

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

- by -

JOHN O. BEYERNHEIMER,

Applicant.

Permit Application No. 1-4722-03795/00001

INTERIM DECISION OF THE ASSISTANT COMMISSIONER

December 17, 2009

INTERIM DECISION OF THE ASSISTANT COMMISSIONER<sup>1</sup>

John O. Beyernheimer ("applicant") filed an application for a freshwater wetlands permit with the New York State Department of Environmental Conservation ("Department") for the construction of a single-family residence and associated activities (the "project") on property situated on the south side of West Third Street in the Village of Patchogue, Town of Brookhaven, Suffolk County, New York (the "site"). The project would be located within the adjacent area of Class I freshwater wetland P-5.

Department staff denied the application and applicant requested a hearing. The matter was referred to the Office of Hearings and Mediation Services and assigned to Administrative Law Judge ("ALJ") Richard A. Sherman. A copy of the ALJ's hearing report is attached.

In this proceeding, Department staff set forth its rationale for denying the application for a freshwater wetlands permit in a thorough and well-presented review. However, for the reasons discussed below, I have determined that unusual circumstances exist that support the issuance of a permit in this proceeding.

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). Pursuant to the regulations governing Class I wetlands, the reduction of Class I wetlands is acceptable "only in the most unusual circumstances" (see 6 NYCRR 663.5[e][2]).

The freshwater wetlands regulations provide for preapplication procedures to determine the scope of applicable regulatory requirements. Specifically, the regulations provide that "[i]f a person wishing to conduct an activity is in doubt about whether the activity is exempt or about which procedural requirement applies, or wants to discuss with the department any phase of the proposed project as it relates to the act or to other permit programs, that person should contact the appropriate regional permit administrator for a preapplication

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<sup>1</sup> By memorandum dated December 8, 2009, Commissioner Alexander B. Grannis delegated decision making authority in this proceeding to Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services. A copy of the memorandum is enclosed with this interim decision.

conference" (6 NYCRR 663.4[b][2]). The Department encourages applicants or potential applicants to contact the agency at an early stage to address project issues, including restrictions that may apply.

Here, applicant met with Department staff on two occasions prior to purchasing the site to discuss regulatory considerations with respect to the construction of a single-family residence on the site. Staff was familiar with the property's wetland characteristics, in part because it had delineated the wetland boundary on the site in July 1991, prior to the preapplication conference later that year (see Hearing Exh 2).

At the adjudicatory hearing on the application, applicant presented evidence that Department staff had advised that a single-family residence of "reasonable" size, subject to appropriate conditions, could be constructed on the site (see Hearing Transcript, at 13-14 & 25-26; Hearing Exh 2 [meeting notes summarizing statements made at the October 28, 1991 preapplication conference]). The ALJ concluded that applicant's testimony in this regard was "highly credible" (Hearing Report, at 10). Moreover, as the ALJ indicates, applicant's purchase of the site subsequent to his conference with staff is consistent with applicant's assertion that staff advised him that a residence could be built at the site (see id.).

Department staff did not proffer evidence or call a witness to refute applicant's testimony regarding the preapplication conference. Although the Department staff person who discussed this matter with applicant at the preapplication conference and who delineated the wetland on the site at that time remains in the employ of the State, she was not called to testify in this proceeding.

Department staff testified to potential adverse impacts of the project on freshwater wetland P-5 and its benefits and functions, and I have considered those concerns. The record, however, also indicates that the project would have certain benefits. Currently the site is the subject of illegal dumping of fill, other disturbed areas are evident on the site, and eroded areas on the site provide a conduit for sediments to be washed into the wetland area (see, e.g., Hearing Transcript, at 32-34, 68-73, 108; Hearing Exh 10). In addition, all of applicant's proposed construction activities would be in the adjacent area and none would be within the boundaries of wetland P-5 itself. The proposed residence and septic system would also

be located as far away from the wetland as is possible given the size of the site (see Hearing Transcript, at 32).

Although subsequent delays occurred in consideration of this application (in part due to applicant's health problems [see Hearing Exh 6, at 2]), nothing in this record indicates that any significant changes in site conditions exist that would alter the earlier assurance given to applicant regarding the construction of a residence on the site.

The aforementioned benefits would not alone support issuance of a freshwater wetlands permit in this matter. The ALJ notes the long-established rule that a governmental entity may not be estopped from the proper discharge of its statutory duties, and I concur with his analysis. Nevertheless, Department staff's representation during the preapplication conference that a residence could be constructed on the site is critical to my conclusion that this case involves "most unusual circumstances."

As demonstrated by this record, applicant sought Department staff's advice with respect to the construction of a residence at this location. This preapplication procedure is one that the Department strongly encourages applicants to follow. In this matter, applicant received a positive response from Department staff regarding construction of a residence on the site and subsequently, in reliance thereon, purchased the property. Department staff's positive response to applicant's inquiry, applicant's reliance on that response to purchase the property, the fact that site conditions have not substantially changed since then, and the aforementioned benefits of the project together constitute "most unusual circumstances" that support issuance of a freshwater wetland permit for this project.

Because Department staff denied the permit application, no draft permit was prepared for consideration in this proceeding. Staff is hereby directed to draft permit conditions for the project, and to use applicant's proposed layout plan for purposes of the location of the residence and septic system (see Hearing Exh 3 [Layout, Grading & Utility Plan]). However, other than the location of the residence and septic system, Department staff may consider modifications to the layout plan and other special conditions to the freshwater wetlands permit to minimize potential adverse impacts to the wetland and its adjacent area.<sup>2</sup>

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<sup>2</sup> To the extent agreed to by Department staff and applicant, modifications to the location of the residence and the septic system may be considered. Otherwise, the location of the residence and septic system as set forth on

Among the issues that warrant further consideration are the following:

- Driveway. The layout plan calls for a "paved driveway." If staff concludes that the replacement of the paved driveway with one having a pervious surface or the modification of the design of the driveway would improve the site's drainage and filtering capacity or result in other environmental benefit, the layout plan should be modified accordingly.

- Clearing on the Property. The layout plan provides for a cleared area between 10 and 16.4 feet along the western and southern sides of the residence. Consideration should be given to eliminating or reducing the width of all or part of the proposed cleared area in these areas to allow for more or all of the natural buffer to remain in place and reduce encroachment towards the wetland. At minimum, those areas should not be reduced to a lawn but should be left with natural vegetation (see Hearing Transcript, at 20 [noting applicant's objective of "a small retirement home in a natural setting"], id. at 167 [noting that the area within the clearing limit does not have to be lawn]).

- Use of Pesticides, Fertilizers or Herbicides. The permit should include a prohibition on the use of pesticides, fertilizers or herbicides on the grounds during and after the construction on the site, providing that pesticides may be used along the outside walls of the residence if necessary to protect its structural integrity. In that regard, applicant should also provide Department staff with written documentation that notice of this prohibition will be made a part of any future sale of the property.

- Improvements beyond the Clearing Limit. Testimony at the hearing indicates that applicant is amenable to protecting and, where appropriate, improving the adjacent area beyond the designated clearing limit. Protective measures and restoration requirements should be fully pursued and incorporated in the permit as appropriate. Applicant has also proposed a covenant to protect the buffer and wetland area on the site (see Hearing Exh 3; Hearing Exh 7, at 1), and Department staff may wish to consider whether to require applicant's furnishing of such a covenant as a condition to the permit.

The aforementioned list does not preclude Department staff from identifying other environmental issues related to the

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the Layout, Grading & Utility Plan shall be the basis for the freshwater wetlands permit.

project that warrant special permit conditions or further discussion with applicant (e.g., roof runoff controls or controls on construction practices).

This matter is hereby remanded to the ALJ, with proceedings adjourned pending the preparation of a freshwater wetlands permit by Department staff. If Department staff and applicant reach agreement on the terms and conditions of the permit, they shall so advise the ALJ who shall then issue an order of disposition in this matter. To the extent that Department staff and applicant do not reach agreement on a term or condition of the permit, any such dispute shall be referred to the ALJ and shall be the subject of adjudication. The parties, however, are encouraged in the event of any dispute to consider mediation as a possible alternative to resuming adjudication.

Department staff is directed to provide a report to the ALJ, with a copy to applicant, by February 15, 2010 on the status of its preparation of the freshwater wetlands permit for the construction of the proposed single-family residence at the site.

New York State Department of  
Environmental Conservation

/s/

By: \_\_\_\_\_  
Louis A. Alexander  
Assistant Commissioner

Dated: December 17, 2009  
Albany, New York

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HEARING REPORT

- by -

/s/

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Richard A. Sherman  
Administrative Law Judge

## HEARING REPORT

### SUMMARY

Applicant, John O. Beyernheimer, applied to the Department of Environmental Conservation ("DEC" or "Department") for a freshwater wetlands permit pursuant to article 24 of the Environmental Conservation Law ("ECL") and part 663 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). Applicant is the owner of a property ("site") located on the south side of West Third Street in the Village of Patchogue, Suffolk County, New York (Suffolk County Tax Map No. 204-8-2-60.1). Applicant proposes to construct a two story, single-family residence and undertake site clearing and grading to construct the residence and the associated septic system, driveway and yard. The entire residential structure, septic system, driveway and yard would be located within the adjacent area of State-regulated freshwater wetland P-5.

Because applicant's proposed project does not meet the standards for permit issuance set forth under 6 NYCRR 663.5, I recommend that the application be denied.

### PROCEEDINGS

Department staff issued a notice of permit denial, dated August 14, 2000, advising applicant that staff had determined that the proposed project did not meet the standards for issuance of a freshwater wetlands permit. By letter dated September 6, 2000, Mr. Beyernheimer requested a public hearing on the denial of his application. The hearing request was referred to this office from the Division of Environmental Permits, Region 1, in October 2000 and the matter was initially assigned to former Administrative Law Judge ("ALJ") Frank Serbent. By letter dated November 8, 2000, applicant requested additional time to negotiate a possible settlement with staff before proceeding to hearing. For personal reasons, applicant subsequently requested that the hearing be indefinitely postponed and the file was placed on inactive status.

By letter dated January 21, 2009, this office advised applicant that a calendar call would be held to schedule the hearing on the application. As a result of that calendar call, a hearing on the application was scheduled to commence on July 7, 2009 and the matter was assigned to me.

A notice of public hearing was published by the Department on June 10, 2009 in the Environmental Notice Bulletin and by applicant on June 11, 2009, in the Long Island Advance newspaper. In accordance with the hearing notice, a legislative hearing, issues conference and adjudicatory hearing were scheduled for and held on July 7, 2009.

#### Legislative Hearing

The hearing notice advised that the Department would accept written and oral comments on the proposed project from interested persons and organizations. No written or oral comments were received.

## Issues Conference

The hearing notice also advised that, on or before June 30, 2009, interested persons and organizations could file for party status and propose issues for adjudication. No filings for party status were received. Accordingly, only staff and applicant participated in the issues conference (see 6 NYCRR 624.4[b][3]).

By agreement of the parties, the issues identified for adjudication are the reasons cited by Department staff for denying the permit, as set forth in the August 14, 2000 notice of permit denial. The denial notice states that the site is located in the adjacent area of a Class I,<sup>1</sup> State-regulated freshwater wetland and that some of applicant's proposed activities are designated under 6 NYCRR 663.4(d) as "P(N)," or "usually incompatible," with the wetland and its functions and benefits. The denial notice further states that the proposed P(N) activities do not meet the compatibility test set forth at 6 NYCRR 663.5(e)(1) because they would result in significant adverse impacts to the adjacent area and to the wetland itself, and are not compatible with the preservation, protection and conservation of the wetland and its benefits. The denial notice also states that applicant's proposed sanitary system is listed under 6 NYCRR 663.4(d)(38) as being "P(X)," or "incompatible," with the wetland and its functions and benefits. Lastly, the denial notice states that applicant's proposed project fails to meet the weighing standards applicable to applicant's proposed activities under 6 NYCRR 663.5(e)(2) and, therefore, staff denied the permit.

## Adjudicatory Hearing

As noted above, the hearing notice advised that interested persons and organizations could file for party status and no filings for party status were received. Accordingly, only staff and applicant were parties to the adjudicatory hearing (see 6 NYCRR 624.5[a] and [b]).

The adjudicatory hearing was held on July 7, 2009. Michael P. Bontje, President, B. Laing Associates, Inc., appeared on behalf of applicant and called the following witnesses: applicant; Philip O. Beyernheimer, applicant's son; Leonard Jackson, P.E., Principal, Leonard Jackson Associates; and Mr. Bontje. Susan H. Schindler, Esq., appeared on behalf of Department staff and called one witness: Robert F. Marsh, Regional Manager, Bureau of Habitat, DEC Region 1. An exhibit list is appended to this hearing report.

At the close of the hearing, the parties accompanied me on a site visit. The parties were advised that they should not attempt to argue their respective cases during the site visit and that ex parte communications between me and any party would not be allowed. The purpose of the site visit was to provide me with a better understanding of the physical layout and attributes of the site.

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<sup>1</sup> State wetlands are divided into four categories, designated as Class I, II, III and IV. Class I wetlands, like that at issue here, "provide the most critical of the State's wetland benefits" (6 NYCRR 663.5[e][2]) and are afforded the greatest protection (see id.; transcript at 98-99).

## Close of the Hearing Record

On August 31, 2009, this office received applicant's closing brief and Department staff's closing brief ("applicant brief" and "staff brief," respectively). In accordance with 6 NYCRR 624.8(a)(5), by letter dated September 3, 2009, I advised the parties that the hearing record was closed.

### FINDINGS OF FACT

1. Applicant purchased the site in November 1993 (transcript at 13). The purchase price is not established in the record.
2. On April 7, 2000, Philip O. Beyernheimer filed a joint application for permit, on behalf of applicant, with the Department for a freshwater wetlands permit to construct a single-family residence at the site (see exhibit 1).
3. The site is currently vacant and undeveloped (see exhibits 1 [application and attached site photographs], 10, 13).
4. The proposed residence would have a footprint of 1,178 square feet and development of the site would include clearing and grading for the residence, septic system, driveway and yard (see exhibit 3 [site survey]; transcript at 112).
5. Applicant's proposal provides for a "covenanted undisturbed area" along the southern (rear) and western portions of the site wherein no clearing or ground disturbance would occur. Additionally, applicant proposes to restore a previously disturbed buffer area on the southeast corner of the site. (See exhibit 3 [site survey]; transcript at 34-35.)
6. The site is 120 feet wide and approximately 92 feet deep. Approximately one quarter of the site, along its southwest corner, is located in State-regulated freshwater wetland P-5, a Class I wetland. The remainder of the site is located entirely within the wetland adjacent area. (See exhibit 3 [site survey]; transcript at 102-103.)
7. Department staff conducted a field inspection at the site in 1999 during which staff delineated and flagged the freshwater wetland boundary. Staff conducted additional field work at the site in 2003 or 2004 to confirm the wetland boundary delineation. (Transcript at 99.)
8. Tuthills Creek runs through the wetland approximately 250 feet west of the site (see exhibit 3 [note 3]; exhibit 12). The creek runs generally to the south into West Lake and empties into Patchogue Bay (see exhibit 12; transcript at 118, 127).
9. The wetland at the site is a red maple deciduous swamp that contains red maple trees in the canopy, arrowwood and pepperbush in the shrub layer, and fern and skunk cabbage in the understory (transcript at 103, 108).

10. The adjacent area at the site is predominately pine oak forest (transcript at 108).
11. Applicant's proposed project includes construction of a single-family residence approximately 18 feet from the wetland, a driveway approximately 37 feet from the wetland, a septic system approximately 60 feet from the wetland, and clearing and grading approximately eight feet from the wetland (see exhibit 3; transcript at 57, 105-106 [all measurements are at each respective activity's nearest point to freshwater wetland P-5]).

## POSITIONS OF THE PARTIES

### Wetland Boundary Delineation

Department staff witness Robert F. Marsh testified that when a proposed project is located along or near the boundary of a mapped State-regulated freshwater wetland, an in-field delineation must be done to determine the precise location of the wetland boundary. This is because the State freshwater wetlands maps are intended only to provide the approximate location of the wetland boundary. (See transcript at 90-91; exhibit 12 [Wetlands Map depicting the "[a]pproximate wetland boundary"].)

Mr. Marsh testified that the Department conducted an in-field wetland delineation at the site in 1999 and that, based upon his analysis of the site's soils, hydrology and vegetation, he confirmed the 1999 delineation during his last visit to the site in 2003 or 2004 (transcript at 99, 162). The Department's wetland delineation shows that approximately three-quarters of the site is located within the adjacent area of State-regulated freshwater wetland P-5 and the remaining approximately one-quarter is located in the wetland itself (id. at 102-103; exhibit 3).

Applicant did not proffer expert testimony or other evidence to challenge the Department's delineation, nor did applicant undermine the basis for staff's wetland delineation during cross examination of Mr. Marsh. Accordingly, the wetland boundary delineation is not in dispute.

### Proposed Activities

Department staff determined that certain of the activities proposed by applicant are designated under 6 NYCRR 663.4(d) as P(N), or usually incompatible, with a freshwater wetland and its functions and benefits. Specifically, staff determined that constructing a residence (see 6 NYCRR 663.4[d][42]), clearing vegetation (see 6 NYCRR 663.4[d][23]), and grading (see 6 NYCRR 663.4[d][25]) within the regulated adjacent area are all P(N) activities. Applicant did not challenge Department staff's determination that these activities are designated P(N) under the wetlands regulations. Accordingly, these P(N) activities are subject to the compatibility tests set forth under 6 NYCRR 663.5(e)(1).

Applicant argues that the proposed activities designated as P(N) satisfy the compatibility tests. Applicant's wetlands expert, Michael P. Bontje,<sup>2</sup> testified that the adjacent area at the site consists of largely disturbed lands, including significant amounts of fill material, and is subject to ongoing fill activity from the unauthorized dumping of yard wastes and other debris (transcript at 66-67, 73; exhibit 10 [photograph 6]). Applicant's expert also introduced evidence of recent erosion events at the site, including photographs of an "erosion gully" on the eastern portion of the site (transcript at 71; exhibit 10 [photographs 3, 4, 5]). Applicant argues that an appropriately constructed and maintained single-family residence will serve to protect the adjacent area and the wetland by eliminating future unauthorized filling and controlling erosion. Therefore, applicant argues, the proposed P(N) activities satisfy the compatibility tests by offering greater protection to the remaining adjacent area at the site and to the wetland itself (transcript at 74; applicant brief at 11, 13).

Department staff largely concurs with applicant's assessment of the current conditions at the site, however, staff asserts that the more western portion of the site has not been subject to recent disturbance and that the entire adjacent area, including the disturbed areas, provides significant benefits to the wetland (transcript at 107, 117-121, 142, 159-160). Moreover, staff identified several aspects of the proposed P(N) activities that staff argues do not satisfy the compatibility tests.

For example, the proposed residence and driveway will be located approximately 18 and 37 feet, respectively, from the wetland boundary (exhibit 3; transcript at 105). Under applicant's proposal, these currently vegetated areas would be replaced with impervious surfaces, thereby altering drainage at the site and degrading the wetland by reducing the vegetative buffer (transcript at 117, 123). Staff testified that the vegetative buffer serves to protect the wetland from excess nutrients, pathogens, and pollutants introduced into the environment by the use of fertilizers, septic systems, and other human activities (*id.* at 117-119, 126-27, 129-130).

Staff testified that excess nutrients cause a depletion of dissolved oxygen in water, or eutrophication, and promote algae blooms in the wetland and receiving waters (transcript at 117-119, 126-27). Staff further testified that nutrient loading has been a problem for many years in the receiving waters of freshwater wetland P-5 and that significant eutrophication is already occurring in portions of the wetland system (*id.* at 118, 151). Additionally, staff asserts that the construction of a residential structure at the site would cause further human encroachment into the wetland area, thereby disturbing existing wildlife habitat and reducing open space (*id.* at 122, 142-143, 148).

With regard to applicant's proposed septic system, Department staff determined that the system is designated under 6 NYCRR 663.4(d)(38) as P(X), incompatible, with a freshwater wetland and its functions and benefits. Applicant challenged this designation and argues that, at the time it was promulgated, 6 NYCRR 663.4(d)(38) was not intended to apply to the septic systems of single-family residences. Rather, applicant argues, 6 NYCRR 663.4(d)(38) was intended to apply only to the "kind of septic system that dealt with multiple residences"

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<sup>2</sup> Mr. Bontje is the president of B. Laing Associates, Inc., an environmental consulting firm, and has 29 years of experience with tidal and freshwater wetlands projects (transcript at 62).

(transcript at 78). Staff asserts that there is no such exception for single-family residences in the governing regulations and no case law supports applicant's interpretation (id. at 115).

Moreover, staff asserts that septic systems present a potential public health risk because nutrients, pathogens, and "[e]verything that gets washed down the drain of a household" will go into the system and may reach the wetland (transcript at 129-130). Further, staff asserts that there is little vertical separation between the bottom of applicant's proposed sanitary system and groundwater at the site and, therefore, sanitary effluent from the proposed system "is going to get minimal treatment when moving from the bottom of [the system] to the wetland" (id. at 132).

Applicant argues that he has designed the proposed project to mitigate its impacts on the freshwater wetland by reducing the size of the proposed residence and by locating the residence and associated structures as far from the wetland as possible. Applicant further argues that the proposed septic system, which includes two septic tanks in sequence, will improve sewage treatment and reduce the need for maintenance on the system. (Transcript at 32-36.)

Department staff acknowledges applicant's efforts to mitigate impacts, but maintains that the proposed activities will, nevertheless, cause unacceptable impacts to the adjacent area and the wetland (id. at 175, 116-128, 188-189). Staff's expert testified that he is not aware of any permit that has been issued by the Department, during the 8½ years he has been on staff, for a residence as close to freshwater wetland P-5 as the residence proposed by applicant, nor is he aware of any permit issued by the Department anywhere on Long Island for a septic system as close to a freshwater wetland as the system proposed by applicant (id. at 188).

## DISCUSSION

In accordance with 6 NYCRR 624.9(b)(1), applicant has the burden of proof to demonstrate that the proposed project will be in compliance with all applicable laws and regulations administered by the Department.

### Permit Standards

Activities proposed by an applicant that are designated under 6 NYCRR 663.4(d) as P(N) (i.e., usually incompatible with a wetland and its functions and benefits) are subject to the tests for compatibility established under 6 NYCRR 663.5(e)(1). The compatibility tests consider whether the proposed activity "(i) would be compatible with preservation, protection and conservation of the wetland and its benefits, and (ii) would result in no more than insubstantial degradation to, or loss of, any part of the wetland, and (iii) would be compatible with public health and welfare." Regardless of the wetland class, a permit may be issued for the proposed activity if all three of the compatibility tests are met.

Activities proposed by an applicant that are designated as P(N) and fail to meet the compatibility tests or that are designated as P(X) (i.e., incompatible with a wetland and its functions and benefits) must meet the weighing standards set forth under 6 NYCRR 663.5(e)(2)

or the permit must be denied. For wetland Classes I, II and III, the weighing standards require that:

"the proposed activity must 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] must minimize degradation to, or loss of, any part of the wetland or [its] adjacent area and must minimize any adverse impacts on the functions and benefits that the wetland provides" (6 NYCRR 663.5[e][2]).

In addition, with respect to Class I wetlands, like that at issue here, the weighing standards state that such 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" (6 NYCRR 663.5[e][2]).

The word "compelling" when applied to an activity undertaken in a Class I wetland "implies that the proposed activity carries with it not merely a sense of desirability or urgency, but of actual necessity; that the proposed activity must be done; that it is unavoidable" (6 NYCRR 663.5[f][4][ii]).

Applying these standards to the instant application for a freshwater wetlands permit, it is clear that the application must be denied.

As previously noted, applicant did not challenge Department staff's determination that the proposed construction of a residence, clearing of vegetation, and grading within the regulated adjacent area are all P(N) activities. Accordingly, these activities are subject to the compatibility tests established under 6 NYCRR 663.5(e)(1).

Applicant's assertion that proper development of the site will reduce or eliminate on-site erosion and unauthorized filling in the adjacent area is credible. The record establishes that both erosion and filling are occurring at the site. Construction of a single-family residence on this now vacant lot would likely reduce these problems, particularly given that applicant's site plan calls for the driveway to extend directly from what is now the dead end of West Third Street. Essentially, those individuals who are currently using the end of the street to access the adjacent area and dump fill would, after construction, have to walk along a portion of applicant's driveway in order to access the adjacent area. Additionally, as an occupied residential lot, it is likely that the site would be maintained in a manner intended to avoid or minimize on-site erosion.

Although applicant identified some potential benefits to the wetland from the proposed development of the site, Department staff identified several other aspects of applicant's proposal that are potentially detrimental to the wetland. Staff's argument that applicant's proposed

activities will result in further human encroachment into the adjacent area is beyond serious debate. Where now there is no permanent human activity at the site, applicant's proposal will result in a single-family residence approximately 18 feet from the wetland at its nearest point. The remaining buffer between the proposed yard and the wetland would be less than 10 feet, at its narrowest point. Wildlife habitat will be lost as will a significant portion of the site's buffering capability. The residence will create an impervious surface of 1,178 square feet and the driveway will further increase the impervious surfaces at the site. These impervious surfaces would replace currently vegetated areas capable of absorbing and filtering pollutants, pathogens and excess nutrients.

Applicant successfully established that there are some potential benefits to the wetland from his proposed activities and Department staff successfully established that there are some potential detriments to the wetland from these activities. On balance, however, I conclude that the potential detriments identified by staff render applicant's proposed activities incompatible with the preservation, protection and conservation of freshwater wetland P-5 and its functions and benefits, and will result in degradation to the wetland. I conclude that applicant has not met his burden to establish that the proposed P(N) activities will satisfy the compatibility tests. Accordingly, these activities must meet the weighing standards or the permit must be denied.

With regard to applicant's proposed septic system, I hold that Department staff has properly categorized this activity as P(X). Applicant's argument that 6 NYCRR 663.4(d)(38) is intended to reach only multi-residence septic systems is rejected. Item 38 plainly states that "[i]ntroducing or storing any substance, including . . . sewage effluent or other pollutant" into the adjacent area of a wetland is a P(X) activity. There is no express exemption for the septic systems of single-family residences<sup>3</sup> and applicant did not cite to any legal authority that would support a holding that an exemption was intended.

I also reject applicant's argument that Department staff's designation of the proposed septic system as a P(X) activity is inconsistent with 6 NYCRR 663.5(d)(42), which designates the construction of a residence or related structures or facilities in a wetland adjacent area as P(N) activities. Applicant's argument ignores the fact that a building lot may be sewered and, therefore, not require an on-site septic system, or may contain both regulated adjacent area and unregulated uplands where a septic system could be sited. Even where a proposed residence is located entirely within a regulated wetland adjacent area, it may be possible for the lot owner to purchase unregulated upland area for placement of a septic system, or to obtain an easement that would allow the lot owner to discharge sewage into an existing or upgraded septic system on a neighboring property.

Applicant's proposed P(N) activities fail to satisfy the compatibility tests, and applicant's proposed septic system is a P(X) activity. Accordingly, these activities are subject to the weighing standards. Among other things, the weighing standards require that the proposed activity be the only practicable alternative that will accomplish an applicant's objective and have no practicable alternative on a site that is not a wetland or adjacent area (see 6 NYCRR

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<sup>3</sup> Notably, 6 NYCRR 663.4(d)(38) includes an exemption for the owner of a private residence to apply pesticides in an adjacent area, with such activity requiring only a letter of permission from the Department.

663.5[e][2]). This standard requires the proposed activity to be the only alternative that is physically or economically feasible, but does not mean that the "more costly alternative is the only feasible one" (6 NYCRR 663.5[f][2]). Applicant did not proffer evidence that would support the conclusion that he has no practicable alternative that will accomplish his objective to own a home in the Patchogue area. Applicant did not create a record with regard to the costs associated with his purchase and ownership of the site, nor did applicant establish whether he is financially able to purchase an existing home or a vacant lot in the area that is not within a regulated wetland or adjacent area. Accordingly, applicant did not meet his burden to establish that he has no practicable alternative.

Moreover, freshwater wetland P-5 is designated as a Class I wetland, the most protected of the State's freshwater wetlands. Where such wetlands are involved, the vast majority of proposed projects that cannot avoid the loss or reduction of a wetland benefit must be rejected. The proposed activity must satisfy a social or economic need of such a compelling nature as to make it tantamount to an actual necessity, something that must be done. Additionally, the need for the project must clearly outweigh the loss or detriment to the wetland benefits by a large or significant margin. (See 6 NYCRR 663.5[f][4].)

Although applicant's desire to build a single-family residence at the site was plainly evident at hearing, construction of a residence within the adjacent area is clearly not an activity that "must be done." Applicant adduced no evidence to support the conclusion that construction of another residence in this already developed community is an actual necessity that cannot be avoided.

#### Other Freshwater Wetlands Projects

In his closing brief, applicant asserts that more than a decade ago the Department issued numerous permits for construction of single-family residences in the adjacent areas of freshwater wetlands. Applicant cites, for the first time, to specific permits and asserts that these and other similar permits "would demonstrate that permits were being issued for residences within 100 feet of Freshwater Wetlands in the time frame of the 1980's through 1990's" (applicant brief at 5-6). Applicant did not cite to, nor attempt to introduce, specific permits at hearing.

By their nature, freshwater wetlands permits are site specific. The facts and circumstances of the permits cited by applicant in his closing brief were not made part of the hearing record and, therefore, staff was not afforded an opportunity to address specifics of those permits. Additionally, the parties were advised that closing briefs "are to address only matters and evidence raised at the hearing [and] are not considered evidence" (ALJ letter to the parties dated August 4, 2009). Accordingly, the permits cited by applicant in his closing brief will not be considered further.

#### Estoppel

Applicant testified that he attended a preapplication meeting with Department staff in 1991, two years prior to his acquisition of the site. At the time of the meeting, the site was comprised of two parcels that were under separate ownership. Applicant testified that he and the

then owner ("parcel owner") of one of the parcels were present at the meeting and were advised by staff that a single-family residence could be constructed at the site. Staff had delineated the freshwater wetland boundary at the site prior to the preapplication meeting and, therefore, was familiar with the site's wetland characteristics (see exhibit 2 [noting that a freshwater wetlands boundary delineation was done by staff on July 19, 1991]). According to applicant, staff was satisfied that a properly configured home of "reasonable size" could be constructed on the upland portion of the site.

Applicant introduced a copy of notes (see exhibit 2<sup>4</sup>) that he asserts memorialize the advice provided by Department staff to applicant and the parcel owner during the preapplication meeting. Applicant's son testified that he attended a second meeting with Department staff where similar advice was given. Applicant's testimony regarding the preapplication meetings was highly credible and the meeting notes corroborate that testimony. Moreover, applicant's subsequent purchase of the site in 1993 is consistent with applicant's assertion that he was advised by staff that he could build on the site. On this record, I conclude that applicant established that he was advised by staff in 1991 that a single-family residence, subject to appropriate constraints, could be constructed at the site.

Nevertheless, because applicant's proposed activities are not in compliance with the policies and provisions of ECL article 24 and 6 NYCRR part 663, the application must be denied (see 6 NYCRR 663.5[a]). To conclude otherwise would run contrary to the long-established rule that a governmental unit may not be estopped from the proper discharge of its statutory duties (see e.g. Matter of Schorr v New York City Dept. of Housing Preserv. and Dev., 10 NY3d 776, 779, [2008] [noting that "[i]t is well settled that estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties"] [internal quotation marks and citations omitted]). The Department is obligated to properly administer and enforce the State's freshwater wetlands law and regulations, and representations made by Department staff during a 1991 preapplication meeting cannot serve to defeat that obligation (see Matter of Parkview Associates v City of New York, 71 NY2d 274, 282 [1988] [holding that "estoppel is not available to preclude a municipality from enforcing the provisions of its zoning laws and the mistaken or erroneous issuance of a permit does not estop a municipality from correcting errors, even where there are harsh results"] [citations omitted]).

### Takings Claim

In his closing brief, applicant argues that Department staff's interpretation of the phrase "compelling economic or social need" under 6 NYCRR 663.5(e)(2) effects a taking of applicant's property without just compensation and is unconstitutional. Applicant argues that staff's interpretation of this phrase limits its application to "public projects" and reduces the likelihood

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<sup>4</sup> Staff objected to the admission of exhibit 2 into evidence. Applicant testified that he did not personally take the notes and that, although he was present at the meeting, he was not certain whether the notes were taken by the parcel owner or by Department staff. Exhibit 2 also appears to contain the handwriting of multiple persons. Nevertheless, applicant's testimony regarding the purpose and substance of the preapplication meeting, as well as the origin and content of exhibit 2, was highly credible. Therefore, I concluded exhibit 2 was of sufficient reliability and probity to warrant its admission into evidence.

that a "private action" will be approved in the adjacent area of a Class I, II or III freshwater wetland "to virtually nil." (Applicant brief at 7-8.)

As an initial matter, I note that applicant did not raise this argument at hearing and, therefore, Department staff was not afforded the opportunity to address it. Although applicant questioned staff's interpretation of the regulation, applicant did not argue that staff's interpretation constituted a taking. Moreover, the record is not definitive with regard to whether staff would categorically reject all proposed private actions that are subject to the weighing standards. As applicant acknowledges, staff's expert testified that "[t]he economic and social benefits to a single individual would be difficult to outweigh the potential detriment to the freshwater wetland. They would have to show almost negligible impact to the wetland to overcome that" (transcript at 154).

These concerns aside, the determination of a takings claim is not a proper matter for adjudication in this administrative proceeding. Such claims must be determined by a civil court (see Matter of Haines v Flacke, 104 AD2d 26, 33 [2d Dept 1984] [denying a petitioner's request for an order directing the Department "to hold an evidentiary hearing for the purpose of receiving testimony and evidence bearing on the taking issue" and holding that "[t]he proper practice is to assert such a claim in the proceeding seeking judicial review . . . Therefore, the evidence on the confiscation issue must be presented to Special Term"]; see also Matter of Brotherton v Department of Env'tl. Conservation, 189 AD2d 814, 816 [2d Dept 1993] [remitting "the matter to the Supreme Court for the purpose of an evidentiary hearing to determine whether the wetlands regulations, considered together with the denial of the [application] would work an unconstitutional taking of [the] petitioner's property"] [citations and internal quotation marks omitted]). Accordingly, the takings issue will not be considered further in this administrative proceeding.

## CONCLUSIONS

The entire site is located within the boundaries of either State-regulated freshwater wetland P-5, a Class I wetland, or its adjacent area. Activities proposed by applicant are listed as P(N), usually incompatible, or P(X), incompatible, with the freshwater wetland and its functions and benefits. The P(N) activities do not meet the compatibility tests and neither these activities nor the activity designated as P(X) meet the weighing standards.

Applicant, John O. Beyernheimer, did not demonstrate that the proposed project meets the standards at 6 NYCRR 663.5 for issuance of a freshwater wetlands permit.

## RECOMMENDATION

The application for a freshwater wetlands permit should be denied.

EXHIBIT LIST

Matter of John O. Beyernheimer  
Application No. 1-4722-03795/00001

Exhibit No.	Description
1	Joint Application for Permit dated March 3, 2000, with attachments
2	Notes concerning the preapplication conference held on October 28, 1991
3	Layout Plan (site survey and layout dated August 17, 2006 and sanitary profiles dated June 7, 2005)
4	Fact sheet on septic tank soil absorption systems, from the Ohio State University Extension
5	Article entitled: "Get to Know Your Septic Tank," by Roger Machmeier, Ph.D., P.E.
6	Letter dated September 11, 2003 from Leonard Jackson Associates to the Department, with attachments, re: application modifications
7	Letter dated December 24, 2003 from Leonard Jackson Associates to the Department, with attachments, re: new permit application (includes letter in response from the Department, dated January 20, 2004)
8	Letter dated April 13, 2007 from Leonard Jackson Associates to the Department re: modified layout plan dated August 17, 2006
9	Letter dated April 27, 2007 from the Department to Leonard Jackson re: modified layout plan
10	Series of site photographs taken by applicant's consultant on or about July 2, 2009
11	Resume of Department staff witness Robert F. Marsh
12	New York State Freshwater Wetlands Map, Patchogue Quadrangle
13	Aerial photograph, dated 2007, of site and immediate vicinity