

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violation of Article 25  
of the Environmental Conservation Law ("ECL") of  
the State of New York and Title 6 of the Official  
Compilation of Codes, Rules and Regulations  
("6 NYCRR") of the State of New York, Part 661,

RULING  
Case No. R2-20070213-73

by

DANIEL AQUILANTE & KATHY AQUILANTE,

Respondents.

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PROCEEDINGS

Department staff brought this enforcement matter in 2008 alleging that respondents violated the tidal wetlands regulations by constructing an addition to property they own at 60 West 17<sup>th</sup> Road, Broad Channel, New York (site) without a tidal wetlands permit. Department staff alleges that the site is located in a tidal wetlands adjacent area and the applicable regulations require a permit for such activity.

Department staff previously moved for an order without hearing in 2008 and the motion was denied as a question of fact remained (see Letter Ruling, Dec. 17, 2010). The matter was adjourned in January 2011 while the parties attempted a mediated settlement. Those discussions failed to reach a resolution of the matter.

Respondents now move to dismiss the proceeding alleging that because the site is not located in a tidal wetland or its adjacent area, the Department does not have jurisdiction over the site. Department staff opposes that motion and again moves for an order without hearing.

Respondents served the motion to dismiss the alleged tidal wetlands regulations violations on the Department on or about March 31, 2011. Respondents support their motion with a memorandum of law and an affidavit of respondent Daniel Aquilante. Department staff opposed the motion and served its motion for order without hearing on or about May 1, 2011. Department staff served with the motion, and in opposition to respondents' motion, affidavits of Regional Permit Administrator John Cryan, and Andrew Walker, Marine Biologist 1 as well as a

memorandum of law. Respondents oppose Department staff's motion by memorandum of law and affidavit of respondent Daniel Aquilante dated May 19, 2011.

## BACKGROUND

The Department contends that respondents violated the tidal wetlands statutes and regulations by constructing a horizontal addition to their residence located at 60 West 17<sup>th</sup> Road, Broad Channel, New York in a tidal wetlands adjacent area without a tidal wetlands permit. The site is located on a waterfront parcel abutting Jamaica Bay. The site, according to Department staff, is mapped as a tidal wetland adjacent area on the official tidal wetland map, panel 598-494.<sup>1</sup> Environmental Conservation Law §25-0401(2) and 6 NYCRR part 661 require a permit for the excavation, placement of fill and erection of structures within a wetland or adjacent area.

Andrew Walker, Marine Biologist 1 with the Department inspected the site on February 7, 2007 and observed excavation and fill placement at the site. He searched Department records and found that no tidal wetlands permit had been issued by the Department for the work being performed.

There is no dispute that respondents began construction of an expansion to the residence located on the site and the construction resulted in excavation and placement of fill. It is also undisputed that no permit was issued for the project. The question is whether the site is located in a regulated tidal wetlands adjacent area.

## POSITION OF THE PARTIES

### **DEPARTMENT STAFF**

Department staff argues that the area comes under the jurisdiction of the tidal wetlands regulations from both the east and west sides of the site. Title 6 of NYCRR part 661 defines adjacent area as follows:

(1) Adjacent area shall mean any land immediately adjacent to a tidal wetland within whichever of the following limits is closest to the most landward tidal wetland boundary, as such most landward tidal wetlands boundary is shown on an inventory map:

(i) 300 feet landward of said most landward boundary of a tidal wetland, provided, however, that within the boundaries of the City of New York this distance shall be 150 feet (see figure 1); or

(ii) to the seaward edge of the closest lawfully and presently existing (i.e., as of August 20, 1977), functional and substantial fabricated structure (including, but not limited to, paved streets and highways, railroads, bulkheads and sea walls, and rip-rap walls) which lies generally parallel to said most tidal wetland

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<sup>1</sup> I take official notice of the official Tidal Wetlands map, panel 598-494.1 referenced by Department staff in its motion papers.

landward boundary and which is a minimum of 100 feet in length as measured generally parallel to such most landward boundary, but not including individual buildings (see figure 2); or

(iii) to the elevation contour of 10 feet above mean sea level, except when such contour crosses the seaward face of a bluff or cliff, or crosses a hill on which the slope equals or exceeds the natural angle of repose of the soil, then to the topographic crest of such bluff, cliff, or hill (see figures 3 and 4). Pending the determination by the commissioner in a particular case, the most recent, as of the effective date of this Part, topographical maps published by the United States geological survey, Department of the Interior, having a scale of 1:24,000, shall be rebuttable presumptive evidence of such 10 foot elevation.

(2) Adjacent area shall not include any area lying landward of an imaginary line drawn between the seaward edges of two existing (i.e., as of August 20, 1977) substantial fabricated structures which constitute the landward limit of an adjacent area, as provided in subparagraph (ii) of this subdivision, where the area landward of such imaginary line does not have located thereon any such fabricated structures and where such imaginary line is less than 100 feet in length, as measured generally parallel to the most landward limit of the tidal wetland involved (see figure 5). (6 NYCRR 661.4[b])

The site is a rectangular parcel measuring 100 feet north to south, by approximately 155 feet east to west (see Survey, Jan. 26, 2009 Response to Motion for Order without Hearing, Exh 11). The south and west sides abut Jamaica Bay, which is mapped at the site as a tidal wetland on the official tidal wetlands map, parcel number 598-494. (Walker 2008 affidavit, ¶7 & 8.) The north side runs parallel to West 17th Road.

The site consists of two tax lots. The eastern lot (Tax lot #1) is 125 feet east to west, and 100 feet north to south. The western lot (Tax lot #120) is 30 feet east to west, and 100 feet north to south (see Survey). Lot 120 contains intertidal marsh and shoal mudflats.

A bulkhead runs east to west for approximately 157 feet across both lots. The bulkhead runs parallel to and about 60 feet south of West 17th Road (see Plan View [12-15-93], 2011 Motion to Dismiss, Exh 3). At the south-west corner, the bulkhead turns north and runs about 50 feet towards West 17th Road.

The bulkhead was legally in existence in 1977 and was replaced by respondents, with a DEC permit, in 1994. That bulkhead was previously the subject of an enforcement proceeding in which Department staff alleged that respondent Daniel Aquilante did not comply with the bulkhead replacement permit terms when he replaced the bulkhead in 1994. Specifically, staff alleged that he failed to install weep holes in the bulkhead as required in the permit. The prior enforcement proceeding was resolved through a consent order (see Consent Order [8-19-99], 2008 Motion for Order without Hearing, Walker Affidavit, Exh D).

In support of its present motion, Department staff argues that the western portion of the bulkhead was not “functioning” in 1994. Accordingly, Department staff asserts that the western bulkhead no longer serves as the eastern border of the wetland on Lot 120, as provided for in 6 NYCRR 661.4(b)(1)(ii). Instead, staff asserts that tidal wetland adjacent area extends 300 feet to the east of the western bulkhead pursuant to 6 NYCRR 661.4(b)(3) (see also 6 NYCRR 661.4[b] figure 6).

As evidence that the bulkhead was no longer functioning in 1994, staff submits a letter from Department biologist Michelle Moore dated April 22, 1994 to respondent’s consultant at the time, which states the bulkhead was not functioning. Department staff also relies on photos of the site in 1994 evidencing that the bulkhead was not keeping water on the water side and land on the land side. The photos attached to the Walker 2011 affidavit (at 2) allegedly show water on the landward side of the bulkhead in 1994, before respondents replaced it. Staff also points to the weep hole requirement as further evidence that bulkhead was not functioning in 1994.

Department staff also argues for the first time in this proceeding, that jurisdiction can also be established at the site when viewed from the eastern side of the property. Staff notes in its memorandum of law attached to the 2011 motion for order without hearing, when viewing the site from the eastern boundary in conjunction with the official tidal wetlands map, tidal wetlands exist to the east of the construction area. Andrew Walker’s April 2011 affidavit notes that the wetlands map has intertidal marsh to the east of respondent’s home, making two curves from west to east, including an area arching north and “significantly landward of where an imaginary extension of where the bulkhead line would be.” (Walker Affidavit, at 10.) When such intertidal marsh is found landward of an existing and functioning manmade structure, the adjacent area is measured as follows:

“Where land lies within the boundaries of an adjacent area described by subparagraph (i) or subparagraph (iii) of this subdivision but appears to be excluded from an adjacent area by subparagraph (ii) of this subdivision or paragraph (2) of this subdivision, such land shall be deemed to be part of an adjacent area.” (6 NYCRR 661.4[b][3]). Section 661.4(b)(3) does allow the regional permit administrator discretionary authority to exclude such land meeting that definition from adjacent area, but the affidavit of Region 2 regional permit administrator John Cryan demonstrates that no exclusion was given to this property.

## **RESPONDENTS**

Respondents move to dismiss the alleged violations arguing that the site is not subject to the tidal wetlands regulations. As noted above, adjacent areas is defined at 6 NYCRR 661.4(b)(1) and references the closest man-made structure in determining adjacent area. The closest man-made structure to the tidal wetlands adjacent to the site is respondents’ bulkhead. (Aquilante Affidavit [5-19-11], ¶ 2) The bulkhead existed in 1977 and allegedly functioned during the 1990s, including during a severe storm that hit the area in 1992. Respondents argue that pursuant to the applicable regulations, the regulations do not apply to the site because the bulkhead was a functioning bulkhead since 1977 and that the bulkhead was functioning in 1994 or a permit to replace it would not have been issued. They argue that Ms. Moore’s 1994 letter is

not sufficient proof that it was not functioning. They further argue that the weep hole requirement the 1994 permit does not prove the bulkhead was not functional, because staff dropped the requirement in the 1999 consent order.

Also, respondents contend that the site is excluded from the jurisdiction of the wetlands regulations based upon the Department issued guidance document, DFW-1 issued in 2010. The guidance document states, in part: “The intent of this guidance is to facilitate consistent determinations regarding the functionality of legally existing structures under the Tidal Wetland Act, this guidance provides a simple interpretation of the term ‘functional’ and guidance for its application.” (DFE-1, I Summary) Respondents note that pursuant to the guidance document, Department staff may not allow for the replacement of a non-functioning bulkhead. Therefore, the logical conclusion is that the bulkhead must have been functioning in 1994 if a permit to replace was issued. Respondents cite section DFW-3 which reads, in part: “in areas where the existing structure is functional and greater than 100 feet in length, landward replacement may actually occur beyond the Department’s jurisdiction. For an activity to take place behind the bulkhead and be non-jurisdictional the bulkhead also needs to predate the law (August 20, 1977).”

As to Department staff’s arguments that jurisdiction is found from the east side of the property, respondents allege that a 12-inch thick concrete wall and slab run down the entire length of the eastern property line, and that the structure was in existence in 1977. Accordingly, respondents argue that this substantial man-made structure limits the alleged tidal wetland adjacent areas to the east.

## DISCUSSION

A contested motion for order without hearing brought pursuant to 6 NYCRR 622.12 shall be granted if, “upon all of the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party.” Civil Practice Law and Rules (CPLR) §3212 allows for the granting of summary judgment when no issue of fact remains. The motion may be granted only upon a showing that the cause of action or defense is established sufficiently to warrant the Court as a matter of law to direct judgment in favor of a party. (CPLR 3212.) CPLR 3212 states that “the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.” It is well established that the court should consider the granting of such a motion a drastic and severe remedy that should be granted when there is no doubt as to the existence of a triable issue of fact (*Moskowitz v. Garlock*, 23 AD2d 943 [3d Dept 1965]). In order to prevail upon a motion for summary judgment, the movant must first make a showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]).

Both parties have raised triable issues of fact regarding the adjacent area boundary lines. Department staff relies on the 1994 Moore letter and photographs from 1994 to support its claim of non-functionality of the bulkhead. Respondents rebut staff’s proof with testimony that the

bulkhead was functional in the 1990s and support this testimony with photographs showing what appears to be a functioning bulkhead (see Aquilante Affidavit [5-19-11], Attachment 1). Thus, triable issues of fact concerning the bulkhead's functionality in 1994 are raised.

In addition, the regulations define a wetland boundary based upon the functionality of a substantial structure in 1977. The regulations do not indicate that a wetland boundary shifts if a previously functional structure becomes non-functional after 1977. Accordingly, a legal issue is raised concerning the basis for Department staff's theory, assuming it is established that the bulkhead ceased to be functional by 1994. Furthermore, the extent to which the 2010 guidance document reflects pre-2010 Department policies concerning bulkhead replacement also present an open legal question.

As to the argument that jurisdiction is established from the east, respondents raise triable factual questions about man-made structures being present that would preclude the applicability of the regulations. Respondents allege that several different substantial man-made structures are present to the east of the site and that those structures have been in existence since 1977. These factual issues need to be explored further.

#### FINDINGS OF FACT

- 1) Respondents began construction of an addition to their personal residence located at 60 West 17<sup>th</sup> Road, Broad Channel, Queens, New York in 2008.
- 2) No tidal wetlands permit was issued for the work undertaken at the site.
- 3) Department staff issued a letter in 1994, which stated that the bulkhead on the property was nonfunctioning.
- 4) Department staff issued a permit in 1994 for the replacement of the bulkhead.

#### CONCLUSIONS OF LAW

- 1) Section 661.4(b) of 6 NYCRR defines tidal wetlands adjacent area.
- 2) A question of fact remains concerning whether the construction occurred within a tidal wetland adjacent area when measured from the western side of the property.
- 3) A question of fact remains whether the construction occurred within a tidal wetland adjacent area when measured from the east side of the property.

#### RULING

Respondents move for a ruling that the project site is not located in the tidal wetlands adjacent area. Staff moves for an order holding that respondents violated ECL 25-0401 and its implementing regulations by commencing construction activities in a tidal wetlands adjacent area without a permit. Questions of fact remain on the issues. Accordingly, respondents' motion to dismiss and Department staff's motion for order without hearing are denied. I am directing that a hearing be held. A conference call will be held for purposes of scheduling the hearing in this matter.

\_\_\_\_\_/s/\_\_\_\_\_  
Molly T. McBride  
Administrative Law Judge

Dated: June 21, 2012  
Albany, New York