

**Issues Ruling**

In the Matter of the Application for  
a Tidal Wetland Permit and a  
Freshwater Wetland Permit

By

Michael Benincasa

DEC #

1-4722-02451/00001

1-4722-02451/00002

February 7, 2007

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**Summary**

Michael Benincasa (applicant) requested an administrative hearing to review the decision of the staff of the Department of Environmental Conservation (DEC staff) to deny his application for a tidal and freshwater wetland permit to construct a single family home in the Town of Brookhaven. Conditions at the site have changed significantly during the last twenty years: in the late 1980s the site was mapped in the adjacent area of a tidal wetland; in 1997 it was determined to be within freshwater wetland M-20 (class I); in April 2000, the Commissioner ordered the tidal wetland map for the area to include this parcel in the tidal wetland because the freshwater wetland was influenced by tidal forces during storm events; and today, the wetland at the site exhibits characteristics only of a tidal wetland. Because of the conditions at the site now, DEC staff counsel stated that the applicant would only be required to meet tidal wetland permit standards.

None of the three issues proposed for adjudication by the applicant meet the standards for adjudication in DEC's hearing regulations (6 NYCRR 624.4). Only the issue proposed by DEC staff for adjudication, namely does the project application meet the tidal wetland permit issuance standards, meets the standards for adjudication. Since the applicant has stipulated that the project would not satisfy permit issuance standards, an adjudicatory hearing to develop a record about this issue is not necessary.

Accordingly, there are no further issues to adjudicate and the matter is remanded to DEC staff to take any further action with respect to the denial.

## History

While not directly relevant to identifying issues for adjudication in this issues conference, a brief history of the applicant's attempts to develop this quarter acre parcel is helpful. This history is based on information in the hearing file and is not meant to be comprehensive, especially as to the earliest activities and litigation ongoing in the state and federal courts.

In June 1987, the applicant applied to DEC staff for a permit to construct a single family dwelling, deck, driveway, septic system and retaining wall (the "project") on property he owns at the northwest corner of Beaver Drive and Doe Place, in Mastic Beach, Town of Brookhaven, Suffolk County (tax map # 0200-982.20-1-10). The permit was necessary because, at the time of the initial application, the applicant's property was mapped by DEC staff as being within the adjacent area of a tidal wetland. This application was never deemed complete.

The proposed project also required a permit from the Town of Brookhaven (Town). As part of the environmental review of this project, the Town, acting pursuant to the State Environmental Quality Review Act (SEQRA) (Article 8 of the Environmental Conservation Law (ECL) and 6 NYCRR Part 617), declared itself lead agency, issued a positive declaration and required the preparation of an environmental impact statement. In response to the positive declaration, the applicant's consultant completed a draft environmental impact statement for the project which was accepted as adequate for public review by the Town of Brookhaven on September 14, 1988. After minor modifications, the final environmental impact statement (FEIS) was filed with the Town on November 21, 1989. On August 8, 1990, the Town Board adopted a resolution to certify findings to deny the requested permit.

Following this denial, the applicant brought suit against the Town in Supreme Court, Suffolk County. A stipulation resolving this litigation was executed on May 14, 1996 and provided for the payment of a monetary settlement by the Town as well as provisions specifying the conditions under which a project could be constructed by the applicant with the Town's approval.

On November 1, 1996, the applicant's consultant wrote to DEC staff stating that the applicant wished to continue to process the 1987 permit application. DEC staff responded that due to the passage of time, the permit application had been deemed withdrawn. On December 27, 1996, the consultant submitted a new

application on behalf of the applicant. This application was for both a tidal wetland permit and a freshwater wetland permit (application #1-4722-02451/00001 and 1-4722-02451/00002). This is the application at issue here.

On January 3, 1997, DEC staff informed the applicant that the application was incomplete because project plans and a survey map for the project were not included. This information was subsequently supplied and the application was deemed complete. As part of its review, DEC staff visited the site on January 30, 1997. During this visit, it was noted that the entire parcel was underwater. Based upon the site visit and its independent review of the materials, on April 7, 1997 DEC staff from the Bureau of Habitat recommended denial of the permit. After further review, on May 12, 1997, DEC staff notified the applicant of its determination to deny the permit because the proposed project did not meet the standards for permit issuance in 6 NYCRR Part 663 (Freshwater Wetlands Permit Requirements) and 6 NYCRR Part 661 (Tidal Wetlands Land Use Requirements).

On May 23, 1997, the applicant formally requested a public hearing pursuant to 6 NYCRR Part 624 to review DEC staff's determination to deny the permit.

On October 7, 1997, DEC staff issued a Findings Statement supporting the denial of the applicant's application because the FEIS did not reasonably demonstrate that the proposed activities could meet the necessary standards for permit issuance. The findings statement stated that "since the entire lot is in a freshwater wetland M-20, this project will result in the loss of approximately 6,000 square feet of Class I freshwater wetland," and noted that the FEIS did not offer any meaningful mitigation.

On January 2, 1998, the applicant filed a CPLR Article 78 proceeding in Supreme Court Suffolk County, (Matter of Benincasa v NYSDEC, Index No. 98-00051) asking that the DEC staff's permit denial be rendered void and the permit granted or that the applicant be granted an administrative hearing, pursuant to his May 23, 1997 request.

A request for hearing was received by Office of Hearings and Mediation Services on January 2, 1998. At that time ALJ John H. Owen was assigned to the matter.

A Combined Notice of Complete Application and Notice of Public Hearing was prepared and published in the *Long Island Advance* on March 26, 1998 and in the *Environmental Notice Bulletin* on April 1, 1998. This notice stated that a legislative

hearing, an issues conference, and an adjudicatory hearing would be held on April 21, 1998. Following the scheduling of the administrative hearing, the applicant withdrew the previously filed Article 78 proceeding.

On April 21, 1998, the legislative hearing was held and no members of the public spoke on the record. Immediately following the close of the legislative hearing record, an issues conference occurred and five issues were stipulated to as meeting the standards for adjudication. The adjudicatory hearing commenced at the close of the issues conference. However, after the adjudicatory hearing began, a dispute arose between the parties regarding the meaning of the stipulation. DEC staff believed that it had stipulated to the fact that the project was to be located within a tidal wetland, while the applicant believed he had stipulated that the project was to be located in an adjacent area of a tidal wetland. DEC staff asserted that the proposed project was to be built entirely in a tidal wetland area, while the applicant asserted that the then current map showed the parcel to be in an adjacent area. DEC staff stated that the parcel needed to be remapped to reflect changes to the boundary of the wetland since the last mapping. ALJ Owen then adjourned the hearing without date, pending remapping. Following this adjournment, the Applicant again filed another Article 78 proceeding (Matter of Benincasa v. NYSDEC, Index No. 98-19842).

On April 24, 2000, the DEC Commissioner signed the order amending Tidal Wetland Map 682-512. This amendment moved the boundary of the tidal wetland landward and affected the applicant's property so that his entire parcel is now within a tidal wetland, not an adjacent area. During the remapping process, the applicant and other affected landowners were put on notice regarding the proposed action. No one, including the applicant, appeared at the remapping hearing or otherwise commented upon or challenged the remapping.

On May 15, 2000, I was assigned to this matter, following the retirement of ALJ Owen. On that date, I informed the parties by writing of my assignment, scheduled the hearing to resume on June 28, 2000, and requested the applicant to secure a hearing room and stenographer. The applicant's attorney subsequently argued that the administrative hearing was stayed by the pending action in Supreme Court. On June 13, 2000, I wrote to the parties informing them that I now considered this matter adjourned at the request of the applicant.

The matter remained in abeyance until August 7, 2000, when the applicant's attorney wrote informing me and the DEC staff

that his client was now prepared to continue with the hearing. Several matters remained outstanding and after receiving submissions from the parties, on October 26, 2000, I ruled on four disputes between the parties. These rulings were that: (1) no additional legislative hearing would be necessary; (2) a new issues conference should be convened; (3) I would not recuse myself; and (4) the appropriate wetland map to be used at the adjudicatory hearing was the one most recently prepared, 682-512 (as amended on April 24, 2000), because it most accurately described the present environmental conditions.

The applicant appealed my ruling and on December 7, 2000 the Commissioner issued an interim decision which held that the proper wetlands map to be used in considering this application was the most recent, the one signed on April 24, 2000. The Commissioner also ruled that the ALJ had done nothing to warrant recusal.

On January 18, 2001, applicant's counsel wrote to me requesting the administrative hearing process be held in abeyance while an Article 78 proceeding challenging the Commissioner's December 7, 2000 interim decision was pending. There is also a pending federal action between the applicant and the Department, the exact nature of this action is unclear based on this administrative record.

In late 2005, applicant's counsel contacted me and stated the applicant was ready to proceed with the administrative hearing process. Discussions regarding the drafting of a stipulation of facts occurred between the parties, but were unsuccessful. The first attempt to schedule the hearing was made in April 2006, but was also unsuccessful. Finally, in the fall of 2006, an administrative permit hearing was scheduled. It was agreed that only a legislative hearing and issues conference would take place, to allow for a written issues ruling.

### **Proceedings**

A notice of legislative hearing and issues conference was published in the Department's electronic *Environmental Notice Bulletin* on November 1, 2006 and in *Suffolk Life* on the same date. The notice set a deadline of November 21, 2006 for the submission of petitions for party status. None were received.

The legislative hearing commenced at 10:00 a.m. on November 28, 2006 at the Patchogue Village Hall, Patchogue, NY. No one spoke or submitted written comments. The issues conference commenced immediately following the legislative hearing at the

same location. The applicant, Michael Benincasa, attended and was represented by William D. Wexler, Esq. DEC Staff was represented by Craig Elgut, Esq., Acting Regional Attorney. Also attending on DEC staff's behalf was Karen Graulich, DEC's Regional Manager for the Bureau of Marine Habitat Protection. As agreed between the parties, no briefs were submitted following the issues conference and the issues conference record closed on January 8, 2007 upon receipt of the transcript.

## **Discussion**

### ***Changing Site Conditions***

As discussed above, the applicant has been trying to develop this parcel for approximately twenty years. In that time the conditions at the site have changed. There is almost nothing in the file regarding the original permit application (#10-86-1754) which was submitted in June 1987. That application was withdrawn on December 26, 1989. The FEIS prepared at that time notes that the project is adjacent to DEC tidal wetlands, and no mention is made of freshwater wetlands.

A new application (the subject of this administrative hearing) was filed in late 1996 for a consolidated permit pursuant to both tidal and freshwater wetlands regulations. A field visit by DEC staff in 1997 indicated that the entire parcel was underwater and in freshwater wetland M-20, a class I wetland. The notice of permit denial stated that the freshwater wetland is inundated by tidal waters during storm events, creating the need for the applicant to meet both freshwater and tidal wetlands permit issuance standards.

In 2000, an amendment to the tidal wetland map for the area showed that the tidal wetland had moved landward and that the applicant's parcel was in a tidal wetland. At this issues conference in late 2006, DEC staff counsel stated that while no additional map amendments had occurred, the tidal wetland continued to move landward as the freshwater wetland had retreated and the parcel was no longer a freshwater wetland, but now exhibits characteristics only of a tidal wetland. Accordingly, DEC staff counsel stated he would waive addressing freshwater wetland regulatory standards in this hearing, because they no longer applied to this parcel.

### ***Standard for Adjudication***

In this case, where DEC Staff has denied a permit application and there is no intervener, the standard to determine

whether an issue is adjudicable is: does the proposed issue relate to a matter cited by department staff as a basis to deny the permit and is contested by the applicant (6 NYCRR 624.4[c][1][ii]). In its May 12, 1997 Notice of Permit Denial, DEC Staff states the "project does not meet the standards for permit issuance outlined in 6 NYCRR Section 663 (Freshwater Wetland Permit Requirement Regulations), and 6 NYCRR Part 661 (Tidal Wetland Land Use Requirements), and is hereby denied." As noted by DEC staff counsel, since the project area is now a tidal wetland, only the standards in 6 NYCRR 661 are relevant.

### ***Issues Proposed for Adjudication***

A total of four issues, three by the applicant and one by DEC staff, were proposed for adjudication. The first issue proposed by the applicant is a factual one: whether the project site is in a mapped tidal wetland or in its adjacent area. If this issue were to be adjudicated, the applicant would call Bruce Anderson, a consultant from Suffolk Environmental. While this proposed issue raises a question of fact, whether or not a tidal wetland exists at the site, this question is beyond the scope of this adjudicatory hearing. Another administrative procedure exists to address this factual assertion by the applicant, namely amending the existing map through the processes set forth in 6 NYCRR 661.15. The Commissioner amended the tidal wetland map for this parcel in April 2000. This map shows the applicant's parcel is within the tidal wetland, and therefore, tidal wetland standards apply to this proceeding. Attempting to challenge whether a wetland exists on the property is in effect an attempt to amend the tidal wetland map and is inappropriate in this proceeding. This issue is not adjudicable.

The second issue proposed by the applicant is whether the actions of ALJ Owen were appropriate during the 1998 issues conference. Specifically, the applicant's counsel argues that the ALJ acted improperly when he adjourned the issues conference without date so that DEC staff could remap the wetlands in the area of the applicant's property. Applicant's counsel concedes that this issue is probably beyond the authority of a DEC ALJ to decide. Rather, based on his statements at the issues conference, he seems to be preserving this issue for review by the Commissioner or the courts. DEC staff responds that it had begun the process of remapping the area of the applicant's property before the 1998 issues conference and the process of amending the map (tidal wetlands map 682-512) when the hearing was scheduled. This issue does not meet the standards for adjudication.

The third issue proposed by the applicant is one that has already been decided by the Commissioner in this case. Applicant seeks to use the wetland map that existed at the time of the 1998 issues conference. This issue was specifically addressed by the Commissioner in her December 7, 2000 interim decision and I am bound by it. This issue will not be adjudicated.

The fourth proposed issue was put forth by DEC staff, whether the proposed project meets the permit issuance standards for a tidal wetland permit. As stated above, the entire project is proposed in an area currently mapped as a tidal wetland. DEC staff details a number of standards the application does not meet, including: (1) the requirement that structures in excess of 100 square feet be 75 feet landward of the tidal wetland (6 NYCRR 661.6[a][1]); and (2) the requirement that the septic tank and leach field be at least 100 feet landward of the edge of the tidal wetland (6 NYCRR 661.6[a][2]). The applicant agrees that this proposed issue meets the standards for adjudication. Further, the applicant stipulates that the application does not meet permit issuance standards, using the current map which shows the parcel in the tidal wetland. The applicant asserts that if the earlier map were used, that shows the parcel to be located in the tidal wetland adjacent area, the project would meet permit issuance standards. Because, the current tidal wetlands map shows the entire parcel to be in a tidal wetland and the applicant's concession that he cannot meet permit issuance standards for a project in a tidal wetland the adjudication of this issue is rendered moot.

### **Conclusion**

Since none of the three issues raised by the applicant involve a matter cited by Department staff as a basis to deny the permit, they do not meet the standard for adjudication, and no hearing will be held on these issues. The fourth issue, raised by DEC staff, is academic since the applicant has stipulated it cannot meet permit issuance standards to construct a house in a tidal wetland. Accordingly, an adjudicatory hearing is not necessary and the matter is remanded to DEC staff to take any additional steps to deny the permit application.

### **Appeals**

This ruling may be appealed to the Commissioner (6 NYCRR 624.8(d)(2)), addressed as follows: Commissioner, New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-1010 (attn: Louis A. Alexander, Assistant Commissioner). The parties shall ensure that copies of all submissions are made

to me, the Chief Administrative Law Judge James McClymonds, and all parties at the same time and in the same manner as transmittal is made to the Commissioner. Please send two copies of any appeal to the Commissioner. No submissions by telecopier or e-mail will be accepted. Appeals should address this ruling, rather than merely restate a party's contentions. Any request for an adjustment to the appeal schedule must be made to DEC's Chief Administrative Law Judge, James McClymonds, at the Office of Hearings and Mediation Services.

Dated: February 7, 2007  
Albany, New York

\_\_\_\_\_/s/\_\_\_\_\_  
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Administrative Law Judge

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