

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

In the Matter of

- of -

the Application for a Tidal Wetlands Permit,
Use and Protection of Waters Permit, and Water
Quality Certification pursuant to
Articles 15 and 25 of the Environmental Conservation Law
and Parts 608 and 661 of Title 6 of
the Official Compilation of Codes, Rules and Regulations
of the State of New York ("NYCRR"),

- by -

RICHARD BARKLE,

Applicant.

Permit Application No. 1-4736-01396/00003

DECISION OF THE ACTING COMMISSIONER

April 14, 2005

DECISION OF THE ACTING COMMISSIONER

Richard Barkle ("applicant") filed an application for a tidal wetlands permit for the construction of a single family dwelling on pilings, a sanitary system with an encircling retaining wall, and a pervious stone driveway (the "proposed project") on property located at Meadow Lane, Village of Southampton, Suffolk County, New York.

The matter was assigned to Administrative Law Judge ("ALJ") Maria E. Villa. For the reasons stated in the ALJ's hearing report, a copy of which is attached, the determination of the staff of the New York State Department of Environmental Conservation ("Department") to deny the application for a tidal wetlands permit is confirmed. I adopt the ALJ's hearing report as my decision in this matter, subject to my comments below.

At the issues conference, applicant and Department staff acknowledged that the proposed project would also require a use and protection of waters permit and a water quality certification pursuant to article 15 of the Environmental Conservation Law ("ECL") and 6 NYCRR part 608 (see Issues Conference ["IC"] Transcript, at 11-13). The requirements for these two additional approvals were addressed during the adjudicatory hearing.

For a tidal wetlands permit, an applicant must demonstrate that a proposed project is compatible with the policy of the Tidal Wetlands Act to preserve and protect tidal wetlands and to prevent their despoliation and destruction (see 6 NYCRR 661.9[b][1][i]). Among other standards that an applicant must satisfy are that the proposed project is compatible with the public health and welfare, and is reasonable and necessary taking into account such factors as reasonable alternatives and the degree to which the activity requires water access or is water dependent (see 6 NYCRR 661.9(b)(1)[ii] and [iii]).

The record demonstrates that applicant failed to meet his burden to show that the proposed project complies with the standards for issuance of a tidal wetlands permit. The record also demonstrates that the proposed project did not comply with the standards for a use and protection of waters permit, and a water quality certification.

As the hearing report details, the proposed project would be located entirely within a valuable tidal wetland on the south side of Shinnecock Bay. The construction of the residence, which as modified would require approximately 535 cubic yards of fill to raise the grade of the property, would diminish the

ability of the site to provide flood and storm control, wildlife habitat, absorption of silt, and marine food production, among other benefits. The sanitary system proposed for the dwelling would be inundated by salt water several times a year, and such water would be directly discharged to Shinnecock Bay (which has been designated as SA, the highest classification for saline surface waters in New York State [see 6 NYCRR 701.10 and Part 923; IC Tr., at 83-84]).

Applicant acknowledged at the adjudicatory hearing that the proposed project could not meet the development restrictions that apply to projects in tidal wetlands, and that a variance from the tidal wetlands regulations would be required (see 6 NYCRR 661.11). The record reflects that applicant failed to demonstrate that the regulatory standards for a variance could be met. In fact, the record clearly demonstrates that granting a variance for the proposed project would have an undue adverse impact on the present and potential value of the tidal wetland.

Accordingly, the application for the proposed project, including the request for a variance from the tidal wetlands regulations, is denied.

For the New York State Department
Environmental of Conservation

/s/

By: _____
Denise M. Sheehan
Acting Commissioner

Albany, New York
April 14, 2005

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of the State of New York (6 NYCRR) Parts 608
and 661 by

RICHARD BARKLE,

Applicant.

Permit Application No. 1-4736-01396/00003

HEARING REPORT

- by -

/s/

Maria E. Villa
Administrative Law Judge

April 12, 2005

Proceedings

On August 15, 2001, an application for a tidal wetlands permit from the New York State Department of Environmental Conservation (the "Department" or "DEC") was made by Richard Barkle, 124 Narod Boulevard, P.O. Box 293, Water Mill, New York 11976 (the "Applicant"). The application sought approval for the construction of a one-family dwelling on pilings, a sanitary system with an encircling retaining wall, and a pervious stone driveway. The initial proposal also called for approximately 1,020 cubic yards of clean fill to be trucked in from an upland source to raise the grades at the property. The amount of fill proposed to be placed at the site was later reduced to approximately 535 cubic yards.

The proposed project would be located at a parcel owned by the Applicant on Dune Road (also known as Meadow Lane or Beach Road) in the Town of Southampton, Suffolk County, New York (SCTM #904-22-1-3). The entire project would be located in tidal wetlands, and would require a tidal wetlands permit pursuant to Environmental Conservation Law (ECL) Article 25 and Part 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR Part 661).¹ Because the Applicant acknowledged that the project could not meet the standards for issuance of a tidal wetlands permit, and did not establish his entitlement to a variance from those standards, this hearing report recommends that the requested permits should be denied.

A Notice of Complete Application was published on April 23, 2003, in the Department's *Environmental Notice Bulletin*, and on April 24, 2003 in the *Southampton Press*. Department Staff determined that the project is not subject to review under the State Environmental Quality Review Act ("SEQRA"), ECL Article 8 and 6 NYCRR Part 617 because it is a Type II action, pursuant to 6 NYCRR Section 617.5(c) (9) and (10) (the construction of a single family residence and accessory/appurtenant residential structures).

¹ When the matter was referred to the Department's Office of Hearings and Mediation Services, the application and hearing referral form indicated that only the tidal wetlands permit would be required. As discussed in greater detail below, at the hearing in this matter, the parties acknowledged that the project would also require a protection of waters permit pursuant to ECL Article 15, Title 5 and 6 NYCRR Part 608, as well as a water quality certification pursuant to Section 608.9(a) of 6 NYCRR.

By letter dated December 15, 2003, Department Staff notified Mr. Barkle that his permit application was denied because the project as proposed did not meet the standards for permit issuance pursuant to Article 25 and Part 661 of 6 NYCRR. Specifically, Department Staff contended that the proposal: (1) would have an undue adverse impact on the present and potential values of the tidal wetland and wildlife habitat (6 NYCRR Section 661.9(b)(1)(i)); (2) was not compatible with the public health and welfare (6 NYCRR Section 661.9(b)(1)(ii)); (3) was not reasonable or necessary (6 NYCRR Section 661.9(b)(1)(iii)); (4) would not comply with development restrictions (setback requirements, in particular) (6 NYCRR Section 661.9(b)(1)(iv)); and (5) did not overcome the presumption of incompatibility pursuant to the use guidelines (6 NYCRR Section 661.9(b)(1)(v)). By letter dated December 22, 2003, the Applicant requested a hearing on the denial.

The matter was referred to the Department's Office of Hearings and Mediation Services to schedule a hearing on February 3, 2004. On February 5, 2004, Maria E. Villa, the administrative law judge ("ALJ") assigned to the file, wrote to advise the Applicant as to the procedures involved in scheduling the hearing. By letter to the ALJ dated October 26, 2004, counsel for the Applicant detailed the difficulties the Applicant had experienced in attempting to schedule the hearing. Following a conference call among the ALJ, Department Staff and the Applicant's representative, a Notice of Hearing dated December 9, 2004 was prepared and published on December 15, 2004 in the Department's *Environmental Notice Bulletin*, and in the *Southampton Press* on December 16, 2004.

The Notice set a deadline of January 21, 2005 for any filings for party status or *amicus* status, and also required that written public comments on the proposed project be received by that date, or be received at the hearing. No written comments or petitions for party status or *amicus* status were received.

The hearing took place January 25, 2005 at the Southampton Village Hall, 25 Main Street, Southampton, New York. The Applicant was represented by Stephen R. Angel, Esq., of the law firm of Esseks, Hefter & Angel, Riverhead, New York. Department Staff was represented by Craig L. Elgut, Esq., Assistant Regional Attorney (now Acting Regional Attorney), DEC Region 1, Stony Brook, New York.

Pursuant to the Notice, the ALJ convened the public legislative hearing at 10:00 AM on Tuesday, January 25, 2005, at the Southampton Village Hall. Two persons spoke at the hearing:

Matthew Atkinson, General Counsel to Peconic Baykeeper, and Kevin McAllister, Peconic Baykeeper's executive director. Mr. Atkinson stated that Peconic Baykeeper is an organization concerned with the preservation and protection of the ecology of Long Island's South Fork, including Shinnecock Bay, where the project would be located. Mr. Atkinson indicated that Peconic Baykeeper opposed the application, and supported Department Staff's denial of the requested permit.

According to Mr. Atkinson, the application was essentially a request for a variance that would require a determination that the Tidal Wetlands Act does not apply to the subject parcel. Mr. Atkinson maintained that the project was clearly incompatible with the use guidelines in Part 661, specifically, those portions of the proposal that called for the placement of fill, the use of dry wells which would be needed to address any stormwater runoff, and noted further that the project would fail to comply with setback requirements. Mr. Atkinson went on to say that the application failed to meet the standards for permit issuance, because the Applicant had not satisfied his burden of proof and thereby established his entitlement to a permit.

The next speaker, Mr. McAllister, stated that he is a trained coastal biologist, with two undergraduate degrees, one in natural resources conservation and the other in marine biology. Mr. McAllister said that he also has a Master's of Science degree in coastal zone management, and that he has been involved with environmental resource management and protection for approximately twenty years, including evaluating potential impacts on wetlands in connection with permitting. He pointed out that tidal wetlands are important for habitat, and that a number of marine species use wetlands for nursery grounds, including bird and reptile populations. The speaker also noted the importance of tidal wetlands for flood attenuation, and stated that as this coastal area becomes more developed, the ability of tidal wetlands to perform this function is diminished.

According to Mr. McAllister, tidal wetlands are an important source that drive the estuarian food chain. Mr. McAllister went on to note that Shinnecock Bay has been classified as significant coastal fish and wildlife habitat by both the New York Department of State and the United States Fish and Wildlife Service, that those organizations have recommended that the area warrants greater protection, and have identified development as one of the most pressing problems in that regard. Mr. McAllister spoke specifically about the impacts of the proposed project, including filling approximately 6,900 square feet of tidal wetland with fill in excess of 1,000 cubic yards, as well as the secondary

impacts associated with water quality degradation, including excess nutrient loading from the proposed septic system and potential pesticide loading from landscape practices on the site.

Mr. McAllister stated that efforts should have been made long ago to protect these sensitive wetlands, noting that there is existing residential development in the vicinity of the site. He observed that wetlands are being lost at an alarming rate, and noted that the subject parcel is adjacent to a Village-owned parcel that consists of protected wetlands. Mr. McAllister concluded his remarks by stating that he supports Department Staff's denial. There were no other speakers at the legislative hearing.

Department Staff noted that the Village's planning consultant, David J.S. Emilita, AICP, had submitted a letter dated May 6, 2003 to the Department, and asked that it be made part of the record. The ALJ responded that the letter had already been marked as Exhibit 5K (Exhibit 5 consisted of the documentation forwarded with the hearing request). In that letter, Mr. Emilita stated that the proposed project would require a permit under the Village Wetlands Law, for which the Village had not received any application. According to Mr. Emilita, the subject property had been listed in the Town of Southampton's Community Preservation Plan and the Village Comprehensive Plan for open space conservation. Mr. Emilita went on to assert that "[i]t is unlikely that the Village would issue a permit for the filling and development of this property because of the presence of extensive tidal wetlands on a majority if not all of its area. [sic] and its value to the ecology of Shinnecock Bay." Exhibit 5K.

An issues conference was convened immediately following the legislative public hearing. Only Department Staff and the Applicant participated, because there were no filings for party status. Counsel for the Applicant stated that "[c]oncerning the standards for permit issuance, which would be I think 661.9(b), I think I will acknowledge that we don't meet those standards," (Issues Conference Transcript at 7; hereinafter "IC Tr. at ___"), but went on to state that the Applicant sought either an approval or denial pursuant to the variance provisions set forth in 6 NYCRR Section 661.11.

Counsel stated further that he had spoken with counsel for Department Staff concerning the need to consider the application pursuant to Article 15 (Use and Protection of Waters) and 6 NYCRR Part 608. The ALJ raised a concern as to the failure of the Notice of Hearing to include any reference to those provisions.

Counsel for Department Staff indicated that the same situation had arisen in another tidal wetlands hearing, and in that case, the Notice was not deemed to be defective, and stated further that Department Staff took the position in this case that there was no need to require the Applicant to resubmit an application to include the request for an approval pursuant to Article 15. The Applicant concurred with Department Staff's position, and the ALJ contacted the Office of Hearings to confirm the representations made by the parties and to determine whether it would be appropriate to proceed. Based upon the discussion on the record as well as the circumstances of the case, the ALJ determined that the hearing would proceed.

The parties agreed as to the regulatory provisions to be considered at the hearing, the record of the issues conference was closed, and a site visit took place. Following the site visit, the adjudicatory hearing proceeded. The following witnesses testified on behalf of the Applicant: John Holden, of Squires, Holden, Weisenbacher & Smith, a surveying, engineering, and land planning firm; Susanna Hermann, an environmental planner employed by En-Consultants, Inc.; and Richard Barkle, the Applicant. Charles T. Hamilton, Regional Supervisor of the Office of Natural Resources and an Alternative Regional Permit Administrator for tidal wetlands permits in the Department's Region 1 Office, testified on behalf of Department Staff. At the conclusion of the adjudicatory hearing, the parties indicated that they did not wish to make closing statements or engage in any post-hearing briefing.

By letter dated January 26, 2005, David J.S. Emilita, AICP, stated that he had been retained by the Village Board to represent the Village of Southampton at the legislative hearing. Mr. Emilita indicated that he had been unable to attend the hearing due to inclement weather in the New England area, and asked that his letter and attachments be made part of the record in this proceeding. The ALJ advised that Department Staff and the Applicant would have until February 18, 2005 to respond to Mr. Emilita's request. No responses were received, and by letter dated March 23, 2005, the ALJ advised the parties that the correspondence and attachments had been marked and received as Exhibit 15.

The hearing record closed on March 23, 2005, upon receipt of the transcript.

Applicable Regulatory Provisions

Section 661.9(b) (1) of 6 NYCRR provides:

The department shall issue a permit for a proposed regulated activity on any tidal wetland only if it is determined that the proposed activity:

- (i) is compatible with the policy of the act to preserve and protect tidal wetlands and to prevent their despoliation and destruction in that such regulated activity will not have an undue adverse impact on the present or potential value of the affected tidal wetland area or adjoining or nearby tidal wetland areas for marine food production, wildlife habitat, flood and hurricane and storm control, cleansing ecosystems, absorption of silt and organic material, recreation, education, research, or open space and aesthetic appreciation, as more particularly set forth in the findings in section 661.2 of this Part, taking into account the social and economic benefits which may be derived from the proposed activity;
- (ii) is compatible with the public health and welfare;
- (iii) is reasonable and necessary, taking into account such factors as reasonable alternatives to the proposed regulated activity and the degree to which the activity requires water access or is water dependent;
- (iv) complies with the development restrictions contained in section 661.6 of this Part; and
- (v) complies with the use guidelines contained in section 661.5 of this Part. If a proposed regulated activity is a presumptively incompatible use under such section, there shall be a presumption that the proposed regulated activity may not be undertaken in the subject area because it is not compatible with the area involved or with the preservation, protection or enhancement of the present or potential values of tidal wetlands if undertaken in that area. The applicant shall have the burden of overcoming such presumption and demonstrating that the proposed activity will be compatible with the area involved and with the preservation, protection and enhancement of the present and potential values of tidal wetlands. If a use is a type of use listed as an incompatible use in the use

guidelines for the area involved, it shall not be undertaken on that area.

The development restrictions in Section 661.6 require a minimum setback of 75 feet landward from the most landward edge of any tidal wetland for structures in excess of 100 square feet. 6 NYCRR § 661.6(a)(1). The minimum setback for any on-site septic system is 100 feet from the landward edge of the tidal wetland. 6 NYCRR § 661.6(a)(2).

The use guidelines are set forth in Section 661.5 of 6 NYCRR. Sections 661.5(b)(30), (45) and (46) list filling, installation of a septic system, and the construction of a single family dwelling, respectively, as a presumptively incompatible uses in an intertidal or high marsh wetland, such that a permit is required.

Section 661.11(a) allows for the grant of a variance "[w]here there are practical difficulties in the way of carrying out any of the provisions" of Part 661, "or where in the department's judgment the strict application of the provisions of section 661.6 [development restrictions] would be contrary to the purposes of this Part." The variance provision allows the Department to vary or modify the application of the provisions of Part 661

in such manner that the spirit and intent of the pertinent provisions shall be observed, that public safety and welfare are secured and substantial justice done and that action pursuant to the variance will not have an undue adverse impact on the present or potential value of any tidal wetland for marine food production, wildlife habitat, flood and hurricane and storm control, cleansing ecosystems, absorption of silt and organic material, recreation, education, research, or open space and aesthetic appreciation.

The burden of showing that a variance to any provisions of Part 661 should be granted rests entirely with the applicant. Id.

With regard to the standards for issuance of a protection of waters permit, 6 NYCRR 608.8 states that

[t]he basis for the issuance or modification of a permit will be a determination that the

proposal is in the public interest, in that:
(a) the proposal is reasonable and necessary;
(b) the proposal will not endanger the health, safety or welfare of the people of the State of New York; and (c) the proposal will not cause unreasonable, uncontrolled or unnecessary damage to the natural resources of the State, including soil, forests, water, fish, shellfish, crustaceans and aquatic and land-related environment.

In order to obtain a water quality certification required pursuant to Section 401 of the Federal Water Pollution Control Act, 33 United States Code 1341, the applicant must demonstrate compliance with the Act, as implemented by the provisions set forth in Section 608.9(a) of 6 NYCRR. The regulation provides, in pertinent part, that the applicant is required to show that the proposal will be in conformance with "State statutes, regulations and criteria otherwise applicable to such activities." 6 NYCRR § 608.9(a)(6). Thus, the Applicant in this case must make such a showing with respect to the requirements of Part 661 of 6 NYCRR. As discussed below, the Applicant failed to meet that burden, and Department Staff's denial of the requested permits should be upheld.

Findings of Fact

- (1) The Applicant in this matter is Richard Barkle, 124 Narod Boulevard, P.O. Box 293, Water Mill, New York 11976. Mr. Barkle owns a parcel of property on Meadow Lane (also known as Dune Road or Beach Road) in the Village of Southampton, Suffolk County, New York, on the south side of Shinnecock Bay. The specific Suffolk County Tax Map designation for the subject property is SCTM 904-22-1-3. Mr. Barkle purchased the property, which is located on Shinnecock Bay, on July 3, 1967 for \$19,000. Mr. Barkle does not own any other property on Meadow Lane.
- (2) On or about August 15, 2001, the Applicant applied for a tidal wetlands permit to construct a single family dwelling on pilings, a sanitary system with an encircling retaining wall, and a pervious stone driveway. The project as modified would require approximately 535 cubic yards of clean fill, to be trucked to the site from an upland source, to raise the grades at the property. The stated purpose of the project is to build a home for the Applicant.

- (3) A Notice of Complete Application was published on April 24, 2003. The application was denied on December 15, 2003, and the Applicant requested a hearing by letter dated December 22, 2003.
- (4) The proposed project would be situated entirely within tidal wetlands consisting of pristine, unaltered high and intertidal marsh. The lot size is slightly more than 90,000 square feet. If the project were approved, the Applicant would be required to obtain a permit for the sanitary system from the Suffolk County Department of Health, and a permit from the Village of Southampton pursuant to its wetland code. The project would destroy at least 10,000 to 12,000 square feet of pristine high marsh tidal wetlands.
- (5) Shinnecock Bay was originally a freshwater pond, until a hurricane in 1938 caused a break that allowed salt water to penetrate the Bay. The original developer of the lots at this location dredged a lagoon and placed fill in the wetland in the 1960s. The area to the east of the site is a dredge and fill area. The subject parcel is at an elevation of 3 to 4 feet, and has not been altered by fill, except for an area that was filled some years ago and has been restored. Other, filled parcels in the area are at an elevation of seven or eight feet.
- (6) The parcel to the west of the site is undeveloped, and is owned by the Village of Southampton.
- (7) The southern portion of the subject parcel, where the proposed project would be located, is adjacent to the road, and consists primarily of high marsh vegetation. It is inundated by salt water approximately two or three times a month during the summer, and approximately two to six times per month during the other seasons of the year.
- (8) The tidal wetland at the site is a valuable one, and provides flood and storm control, habitat for wildlife, absorption of silt and organic material, and marine food production. These benefits would be diminished or destroyed if the proposed project were permitted.
- (9) The subject parcel has been identified as a preservation parcel proposed for public acquisition by the Village of Southampton in the 1989 Southampton

Village Wetlands Protection Action Plan, as well as in the Town of Southampton Community Preservation Project Plan prepared in 1998. The parcel has been recommended for parks/recreational/open space use in the Village of Southampton Comprehensive Plan, which was adopted in 2000. The tidal wetlands at the site are valuable for open space and aesthetic appreciation.

- (10) The sanitary system proposed for the site would be inundated by salt water several times a year. The water that comes into contact with the septic system would be directly discharged to Shinnecock Bay. This would have a deleterious effect on the health and safety of the people of New York, because the Bay's waters are classified "SA," and thus are entitled to the highest level of protection under state law. The Bay's waters are certified for commercial shellfishing and swimming.
- (11) If the proposed project were to be permitted, it is likely that other permits would issue for similar projects. As a result, there is a strong likelihood that the waters of Shinnecock Bay would no longer be classified as "SA," due to increased pollutant discharge into the waters of the Bay.
- (12) The proposal would cause unreasonable, uncontrolled and unnecessary damage to the natural resources of the area as a result of the proposed filling, construction of a residence, and installation of a driveway.

Discussion and Ruling

Positions of the Parties

The Applicant acknowledged that the project could not meet the standards for permit issuance set forth in Section 661.9, because the entire property is situated within tidal wetlands. The Applicant pointed out that at the time he purchased the property in 1967, as part of a series of lots developed for single family dwellings, filling and construction of a house on the site was not restricted. According to the Applicant, the Department should grant a variance, noting that the proposal was the result of attempts to affect the wetlands as little as possible, given the requirements imposed by the Suffolk County Department of Health as well as the Village of Southampton. The Applicant took the position that under the circumstances, he could demonstrate a practical difficulty under the variance

provisions in the regulations because he owns only this parcel, and the project cannot be altered to comply with development restrictions. The Applicant argued further that the proposal sought the minimum relief possible, and that he had attempted to mitigate impacts as best he could.

Department Staff agreed that the proposal would not comply with the standards for issuance of a tidal wetlands permit, and argued further that a variance pursuant to Section 661.11 is not appropriate in this case. Department Staff pointed out that no setbacks were offered, and that in seeking a variance, the Applicant was still obliged to comply with the policy of the Tidal Wetlands Act to preserve and protect tidal wetlands.

Adjudicatory Hearing

At the hearing, the Applicant called John Holden, a professional engineer and surveyor, who testified that the septic system configuration originally set forth in the application would be modified to allow for more space between the pools. Adjudicatory Hearing Transcript at 22 (hereinafter "Tr. at ___"); Exhibit 12. As a result of this change, the amount of fill that would be required at the site was reduced from 1,020 cubic yards to approximately 535 cubic yards. Tr. at 24-25. Mr. Holden testified that the site is served by public water. Tr. at 34.

Mr. Holden went on to state that he and his firm had provided services to the original developer of the lots at this location, including the subject parcel. Tr. at 34-35. According to Mr. Holden, the developer, Norman Felski, dredged a lagoon and used the dredged material to fill the land. Tr. at 37, 39-40. Mr. Holden testified that at the time of the dredging and filling, during the 1960s, there were no restrictions on such activity in that area. Tr. at 40-41.

The Applicant then called Susanna Hermann, an environmental planner employed by En-Consultants, Inc. Ms. Hermann testified as to her experience in assisting clients with projects located in or adjacent to tidal wetlands, and stated that in this case the project was designed to conform as much as possible with the Village of Southampton code as well as the regulations of the Suffolk County Department of Health. Tr. at 45-47. According to Ms. Hermann, her efforts were directed toward minimizing intrusion into the wetlands area as much as possible, by placing the structure on pilings and proposing a pervious driveway to eliminate runoff. Tr. at 47-48. In addition, Ms. Hermann testified that the house would be the minimum size allowed under

the Village's zoning code, and would be placed at the minimum setback from the road. Tr. at 48.

With respect to the septic system, the witness stated that the system had been designed to be in conformance with Suffolk County Health Department regulations, and conforms with all minimum requirements, including setbacks from the house to the tank, from the cesspool to the tank, and from the cesspools to the retaining wall. Tr. at 48. Ms. Hermann stated further that the septic system would be located on the street side of the property and would be situated more than 100 feet from permanent surface water. Tr. at 48-49. According to Ms. Hermann, the development was proposed in the high marsh area, rather than the intertidal marsh area, to minimize impacts. Tr. at 49. Ms. Hermann testified that if the Department were to approve the project, and if the Village of Southampton issued a wetland permit, it would be her expectation that the Suffolk County Department of Health would issue a permit for the septic system. Tr. at 51-52.

The Applicant testified on his own behalf. Mr. Barkle stated that he acquired the property for \$19,000 on July 3, 1967, with the intention of building a home at the site. Tr. at 54-55. Mr. Barkle testified that he did not own any other property on Meadow Lane. Tr. at 55.

Charles Hamilton, from the Department's Region 1 office, testified on behalf of Department Staff. Mr. Hamilton is the Regional Supervisor of the Office of Natural Resources, and also serves as an Alternative Regional Permit Administrator with respect to the tidal wetlands permitting program. Tr. at 57-58. Mr. Hamilton stated that he supervises the Marine Habitat Protection Unit, and that he has been handling tidal wetland matters for the Department since 1981. Tr. at 59.

Mr. Hamilton described the proposed project, noting that the location was a regulated tidal wetland identified as a high marsh. Tr. at 61. According to Mr. Hamilton, the project would be located on the eastern-most barrier island on Long Island, on the south side of Shinnecock Bay. Tr. at 63. Mr. Hamilton stated that Shinnecock Bay was once a freshwater pond, until a hurricane in 1938 caused a break that allowed salt water to penetrate the bay. Id. Mr. Hamilton indicated that the area consists of high and intertidal marsh area. Id. The witness testified that the area to the east of the site is a dredge and fill area where, in the 1960s, the wetlands were dredged and the fill used to raise the grade so that residences could be built. Id. Mr. Hamilton stated that the parcel to the west of the site

is owned by the Village of Southampton "which encompasses again, high marsh and intertidal marshes right down to shoals and mud flats, then to littoral zones of Shinnecock Bay." Tr. at 63-64.

Mr. Hamilton testified that the southern portion of the subject parcel (the portion adjacent to the road) includes primarily high marsh vegetation in an area that is inundated by salt water perhaps two or three times a month during the summer, and approximately two to six times per month during the other seasons of the year. Tr. at 64. Mr. Hamilton was in agreement with Mr. Holden's account of the dredging and filling undertaken by the developer, Mr. Felski, and testified that the area had "definitely been dredged and filled in the '60s to develop along the shore." Tr. at 68. Mr. Hamilton indicated that he had reviewed other applications for projects in this area, and noted that the Barkle property was at an elevation of approximately three to four feet, and had not been altered by the addition of fill, while other parcels were at seven or eight feet where material had been placed as fill. Tr. at 69.

As set forth above, Section 661.9(b)(1)(i) of 6 NYCRR directs the Department, in considering a tidal wetlands permit application, to make a determination that the proposed activity "is compatible with the policy of the act to preserve and protect tidal wetlands and to prevent their despoliation and destruction in that such regulated activity will not have an undue adverse impact on the present or potential value of the affected tidal wetland area or adjoining or nearby tidal wetland areas for marine food production, wildlife habitat, flood and hurricane and storm control, cleansing ecosystems, absorption of silt and organic material, recreation, education, research, or open space and aesthetic appreciation, as more particularly set forth in the findings in section 661.2 of this Part, taking into account the social and economic benefits which may be derived from the proposed activity." In this regard, Mr. Hamilton testified that the site of the proposed project consists of pristine, unaltered tidal wetlands. Tr. at 72. Although some filling occurred at the site, Mr. Hamilton noted that the filled area has been restored by the Applicant. Id. Mr. Hamilton described the site as "a very valuable marsh," noting the benefits provided with respect to marine food production, absorption of silt and organic material, and attenuation of storm wave action, particularly when northeast storms occur, providing flood and storm control. Tr. at 72-73.

According to Mr. Hamilton, these benefits would be totally lost if the project were permitted. Tr. at 73. The witness noted that wildlife habitat would be destroyed, citing the

effects of both the construction of the residence as well as the shading that would occur at the site as a result of that construction, and opined that it was likely that additional filling would be required at the site of the driveway, given the high water that could be anticipated at times of storms or moon tides. Tr. at 73-74. Mr. Hamilton testified credibly that these impacts would further diminish the values of the tidal wetlands at the site. Id. The witness stated that impacts to open space and aesthetic appreciation could be anticipated if the proposal went forward, because of the subject parcel's location immediately adjacent to an undeveloped, Village-owned parcel. Tr. at 76-77.

With respect to open space, as noted above, after the hearing took place the ALJ received a request from David J.S. Emilita, AICP, on behalf of the Village of Southampton, to provide additional material in connection with the proposed project. Neither Department Staff nor the Applicant objected to the receipt of the submission, marked as Exhibit 15. Mr. Emilita's letter pointed out that the subject parcel has been identified as a preservation parcel proposed for public acquisition in the 1989 Southampton Village Wetlands Protection Action Plan, as well as in the Town of Southampton Community Preservation Project Plan prepared in 1998. Both documents were included as part of the Village's submission.

As a result of its inclusion in the Community Preservation Project Plan, the subject parcel is eligible for public acquisition with community preservation funds generated from the two per cent real estate transfer tax. The parcel has been recommended for parks/recreation/open space use in the Village of Southampton Comprehensive Plan, which was adopted in 2000. According to the Village, the purchase of the subject parcel for open space would implement local land use plans. The Village's submission also included two recent decisions of the Zoning Board which declined to grant permits to build on parcels of vacant land on Meadow Lane, where development was proposed on upland, rather than in the tidal wetland itself.

With respect to the sanitary system proposed at the site, Mr. Hamilton testified that the system would be surrounded by marine saltwater at least once per month at times of low or high tides and perhaps two to six times per month during the fall, spring, and winter months when northeast storms occur, and noted that there was no provision for collection of stormwater runoff from the roof of the residence. Id. Mr. Hamilton pointed out that the water that came into contact with the septic system would then discharge directly to the waters of Shinnecock Bay.

Tr. at 75. The witness observed that this would have a deleterious impact on the health and safety of the people of the State of New York, in contravention of Section 661.9(b)(1)(ii), because of the raw sewage discharge to surface waters. Id. Contrary to Ms. Hermann's testimony, Mr. Hamilton stated that he would find it hard to believe that the Suffolk County Department of Health would approve the installation of a septic system at a site surrounded by wetlands. Tr. at 76.

Mr. Hamilton referred to the February 16, 1987 Significant Coastal Fish and Wildlife Report for Shinnecock Bay (Exhibit 11), stating that the purpose of the document was to identify critical, valuable fish and wildlife areas based upon the rarity of the ecosystem, the vulnerability and population of the fish and wildlife species found in the area, as well as the current human use. Tr. at 87. According to the witness, Department Staff uses the report to assess the current value of a particular tidal wetland in evaluating the impacts to be anticipated if a proposed project is approved. Tr. at 88. Mr. Hamilton quoted from a section of the document that called for efforts to be undertaken to control the discharge of sewage from recreational boats and upland sources due to the significant impacts on the fish and wildlife in the area and the elimination of the salt marsh, with direct loss of habitat area from excavation or filling. Tr. at 89; Exhibit 11 at 4. Mr. Hamilton took the position that the report speaks directly to the impacts to be expected from the discharge of sewage from the project to the tidal wetlands, as well as the destruction of wetland values due to filling and construction of the residence. Tr. at 89. The witness testified that Department Staff's position is that the application for a permit should be denied. Id.

With respect to the reasonableness of or necessity for the project, the criteria set forth in Section 661.9(b)(1)(iii), Mr. Hamilton testified that the project is not water-dependent, and that water access is not required. Tr. at 77. Mr. Hamilton went on to explain that the proposal does not comply with the development restrictions set forth in Section 661.6, because the sanitary system would be installed in a tidal wetland, rather than at the minimum setback of 100 feet, and the residence and deck would be placed in a tidal wetland high marsh area in contravention of the regulatory requirement that such development be located a minimum of 75 feet from a tidal wetland. Tr. at 78. Mr. Hamilton stated that it would not be reasonable for the Department to approve any variances such as those proposed by the Applicant for this site, because to do so would only encourage further development of other parcels with concomitant destruction and despoliation of the tidal wetlands. Tr. at 82.

The standards for permit issuance articulated in Section 661.9(b)(1)(i) require a determination by the Department that the proposed activity will not have an undue adverse impact, not only on the present value of a particular tidal wetland, but on potential value as well. Therefore, the impact of future proposals and the cumulative impact such projects could have on tidal wetlands should be taken into account. "Failure to engage in this predictive analysis would be to ignore the fundamental purpose of the State's tidal wetlands laws and regulations which is to preserve and protect tidal wetlands and to prevent their despoliation and destruction. Moreover, such an approach would disregard the dictates of ECL Section 3-0301(1)(b), which requires the Department to consider the cumulative impacts of a project in connection with permit application review." Matter of Kroft, ALJ's Hearing Report, at 22; 2002 WL 1586198, * 16 (July 8, 2002).

Mr. Hamilton testified that the "precedent setting nature of this approval" would cause a cumulative impact, which is particularly problematic given the location of the site on Shinnecock Bay. Tr. at 82-83. The witness pointed out that Shinnecock Bay has been designated as a Priority Water Body, classified as "SA" pursuant to 6 NYCRR Part 923, which is the highest classification for marine waters or salt waters within New York State. Tr. at 83-84. Mr. Hamilton noted that waters so classified are certifiable for commercial shellfishing, as well as swimming, and that the waters retain this designation year round. Tr. at 84-85. According to Mr. Hamilton, "[w]hen the waters are open year round that indicates they can't get any cleaner than they are now." Tr. at 85. Mr. Hamilton went on to testify that if this project were approved and other projects followed, there is a strong likelihood that the water would lose its classification due to increased pollutant discharge into Shinnecock Bay. Id.

With respect to the use guidelines, Mr. Hamilton testified that the pervious driveway would likely consist of gravel, which is considered filling and thus would be presumptively incompatible in the wetland area, and for which a permit would be required. Id. The witness went on to explain that filling is so classified in the use guidelines set forth in Section 661.5(b) under Category 30, and noted that a presumptively incompatible activity such as filling is presumed to destroy the value of the tidal wetland affected by the activity. Tr. at 79. Mr. Hamilton stated that other activities proposed at the site are also presumed to be incompatible, including the installation of utilities such as a water main or water line (Category 42);

installation of a sanitary system (Category 45); and construction of a single family dwelling (Category 46). Tr. at 79-80.

Mr. Hamilton concluded that the project as proposed would not be compatible with the policy of the Tidal Wetlands Act to protect and preserve tidal wetlands and prevent their despoliation and destruction. Tr. at 81. The witness observed that the project would destroy at least 10,000 to 12,000 square feet of pristine high marsh tidal wetland areas. Tr. at 82.

When questioned concerning the project's eligibility for a protection of waters permit, Mr. Hamilton stated that the proposal would cause "unreasonable, uncontrolled and unnecessary damage" to the natural resources of the area as a result of the proposed filling, construction of the residence within the high marsh area, including increased shading, and the installation of a driveway. Tr. at 86. Under the circumstances, Mr. Hamilton opined that the Applicant had not met his burden of demonstrating his entitlement to a protection of waters permit. Id.

It is undisputed that the project, as proposed, does not meet the standards for issuance of a tidal wetlands permit. In order to proceed, the proposed project would require a variance from the development restrictions set forth in Section 661.6. The Applicant bears the burden of demonstrating that a variance, if granted, would not have an undue adverse impact on the present or potential value of the tidal wetland. 6 NYCRR § 661.11(a). Section 661.11(a) provides that "[t]he burden of showing that a variance to such provisions should be granted shall rest entirely upon the applicant."

In this case, the record demonstrates that the Applicant has not sustained this burden. The proposed project would eliminate or diminish a number of tidal wetland benefits, including the wetlands' value for flood control, wildlife habitat, marine food production and silt/organic material absorption, as well as open space and aesthetic appreciation. Moreover, the record supports a finding that the construction of a sanitary system at this site would pose a threat to marine life as well as the public's health and welfare. This threat is exacerbated because of the pristine nature of Shinnecock Bay, whose waters have been classified "SA," indicating that the Bay is entitled to the highest level of State protection.

The Applicant did not undertake any cross-examination of Mr. Hamilton, who testified credibly, nor was his testimony rebutted. Under the circumstances, a variance should not be granted. Moreover, the Applicant failed to demonstrate that he should

receive a protection of waters permit or a water quality certification. The record shows that the project would damage the tidal wetland, a valuable natural resource. Because the proposal does not meet the standards for issuance of the required approvals, a water quality certification cannot be made.

Conclusions

- (1) The project does not comply with the standards in 6 NYCRR Section 661.9(b)(1)(i) in that it will have an undue adverse impact on the present and potential value of the tidal wetland at the site for marine food production, wildlife habitat, flood and hurricane storm control, cleansing ecosystems, absorption of silt and organic material, and open space and aesthetic appreciation.
- (2) The project does not comply with the standards in 6 NYCRR Section 661.9(b)(1)(ii) in that it is not compatible with the public health and welfare. The proposed septic system will be subject to saltwater intrusion at various times during the year, with a consequent discharge of raw sewage into the waters of Shinnecock Bay.
- (3) The project does not comply with the standards in 6 NYCRR Section 661.9(b)(1)(iii) in that it is not reasonable and necessary, because the project is not water dependent.
- (4) With regard to the standards for a protection of waters permit pursuant to 6 NYCRR Section 608.8, as set forth above, the project as proposed is not reasonable and necessary, and therefore does not comply with Section 608.8(a). The proposal would cause unreasonable, uncontrolled and unnecessary damage to the natural resources of the area as a result of the proposed filling, construction of the residence within the high marsh area, including increased shading, and the installation of a driveway at the site, and therefore does not comply with Section 608.8(c).
- (5) With regard to the standards for granting a water quality certification under 6 NYCRR Section 608.9, because the proposal does not satisfy the requirements for issuance of tidal wetlands and protection of waters permits, the project fails to comply with state statutes, regulations and criteria otherwise applicable

to activities subject to the requirements of Section 608.9(a)(6). As a result, the certification required pursuant to 6 NYCRR Section 608.9 cannot be made.

Recommendation

The application for the proposed project, including the request for a variance from the tidal wetland regulations, should be denied.