marsh's testimony about an earlier wetland delineation done in connection with the permit for 440 Idaho Street, and his testimony that delineations are usually valid for three to five years (Tr. 73 - 75, 77). Mr. Marsh's testimony is more credible on this subject, if for no other reasons than Mr. Marsh's familiarity with the wetlands permit process and his role in the earlier delineation. The approximate boundary of the wetland at the site is also shown on the freshwater wetlands map (Ex. 3) that was promulgated in 1993.

The Applicant argued that other houses in the area of his site are closer to the creek than the house he proposes to build. Mr. Marsh testified that the house and yard at 440 Idaho were built in the adjacent area of the wetland, not in the wetland itself, and the Applicant did not contradict this other than to suggest it was suspicious that this construction somehow fit perfectly within a non-wetland area. Other than a mention by Mr. Marsh that an unspecified house or houses might have been built 20 or 30 years ago (Tr. 77), the record does not indicate the age of the other houses, whether they were built before or after the Freshwater Wetlands Act went into effect, nor whether they were built pursuant to freshwater wetlands permits.

The site is clearly within a freshwater wetland. The size of the trees on site and the extent of muck soil indicates that it is an established wetland, not one that might have been created recently due to drainage changes on neighboring lots or other disturbances (Tr. 61 - 62, 80 - 81). The neighbor's retaining wall might have contributed to accumulation of water, but the record does not support a conclusion that such runoff created the wetland on the site.

Although the parties did not make arguments concerning how sanitary wastes from the house would be dealt with, the application materials are unclear with regard to whether or how the house would be connected to the sewer. Exhibit 2 includes two surveys of the lot and the proposed house, both dated June 14, 2007. One contains a note saying "no sewer availability on this lot" and the other contains a note saying "no spur location available on this lot." The latter survey has a faint line, labeled with the letter "S," drawn between the proposed house location and the edge of the lot near its northwestern corner. The Applicant testified that there are sewers in the area and that he assumed the "S" is for sewers. He was not familiar with the note about a "spur location" and did not know who had put the notes on the surveys (Tr. 32 - 35). If the Commissioner decides to issue the requested permit, I recommend that the decision

require the Applicant to show that arrangements for connection to the sewer have been made with the relevant sewer agency or authority, prior to the permit becoming effective.

CONCLUSIONS

1. The activities proposed in the application require a freshwater wetlands permit from DEC pursuant to Environmental Conservation Law article 24 and 6 NYCRR part 663. All of the activities are proposed to take place within freshwater wetland BW-4, a Class I wetland. All of the activities are incompatible with freshwater wetlands (see, 6 NYCRR 663.4[d]) and therefore must meet each of the Class I standards in 6 NYCRR 663.5(e)(2) in order for the permit to be issued.

2. The activities proposed in the application do not meet the applicable standards. The proposed project would not be compatible with the public welfare in that it would adversely affect the storm water storage function of the wetlands on site, as well as other functions, and would cause the loss of the majority of the wetland on the site. The need for the project is not a compelling economic or social need that clearly and substantially outweighs the loss of or detriment to the benefits of the Class I wetland.

RECOMMENDATION

I recommend that the application be denied. If the Commissioner disagrees with this recommendation, I recommend that the permit include a condition regarding the sewer connection as outlined above.