

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 ("ECL") and Part 663
of Title 6 of the Official Codes, Rules
and Regulations of the State of New York
("6 NYCRR"), and a Wild, Scenic and
Recreational Rivers System Permit
Pursuant to ECL Article 15, Title 27,
and 6 NYCRR Part 666,

- by -

ALEXANDER JOACHIM,

Applicant.

Permit Application No. 1-4730-01198/00003

DECISION OF THE COMMISSIONER

May 31, 2007

DECISION OF THE COMMISSIONER

Alexander Joachim ("applicant") filed an application with the New York State Department of Environmental Conservation ("Department") for a freshwater wetlands permit pursuant to Environmental Conservation Law ("ECL") article 24 and part 663 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), and a wild, scenic and recreational rivers system ("WSSR") permit pursuant to ECL article 15, title 27, and 6 NYCRR part 666, in order to construct a two-story single-family residence with a septic system and associated appurtenances (the "project") on property located at 2427 River Road in Calverton, Town of Riverhead, Suffolk County (the "site").

Administrative Law Judge ("ALJ") Edward Buhrmaster, to whom this matter was assigned, has prepared the attached hearing report in which he recommends that the application be denied. I hereby adopt the hearing report as my decision in this matter except that I make no determination as to the location of the river bank at the site.

Factual and Procedural Background

The site consists of a vacant, undeveloped and

vegetated parcel approximately one acre in size. Mr. Joachim and his wife purchased the property in July 2003 for \$17,500. The southern portion of the property includes a part of Class I freshwater wetland, R-5, and abuts the Peconic River, a waterbody protected by the Wild, Scenic and Recreational Rivers System Act ("WSRR Act") (see ECL 15-2714[3][gg]). Between 75 and 80 percent of the site is part of the Class I wetland.

Because the proposed project would be located entirely within the 100-foot regulated adjacent area of Class I wetland R-5, a freshwater wetlands permit is required (see 6 NYCRR 663.4). Furthermore, because the proposed project would be located within a corridor of the Peconic River designated as a "recreational" river area, a WSRR permit is required for its construction (see 6 NYCRR 666.8).

Department staff denied Mr. Joachim's application on the ground that the proposed project did not satisfy the standards for issuance of a freshwater wetlands permit or the standards for issuance of a WSRR permit. Mr. Joachim requested a hearing on Department staff's denial and the matter was assigned to ALJ Buhrmaster. After issues for adjudication were identified, the hearing was adjourned in order to allow applicant to submit a written request to the Department for a variance from

the regulatory prohibition against siting private dwellings within 150 feet of the bank of a recreational river (see 6 NYCRR 666.9[a] and 666.13[C][1]). Applicant submitted a variance request on January 16, 2006, which was subsequently denied by Department staff by letter dated April 27, 2006. A hearing was then held in this matter on October 24, 2006.

Discussion

An applicant for a Department permit bears the burden of proof to show that the proposed project meets the applicable regulatory criteria (see 6 NYCRR 624.9[b][1]). In this proceeding, the applicant must sustain its burden of proof by a preponderance of evidence where factual matters are involved (see 6 NYCRR 624.9[c]).

The Freshwater Wetlands Permit

Erecting a residence upon a freshwater wetland or within its adjacent area is a "regulated activity" which requires a permit from the Department (see 6 NYCRR 663.4[a][Item 42]). The applicable criteria involve a determination of compatibility and a weighing of need against the benefits that would be lost (see 6 NYCRR 663.5[d] and [e]).

In this instance, all activities associated with

applicant's project are proposed to occur within the 100-foot adjacent area to Class I freshwater wetland R-5. Constructing a residence or related structures or facilities in an adjacent area of a freshwater wetland is, by regulation, designated "usually incompatible" with a wetland and its functions or benefits (see 6 NYCRR 663.4[d], item 42).

Other activities related to applicant's project, including the filling of the wetland adjacent area to construct a septic system and the clear-cutting of vegetation other than trees, are also designated as "usually incompatible" with a wetland and its functions and benefits (see 6 NYCRR 663.4[d], items 20 and 23). The introduction or storage of any sewage effluent, such as through applicant's proposed septic system, is in all cases "incompatible" with a wetland and its functions and benefits (see 6 NYCRR 663.4[d], item 38).¹

The tests set forth in section 663.5(e) to determine the compatibility of all activities identified as "usually incompatible" in section 663.4(d) require the Department to

¹ The regulatory activities chart provides that "[i]ntroduction of sewage effluent . . . into wetlands or adjacent areas may contaminate ground and surface water with undesirable chemicals, nutrients and organisms. . . . Excessive nutrients alter vegetative cover, fish and wildlife distribution, and water potability. Resulting organisms may also create a health hazard" (6 NYCRR 663.4[d] [Pollution and Pesticides]).

consider whether the 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"

(6 NYCRR 663.5[e][1]). If all three of these compatibility tests are met, then "no other weighing standards need be met, regardless of the wetland class" and a permit, with or without conditions, could be issued by the Department for such activity (see id.).

If the proposed activity is listed as "incompatible" or cannot meet the three tests for compatibility noted above, then a permit for an activity in a Class I freshwater wetland may be issued only if the proposed activity meets each of the following weighing standards:

- (i) "the proposed activity must be compatible with the public health and welfare, be the only practical 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;"
- (ii) "the proposed activity must minimize degradation to, or loss of, any part of the wetland or is [sic] adjacent area and must minimize any adverse impacts on the functions and benefits that the wetland provides;" and
- (iii) "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]; see 6 NYCRR 663.5[f][1], [2], [3], and [4]).

The Department's regulations emphasize that "Class I wetlands provide the most critical of the State's wetland benefits, reduction of which is acceptable only in the most unusual circumstances" (6 NYCRR 663.5[e][2]). In this matter, applicant failed to demonstrate compliance with the applicable regulatory criteria. As stated in ALJ Buhrmaster's hearing report, applicant did not demonstrate how the "incompatible" activity of installing a septic system within the adjacent area to this Class I wetland boundary, and the "usually incompatible" activities associated with construction of a residence, including vegetative clearing and placement of fill in the adjacent area, would comply with applicable regulatory criteria (see 6 NYCRR 663.5[e][1] and [2]).

Further, the ALJ indicated that applicant did not demonstrate an "actual necessity" for undertaking the proposed activity (see 6 NYCRR 663.5[f][4][ii]). Therefore, ALJ Buhrmaster concluded that the freshwater wetlands permit application should be denied.

The WSRR Permit

As previously noted, in addition to a freshwater wetlands permit, a WSSR permit was also required because the activities proposed by applicant at the site are located within a regulated corridor of the Peconic River. The Peconic has been classified by the Department as a "recreational river" where it passes along the southern boundary of applicant's property (see ECL 15-2714[3][gg]).²

Before the Department can issue a WSSR permit to a private applicant, it must first be determined that:

- "(1) the proposed land use or development is consistent with the purposes and polices of the [Wild, Scenic and Recreational Rivers System] act and with the provisions of [Part 666];
- (2) the resources specified in section 666.2(e) of this Part will be protected and the proposed activity will not have an undue adverse environmental impact; and
- (3) no reasonable alternative exists for modifying or locating the proposed activity outside of the designated river area"

(6 NYCRR 666.8[f][1], [2], and [3]).

ALJ Buhrmaster has concluded that the foregoing

² "Recreational rivers are generally readily accessible, and may have a significant amount of development in their river areas and may have been impounded or diverted in the past. Management of recreational river areas will be directed to preserving and restoring their natural, cultural, scenic and recreational qualities, except in areas delineated by the department as communities, which will be managed to avoid adverse environmental impacts and loss of existing river corridor values." 6 NYCRR 666.4(c).

determinations could not be made because the activities associated with the construction of applicant's proposed residence are not consistent with the purposes and policies of the WSRR Act and its implementing regulations. In particular, and as noted by the ALJ, the construction of a residence, the installation of a septic system within 150 feet of the river bank, and the associated vegetative clearing and placement of fill, would have an undue adverse environmental impact on the river corridor. Moreover, private residences located within 150 feet of a recreational river bank are designated as a "prohibited use" by the Department (see 6 NYCRR 666.13[C][1]).³

Variance from the WSSR Regulations

Section 666.9 delineates the circumstances by which a variance from the WSRR regulations can be authorized by the Department. The variance provisions distinguish between development or improvement specifically prohibited by the WSRR Act (see ECL article 15, title 27) and those activities prohibited by the implementing regulations of Part 666. No variance may authorize any development or improvement prohibited

³ The use guidelines also note that: "(i) All new residential structures constructed within 500 feet of the bank must be screened by vegetation or topographic features as viewed from the river; must not exceed 34 feet in height; and must not be constructed on a slope greater than 15 percent; ... (iii) Each private dwelling . . . in a recreational river area must be on a lot of at least 2 acres and have, when applicable, a shoreline frontage of at least 200 feet" (6 NYCRR 666.13[C][NOTE][i] and [iii]).

by the WSRR Act (see 6 NYCRR 666.9[a]). Where development or improvement is limited or prohibited solely by the regulations in Part 666, the Department can issue a variance. The land use and development guidelines set forth in section 666.13 are applicable solely to activities covered by Part 666 and not to those prohibited by and referenced in the WSRR Act.⁴

Because applicant's proposal to construct a residence within 150 feet of a recreational river bank is prohibited by the Department's regulatory use guidelines (see 6 NYCRR 666.13[C][1]) but not by the WSRR Act itself (see ECL 15-2709[2][c]), a variance application can be considered.

In considering applicant's variance request from the use guideline at 6 NYCRR 666.13(C)(1) prohibiting residential structures within 150 feet of a recreational river, the parties to this proceeding agreed that the standards for an area or dimensional variance set forth at 6 NYCRR 666.9(a)(2) were applicable. Those standards require a determination whether

⁴ An examination of the WSRR Act reveals only a limited number of specified prohibitions. As relevant here, in "recreational river areas," the statute provides that "the lands may be developed for the full range of agricultural uses, forest management pursuant to forest management standards duly promulgated by regulations, stream improvement structures for fishery management purposes, and may include small communities as well as dispersed or cluster residential developments and public recreational areas" (ECL 15-2709[2][c]). In contrast, the Department's regulations implementing the WSSR Act set forth a number of prohibited activities.

adherence to the applicable use guideline "would cause practical difficulty for the applicant. In making its determination, the department will consider the benefit to the applicant if the variance is granted, as weighed against the adverse impacts upon river resources" (6 NYCRR 666.9[a][2]). In addition, the Department considers:

- "(i) whether and to what extent a change will be produced in the character of the river corridor or a detriment to nearby properties will be created by the granting of the area variance;
- (ii) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance;
- (iii) whether the requested area variance is substantial;
- (iv) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the river corridor;
- and
- (v) whether the alleged practical difficulty was self-created, which consideration will be relevant to the decision of the department, but will not necessarily preclude the granting of the area variance"

(6 NYCRR 666.9[a][2][i]-[v]).⁵

The regulations provide that private dwellings shall not be located within 150 feet of the bank of a recreational

⁵ In addition to the foregoing considerations, "an applicant for an area variance has the option of seeking to prove, by competent financial evidence, that the strict application of the subject provision(s) of this Part will result in significant economic injury. Such evidence will be limited to the effect of such provision(s) upon the value of the property in question; whether the value would be enhanced were a variance granted will not be relevant" (6 NYCRR 666.9[a][2]).

river (see 6 NYCRR 666.13[C][1]). In this case, Department staff and applicant dispute where the river bank of the Peconic River is actually located for purposes of measuring the 150-foot distance from the proposed dwelling to the river bank. Staff maintains that the proposed dwelling would be located 54 feet from the river bank, while applicant argues that the dwelling would be 140 feet from the river bank.⁶

However, a resolution of that dispute is not necessary for a determination on the WSRR permit in this matter and, accordingly, I make no determination with respect to the location of the river bank or the positions taken by Department staff or the applicant on that matter.

Whether applicant's residence would be located 54 feet or 140 feet from the river bank, ALJ Buhrmaster correctly determined that the proposed project violates the 150-foot prohibited use guideline. The ALJ details how the project would adversely impact the river corridor's natural and scenic qualities, and would be inconsistent with the overall objective

⁶ Section 666.3(aaa) defines "river bank" as "that land area immediately adjacent to and which slopes toward the bed of a watercourse, the integrity of which is necessary to maintain the watercourse. For purposes of this Part, a bank will not be considered to extend more than 50 feet horizontally from the mean high water line, except that it may be extended up to the crest of a contiguous bluff, cliff, hillside or similar feature, where necessary to protect a watercourse."

of preserving the natural and scenic qualities of a recreational river.

The ALJ also discusses the risk that the proposed septic system presents for contaminants to enter river waters. In light of the foregoing environmental concerns and impacts, a variance from the 150-foot set back requirement in section 666.13 is not warranted in this case.⁷

In addition, it is undisputed that the property in question is approximately one acre in size (see, e.g., Adjudicatory Hearing Exhibit 22), which is half of the two-acre minimum size required in a recreational river corridor (see 6 NYCRR 666.13 (C), Note [iii]; see also Draft Environmental Impact Statement on Promulgation of Statewide Rules and Regulations for the New York State Wild, Scenic and Recreational Rivers System, May 28, 1985, at 13 [regulatory restrictions for recreational river areas include that each individual principal building requires a two-acre lot]).

⁷ Furthermore, the ALJ noted that applicant purchased the subject property at least ten years after the Peconic River's designation under the WSSR Act and had at least constructive notice, if not actual notice, of the requirement that a residence be set back 150 feet from the river bank.

Consistency with all provisions of Part 666 must be established before a WSRR permit may be issued, unless a variance is obtained. Applicant's failure to request a variance from the two-acre requirement provides an independent basis for permit denial.

Conclusion

Based on this record, the application for a freshwater wetlands permit and wild, scenic and recreational rivers system permit, and the requested variance from the wild, scenic and recreational rivers system use guidelines, are denied.

For the New York State Department
of Environmental Conservation

/s/

By:

Alexander B. Grannis,
Commissioner

Dated: May 31, 2007
Albany, New York

TO: Charles W. Bowman (By certified mail)
Land Use Ecological Services, Inc.
209 West Main Street, 2nd Floor
P.O. Box 1060
Riverhead, New York 11901

Alexander Joachim (By certified mail)
32 Pameeches Path
East Moriches, New York 11940

Vernon Rail, Esq. (By regular mail)
New York State Department of
Environmental Conservation
Region 1 Office
Stony Brook University
50 Circle Road
Stony Brook, New York 11790-3409

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

In the Matter

- of -

the Application for a Freshwater Wetlands
Permit pursuant to 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"), and a
Wild, Scenic and Recreational Rivers System
Permit pursuant to ECL Article 15, Title 27,
and 6 NYCRR Part 666

- by -

ALEXANDER JOACHIM,
Applicant

Permit Application No. 1-4730-01198/00003

HEARING REPORT

- by -

/s/

Edward Buhrmaster
Administrative Law Judge

PROCEEDINGS

Background and Brief Project Description

Alexander Joachim ("the Applicant") proposes to construct a two-story single-family dwelling, with a 40-foot by 22-foot footprint, pervious driveway, septic system and retaining wall, at 2427 River Road in Calverton, Town of Riverhead, Suffolk County.

To move ahead with the project, Mr. Joachim requests a freshwater wetlands permit pursuant to Environmental Conservation Law ("ECL") Article 24 and Part 663 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), as well as a wild, scenic and recreational rivers system permit pursuant to ECL Article 15, Title 27, and 6 NYCRR Part 666.

Department Staff determined that the project is a Type II action not subject to review under the State Environmental Quality Review Act (ECL Article 8 and 6 NYCRR Part 617). Staff considered the project to involve the construction of a single-family residence on an approved lot, including provision of necessary utility connections, installation of a septic system, and construction of minor accessory/appurtenant residential structures. As such, the project was deemed to be a Type II action pursuant to 6 NYCRR 617.5(c)(9) and (10).

Department Staff issued a letter (Exhibit No. 6-1M) denying the application on October 22, 2004, determining that the project did not meet standards for issuance of either a freshwater wetlands permit or a wild, scenic and recreational rivers system permit. By letter of November 5, 2004 (Exhibit No. 6-1N), Mr. Joachim, through his representative, requested a hearing on the denial. That request was referred to the Department's Office of Hearings and Mediation Services, and received by the office on March 14, 2005, at which time I was assigned to conduct the hearing. I held two conference calls with the parties' representatives - - on March 16 and May 24, 2005 - - to confirm Mr. Joachim's responsibilities in terms of hearing scheduling, and then to fix the hearing date. By letter of May 25, 2005, I confirmed the parties' agreement that the hearing would begin on October 4, 2005, at the Riverhead Town Hall.

On August 19, 2005, the Department issued a combined notice of complete application and notice of public hearing (Exhibit No. 1) which was published in the Riverhead News-Review on September 1, 2005 (see affidavit of publication, Exhibit No. 2) and also appeared in the Department's Environmental Notice Bulletin. The

Department sent the notice to interested state and local officials. (See distribution list, Exhibit No. 5.)

The hearing went forward as announced in the notice on October 4, 2005, at the Riverhead Town Hall.

Department Staff appeared by Vernon Rail, assistant regional attorney at the Department's Stony Brook office.

Mr. Joachim appeared by Charles Bowman of Land Use Ecological Services, Inc.

Legislative Hearing

The hearing notice provided for written and oral public comments on the project application. No written comments were provided before or at the hearing, and no one appeared at the hearing to offer oral comments.

Issues Conference

The hearing notice provided an opportunity for persons and organizations to make written filings for party status, and to propose issues for adjudication with regard to the permit application. No filings were received by the deadline set in the hearing notice, or subsequently. As a result, the only participants at the hearing were Mr. Joachim and Department Staff, and the only issues that were identified involved Staff's bases for denying the permit application.

Hearing Adjournment

After the issues were identified, the hearing was adjourned to afford Mr. Joachim the opportunity to make a written request for a variance from a regulatory prohibition against location of private dwellings within 150 feet of the bank of a recreational river. The variance request (Exhibit No. 19) was submitted on January 16, 2006, and Department Staff responded to it by letter dated April 27, 2006 (Exhibit No. 20).

On May 2, 2006, I held a conference call with the parties' representatives to discuss resumption of the hearing. The parties ultimately agreed to resume the hearing on October 24, 2006, again at the Riverhead Town Hall.

Adjudicatory Hearing

The adjudicatory hearing addressing Staff's objections to the project was held on October 24, 2006.

Department Staff presented as its witness Robert F. Marsh, the Region 1 manager of the Department's Bureau of Habitat. (Mr. Marsh's resume was received as Exhibit No. 8.)

Mr. Joachim appeared through Mr. Bowman, who testified on his behalf. Mr. Bowman, the president of Land Use Ecological Services, Inc., is an environmental consultant and analyst who developed the project application. (His resume and a summary of his company's operations were received as Exhibit No. 9.)

Also testifying for Mr. Joachim was Joseph A. Ingegno, a land surveyor in Riverhead, who prepared a property survey on which the project is displayed.

Closing Statements

Oral closing statements were delivered at the hearing by Mr. Rail and Mr. Bowman. Also, because of the poor quality of the hearing transcription, an additional opportunity was provided for written closings. No written closing was received on behalf of Mr. Joachim, though Mr. Rail filed a closing brief dated January 31, 2007.

Transcript Corrections

Because of the poor quality of the hearing transcription, I circulated a copy of the transcript, annotated with my own proposed corrections, for the parties' comments. There were no objections to my corrections, and the parties suggested additional corrections of their own. All the corrections, both those proposed by me and those proposed collectively by the parties, have been adopted for the sake of compiling as accurate a transcript as possible.

Closure of Hearing Record

As confirmed in a letter I circulated to the parties' representatives on February 9, 2007, the hearing record closed on February 5, 2007, the date that the transcript, as annotated by the parties, was returned to me.

Statement of Issues

The issues in this case were derived from Department Staff's objections to issuance of the requested permits. Staff determined that the project does not satisfy the standards at 6 NYCRR 663.5 for issuance of a freshwater wetlands permit, and that the project also does not meet the standards at 6 NYCRR 666.8(f) for issuance of a wild, scenic and recreational rivers system permit.

Pursuant to 6 NYCRR 666.13(C)(1), private dwellings are prohibited within 150 feet of the bank of a recreational river. Department Staff and Mr. Joachim disagree about the location of the river bank, but agree that the proposed house is within 150 feet of it, and that a variance is needed if a permit is to be issued. Staff determined, upon review of the variance request, that a variance is not warranted in this instance. Staff contends that the requested variance is substantial, and that granting the variance would have an adverse impact on environmental conditions along the river corridor, and change the corridor's character.

FINDINGS OF FACT

1. Alexander and Linda Joachim of East Moriches, New York, own a parcel of property about one acre in size situated at 2427 River Road, Calverton, in the Town of Riverhead, Suffolk County. [See location map, Exhibit 6-1D.]

2. The Joachims bought the property, along the road's south side, on July 11, 2003, from Joseph H. Owen for a sales price of \$17,500. [See Exhibit No. 21, a sale detail report from Sales Web.] The deed was recorded on July 23, 2003, in the Office of the Suffolk County Clerk, Liber D00012262, page 730.

3. On June 4, 2004, Mr. Joachim filed an application with the Department for both a freshwater wetlands permit and a wild, scenic and recreational rivers system permit. The application was made for the purpose of constructing a two-story single-family dwelling at the River Road property, which is now vacant and undeveloped.

4. The proposed dwelling would have a footprint of 650 square feet, the minimum required by town zoning. It would be set back 20 feet from the road, 40 feet wide along its front and 22 feet deep along its east side. The back of the house would face toward the Peconic River and a Class I freshwater wetland,

R-5, that exists between the river and the upland portion of Mr. Joachim's property.

5. A non-disturbance buffer approximately 30 feet wide is intended to separate the limit of clearing, grading and ground disturbance from the wetland, to provide screening and protection for wetland resources. Also, a continuous line of hay bales with silt fencing is intended to be placed at the limit of ground disturbance prior to the start of construction. [See Exhibit No. 22, a property survey map on which the project features are depicted.]

6. The house would be built in association with a pervious driveway west of the house, a septic system that would be located between the house and the road, and a one-foot-high wood tie retaining wall between the septic system and the road.

7. The septic system has a linear design, with a 54-foot setback from the wetland to the septic tank, and a 70-foot setback from the wetland to the nearest active leaching pool. Most of the leaching pools are set back at least 75 feet from the wetland.

8. The bottoms of the leaching pools are intended to be at least 2 feet above groundwater, in an area where the groundwater table is 4.8 feet below the surface. Because of the high groundwater table, filling would occur in the area of the septic system, and this fill would be contained by the retaining wall. Each of the leaching pools would be two feet high, with a six-inch cap on top.

9. The entire project would be located within the regulated 100-foot adjacent area of wetland R-5, as shown on the Riverhead Quadrangle map, Map 18 of 39 for Suffolk County, promulgated by the Department pursuant to the state's freshwater wetlands act on May 26, 1993. [The map was received as Exhibit No. 6-2.]

10. The adjacent area is vegetated primarily with pioneer or ornamental species such as black cherry, honey locust, poison ivy, pokeweed, vinca, white heath aster, mugwort and Virginia creeper.

11. The Class I freshwater wetland on the subject parcel serves the following benefits and functions as outlined in ECL 24-0105:

- - Flood and storm control, because of the wetland's hydrologic absorption and storage capacity;

- - Wildlife habitat, in that the wetland provides breeding, nesting and feeding grounds and cover for many forms of wildlife, wildfowl and shorebirds;
- - Protection of subsurface water resources;
- - Pollution treatment; and
- - Storm-related erosion control.

12. The wetland comprises between 75 and 80 percent of the subject parcel. The remainder of the parcel is an upland area, elevated over the wetland by as much as six feet, in which filling occurred many years ago, before Mr. Joachim purchased the lot. The upland has a steep downward slope close to the wetland, and pieces of concrete debris can be seen in this area, at the surface and buried in the bank. The slope significantly exceeds the natural angle of repose, and adjoining parcels do not incorporate such a steep slope and are also lower in topography.

13. The onsite wetland is mostly deciduous swamp dominated by red maple, with a couple of *Salix* (willow) trees close to the river. These wetland trees depend upon seasonal or permanent flooding or sufficiently water-logged soils to give them a competitive advantage over other trees. [See ECL 24-0107(1)(a)(1).]

14. The wetland also includes a dense understory of mixed shrubs such as blueberry, northern arrowwood, and some sweet pepperbush, as well as a groundcover understory of cinnamon fern and skunk cabbage.

15. The wetland extends onto the adjoining property east of the project site, but not onto the adjoining property west of the site. The latter property has lawn which extends to the river's edge, and it appears that some filling occurred there before the Peconic became protected under the wild, scenic and recreational rivers system act.

16. The subject site and the adjacent Peconic River are inhabited and used by wildlife common to the area, including various species of birds, fish, amphibians and small and large mammals.

17. The stretch of the Peconic adjacent to the project site is protected by the Department as a recreational river. [See Exhibit No. 7, a map showing the approximate location of the subject property, highlighted in yellow, within the Peconic's recreational river corridor.] The river is heavily used for recreational purposes, most particularly canoeing and kayaking, as well as fishing, hunting and swimming.

DISCUSSION

This project requires two permits from the Department: (1) a freshwater wetlands permit, and (2) a wild, scenic and recreational rivers system permit. The freshwater wetlands permit is needed because all project activities would occur within 100 feet of Class I wetland R-5, in other words, within the wetland's regulated adjacent area. The rivers system permit is needed because all project activities would occur within the regulated corridor of the Peconic River.

The longest river on Long Island, the Peconic originates in the middle of the island, near Brookhaven National Laboratory, then flows generally eastward, emptying into Flanders Bay. West of the project site, the river corridor is classified as scenic, but as it enters Calverton, in the vicinity of the project site, the corridor is classified as recreational. The river is slow-moving and, near the project site, it has numerous bends and turns in its channel. Although the site itself is undeveloped, other properties along the south side of River Road, including those on both sides of the project site, are developed with houses, and some are cleared to the river. Just east of the project site, the river passes under the Long Island Expressway, before moving on to Riverhead.

The project site is separated from the river by an extensive area of Class I wetland. The boundary of the wetland, as it crosses the project site, has been flagged and is depicted on the property survey (Exhibit No. 22). The parties agree as to the wetland's delineation, and therefore about the distance of various proposed activities from the wetland. However, they do not agree as to the location of the Peconic river bank, which means that the distance from the river bank to the proposed dwelling is disputed. This is important because of the use guideline [at 6 NYCRR 666.13(C)(1)] that prohibits private dwellings, mobile homes, and multiple family dwellings within 150 feet of the river bank.

Department Staff contends that the proposed house would be 54 feet from the river bank and, therefore, that a substantial variance is required for the project to go forward. On the other hand, Mr. Joachim contends that the proposed house would be 140 feet from the river bank and, therefore, that only a minor variance is needed.

The parties' disagreement was highlighted in the testimony of Mr. Marsh for the Department, and Mr. Ingegno for Mr. Joachim. According to Mr. Marsh, the river bank should be considered the

same as the boundary of the freshwater wetland, as determined from the transition between terrestrial and aquatic vegetation. Mr. Ingegno said the river bank should be considered to be that line where wetland vegetation stops and open water begins, or, as he put it in his testimony, where if you walked any further you would fall in the water.

The rivers system regulations define "river bank" as "that land area immediately adjacent to and which slopes toward the bed of a watercourse, the integrity of which is necessary to maintain the watercourse" [6 NYCRR 666.3(aaa)]. Applying this definition, I agree with Mr. Ingegno's understanding of where the river bank is located. Mr. Ingegno testified that he visited the site on March 10, 2003, for the purpose of doing his property survey, and that he returned to the site on July 29, 2003 and May 15, 2004. He said that, during these visits, he never saw the area between his and Staff's river bank lines (in other words, the wetland area) covered with water. He added that he has lived in Riverhead for 35 years, and that his survey depicts what he understands to be the river's normal course. He said he had done three or four other surveys along the river, also in association with building applications, and that in each survey he had separate lines for the edge of the water and the edge of the wetlands.

Mr. Ingegno's understanding of the "river bank" is consistent with the depiction of the river in an aerial photograph taken in March 2000 and received as Exhibit No. 10. That photograph shows a clear demarcation between the open water of the river as it meanders past the site, and the vegetated wetland. The property survey provided by Mr. Ingegno shows not only the river bank, but the area (depicted in the survey as Zone "X") which was determined to be outside the river's 500-year floodplain. That depiction confirms that when the river floods, the flooding does not extend to the boundary of the wetland.

Mr. Marsh determined the river bank's location on the basis of how one might determine the "mean high water" of a water body at a given location. According to 6 NYCRR 666.3(hh), "mean high water" means "the approximate high-water level" for a water body, "that distinguishes between predominantly aquatic and predominantly terrestrial habitat." The regulation provides that mean high water is determined preferably by "available hydrologic data, calculations, and other relevant information concerning annual water levels," but can also be determined by other means including "vegetative characteristics" (e.g., location, presence, absence, or destruction of terrestrial or aquatic vegetation). [See 6 NYCRR 666.3(hh)(1)-(4).]

Not having hydrologic data, Mr. Marsh determined "mean high water" by looking for the limit of hydrophytic vegetation (vegetation that grows in waterlogged soils), and then concluded that the river bank was in a similar location on the basis that the river's water level does not fluctuate much. As noted in my findings, the wetland includes red maple and willow species that the law indicates depend on flooding or waterlogged soils to give them a competitive advantage. A review of this vegetation proved useful in determining the wetland boundary - a boundary that Mr. Joachim does not contest - but it does not establish the river bank.

The definition of "river bank" refers to "mean high water" only to confirm that a river bank "will not be considered to extend more than 50 feet horizontally from the mean high water line, except that it may be extended up to the crest of a contiguous bluff, cliff, hillside or similar feature, where necessary to protect a watercourse." [6 NYCRR 666.3(aaa).] This language recognizes that, in certain cases, the river bank may be some distance beyond the "river bed," defined as "that land area covered by water at mean high water." [6 NYCRR 666.3(bbb).] At this site, the river bank exists along the edge of the river bed, since the land area beyond the bank does not slope toward the bed, but is an extensive wetland flat. The only pronounced change in elevation occurs beyond the wetland boundary, where the property slopes toward the wetland from the upland along River Road. Old, unregulated filling in the upland area has created what might be considered a bank facing the river, but it has no apparent effect on the river's course.

Mr. Marsh said that he identified the river bank boundary not only on the basis of hydrophytic vegetation, but on the basis of standing water he observed at the landward edge of the wetland, at the toe of the upland slope. He did not indicate the depth of the water, or the extent of its coverage on the wetland. Mr. Ingegno acknowledged only that the wetland had a "spongy bottom," but that when he was walking in it, "we were not in the water." Mr. Bowman said there is standing water in the wetland periodically, but distinguished it from the flowing water of the river.

Standing water and what Mr. Ingegno described as a spongy surface are both consistent with a wetland environment, though they do not establish the wetland, particularly that part of it which falls outside the river's flood plain, as part of the river bed, or within the river bank. Water in a wetland may come from a number of sources, including direct precipitation, upland runoff, upwelling springs, or a groundwater table that is close

to the surface (which this one has, based on test hole data). Mr. Marsh did not identify the source of the standing water he observed, but by using it to establish the river bank, he implies a connection with the river that, on this record, cannot be established. The fact that so much of the wetland exists outside the river's flood plain (the location of which on the survey map was not challenged by Staff) suggests that the water in the wetland does not come from the river. Overall, the evidence supports Mr. Ingegno's view that the river and the wetland have their own separate boundaries.

- - Freshwater Wetlands Permit

As acknowledged by both parties, all development associated with this project is proposed to occur within the adjacent area of Class I freshwater wetland R-5, defined as that area within 100 feet of the designated wetland boundary. With regard to permit issuance, each of the activities proposed by the applicant must be viewed in relation to its compatibility with the wetland and its functions and benefits, and, if deemed to be incompatible, must be subjected to certain standards by which the economic or social need that is satisfied by the proposed activity is weighed against the loss of or detriment to the wetland benefits.

Here, according to an activities chart at 6 NYCRR 663.4(d), each of the activities which are part of the project is deemed to be at least usually incompatible with a wetland and its functions and benefits. More particularly:

- - Constructing a residence or related structures or facilities in the adjacent area of a wetland [Item 42 in the chart] is classified as P(N), meaning a permit is required, and the activity is considered usually incompatible with a wetland and its functions or benefits, although in some cases the proposed action may be insignificant enough to be compatible.

- - Filling in the adjacent area of a wetland [Item 20] - in this case in association with construction of the septic system - is also considered P(N), as is clear-cutting of vegetation other than trees [Item 23], permits being required for both activities.

- - Introducing or storing sewage effluent [Item 38] - through development of the septic system - is considered P(X), meaning a permit is required, and the activity is in all cases incompatible with a wetland and its functions and benefits.

Of these activities, the introduction of sewage effluent is of greatest concern, because it is classified as P(X) not only for the wetland, but for the adjacent area as well. The activities chart indicates that introduction of sewage effluent into wetlands or adjacent areas may contaminate ground and surface waters with undesirable nutrients and organisms that may create a health hazard. In this case, Staff is particularly concerned about the potential human health risk should pathogens, including viruses, enter surface waters.

Mr. Joachim has sought to mitigate impacts from his proposed septic system by locating it as far from the wetland and river as possible, in the upland area between the proposed house and River Road, only five feet from the road's edge. Even so, the septic tank would be 54 feet from the wetland boundary, and the nearest leaching pool would be 70 feet from the wetland boundary. In another effort to mitigate impacts, Mr. Joachim said he would covenant that the proposed house be limited to two bedrooms, to reduce the volume of effluent it would generate.

The septic system, the cost of which Mr. Bowman estimated to be \$25,000, was described as a linear, five-pool sanitary leaching system with concrete retaining walls. Mr. Bowman said the system would be constructed to provide two feet of separation between the bottom of the leaching pools and groundwater, and would be located far enough from the wetland to adequately filter effluent. He added that sanitary engineers employed by the Suffolk County Department of Health Services would review the sanitary design to assure that groundwater quality is not compromised and the public health and welfare are maintained. That review had not occurred at the time of this hearing, and the parties' key witnesses, Mr. Bowman and Mr. Marsh, are environmental scientists, not sanitary engineers.

Mr. Bowman acknowledged it is normal to maintain a 100-foot separation between a septic system and a wetland, but said that distance was appropriate for a four bedroom house, which would have twice the effluent of the two bedroom house proposed by Mr. Joachim. On the other hand, Mr. Marsh said the regulation keeps septic systems 100 feet from a wetland because of studies showing that viruses can travel more than 100 feet through sandy soils, such as those at the project site. Mr. Marsh described a situation in which viruses could travel, presumably through the groundwater, from the area of the leaching pools to the wetland, a distance of as little as 67 feet, then enter the wetland's surface waters, and from there reach the river, which he said is heavily used by the public for activities such as fishing and swimming. Mr. Marsh said that, in his six years of permitting

experience, he had seen sanitary systems built less than 100 feet from a freshwater wetland, but that the Department had not permitted systems that were less than 75 feet from a wetland. He claimed that sand is good for filtering water, but only in relation to certain contaminants, and not for pathogens like viruses. In describing his background, Mr. Marsh explained that he had taken training courses within the Department on waste water treatment systems.

A preponderance of the record evidence establishes that the septic system, because of its proximity to the wetland, is not compatible with the public health and welfare, and therefore does not fully meet the weighing standards of 6 NYCRR 663.5(e)(2). This by itself is sufficient to deny the project application, since the house cannot be built without some means of treating its sewage effluent.

Beyond that, however, the applicant did not overcome the presumption that the house itself, and the clear-cutting required for property development, are themselves incompatible with the wetland and its functions and benefits. As Staff contends, these activities would cut significantly into the buffer that is now provided by the wetland's adjacent area. The house itself would be as close as 54 feet from the wetland, and the driveway would be as close as 38 feet from the wetland. Additional clearing, grading and ground disturbance would be as close as 28 feet from the wetland.

Mr. Marsh explained that the wetland and its adjacent area are both now well-vegetated, and combine to provide valuable habitat for wildlife, wildfowl and shorebirds. Particular species were not discussed during the parties' testimony, though the parties stipulated before the hearing that the site and the adjacent river are inhabited or used by wildlife common in the area, including various species of birds, fish, amphibians and small and large mammals.

In its permit denial letter, Department Staff said that the upland area of the project property has some potential as salamander habitat, since the subject property is located within 1,000 feet of a known tiger salamander breeding pond, and salamanders have been shown to use upland habitat over 1,000 feet from documented breeding grounds. At the hearing, however, Staff made no reference to these salamanders, or the possibility that they use the wetland's adjacent area as habitat. At most, one may conclude that if the project went forward, the wetland itself would be less attractive generally for wildlife breeding, nesting

and feeding, due to the loss of vegetated buffer and the increased proximity of human activities.

Mr. Marsh also explained that the wetland and its adjacent area both serve a flood control function. He said that the addition of less pervious surfaces in the adjacent area, such as the impervious roof and the driveway which, while somewhat pervious, would be less absorbent than the existing soils, would reduce the adjacent area's ability to take in precipitation. That precipitation would then be more likely to run downslope into the wetland, further taxing the wetland's storage capacity.

Finally, Mr. Marsh explained that the removal of vegetation in the adjacent area would impact that area's ability to filter the water that reaches the wetlands, including filtering of nutrients that would be added by the sanitary system.

The weighing standards [at 6 NYCRR 663.5(e)(2)] state that Class I wetlands provide the most critical of the state's wetland benefits, reduction of which is acceptable only in the most unusual circumstances. They further state that 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.

As Mr. Marsh explained, construction of a house at this location does not satisfy a compelling economic or social need, since it benefits only the property owner, not the community at large. As a community benefit project, Mr. Marsh offered the example of a firehouse that would be built in a wetland's adjacent area because no appropriate alternative location could be established. In that instance, he said, the need for the facility would have to be weighed against its wetland impact, unlike here, where the need is not established.

Mr. Bowman contends that if the house is not built, Mr. Joachim will have suffered a severe economic hardship and a taking of his property without compensation. On the other hand, Mr. Joachim purchased his property in 2003, well after the Department's wetland regulations took effect. In this case, as Staff counsel argues, his hardship is self-created, and there is no particular need that he build at this site, as opposed to another site that is not adjacent to a wetland.

Because the construction of the house, as proposed, would not be compatible with the preservation, protection and conservation of the Class I wetland and its benefits, it must

meet certain standards at 6 NYCRR 663.5(e)(2) to be approved. It must be compatible with the public health and welfare, be the only practicable alternative that could accomplish the applicant's objectives and have no practicable alternative on a site that is not a freshwater wetland or an adjacent area. Furthermore, it 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.

It is clear that, working within the confines of the existing site, the Applicant has taken care to mitigate wetland impacts by concentrating activities in the upland part of the site closest to the road, proposing the smallest house allowable under local zoning, and incorporating a non-disturbance buffer between the cleared area and the wetland. On the other hand, there is no reason why, to build a house for himself, he must do so on the site he has chosen. Mr. Bowman points out that Mr. Joachim does not own another site that is not a wetland or an adjacent area. However, it was his choice to purchase the property that he did, when he knew (or at least should have known) that the presence of wetland could limit its development potential, and prevent him from realizing his objective.

Of the various activities proposed for the adjacent area, only the filling in relation to the septic system's construction could be considered to be compatible with the wetland and its functions and benefits, and then only to the extent the filling is intended to ensure an adequate separation between the bottom of the leaching pools and groundwater. Ensuring an adequate separation is important so the soil beneath the leaching pools can filter contaminants from the effluent in unsaturated conditions. The filling is meant to enhance the performance of the septic system, but as noted above, the system is still too close to the wetland to be permitted, particularly given the threat of viruses escaping to the wetland and from there to the river.

- - Rivers System Permit

Apart from a freshwater wetlands permit, this project requires a rivers system permit pursuant to Part 666 of the Department's regulations, given the project's location within the recreational corridor of the Peconic River. Before a rivers system permit may be issued, it must be determined that:

(1) the proposed land use or development is consistent with the purposes and policies of the Wild, Scenic and Recreational Rivers System Act and with the provisions of Part 666;

(2) specified resources (or features) of protected rivers will be protected and the proposed activity will not have an undue adverse environmental impact; and

(3) no reasonable alternative exists for modifying or locating the proposed activity outside of the designated river area. [See 6 NYCRR 666.8(f).]

These determinations cannot be made in this case, as Mr. Marsh explained at the hearing. Not only does the project fail to meet the relevant permitting standards, it runs afoul of a separate use guideline (in the table at 6 NYCRR 666.13) prohibiting private dwellings within 150 feet of a recreational river bank. The applicant is seeking a variance from this prohibition pursuant to 6 NYCRR 666.9, but a variance is not warranted in this case.

As noted above, the Peconic is classified by the Department as a recreational river where it passes along the south border of the subject property. According to 6 NYCRR 666.4(c), recreational rivers are deemed to be "generally readily accessible, and may have a significant amount of development in their river areas." In fact, the properties on either side of the subject property have been developed with houses, as have other nearby properties along the south side of River Road. This development occurred before the rivers system law took effect, and some of the houses are as much as 50 years old.

The regulations also provide that management of recreational river areas "will be directed to preserving and restoring their natural, cultural, scenic and recreational qualities, except in areas delineated by the department as communities, which will be managed to avoid adverse environmental impacts and loss of existing river corridor values." Though the area on both sides of River Road in the vicinity of the project site, all of it in the river corridor, has been largely developed with houses, there is no evidence that it is within a Department-delineated "community," or that it has the characteristics of a "community" as that term is defined at 6 NYCRR 666.3(m).

In considering a variance from the use guideline prohibiting private dwellings within 150 feet of a recreational river bank, the parties agree that the standards for an area or dimensional variance [at 6 NYCRR 666.9(a)(2)] apply. Those standards require consideration of whether compliance with the guideline would cause "practical difficulty" for the applicant, which is based on

weighing the benefit to the applicant if the variance is granted, against the adverse impacts upon river resources. In its determination, the Department will also consider:

- - Whether and to what extent a change will be produced in the character of the river corridor or a detriment to nearby properties will be created by the granting of the variance;
- - Whether the benefit sought by the applicant can be achieved by some other method, feasible for the applicant to pursue, other than an area variance;
- - Whether the requested variance is substantial;
- - Whether the proposed variance will have an adverse impact on the physical or environmental conditions in the river corridor; and
- - Whether the alleged practical difficulty was self-created, which consideration will be relevant to the Department's decision, but will not preclude the granting of the variance. [6 NYCRR 666.9(a)(2).]

In its April 27, 2006 letter (Exhibit No. 20) Department Staff denied the variance on the grounds that the proposed project (1) would have an adverse impact on the character of the river corridor, because the dwelling and its associated clearing would be visible from the river, and (2) would have a potential impact on the environmental conditions of the river corridor, due to the septic system's proximity to the wetland (the edge of which Staff equates with the river bank), and the possibility that this might lead to contamination of the river with excess nutrients, chemicals and harmful pathogens. In relation to environmental impacts, Staff also raised concerns that clearing would eliminate river buffer, affecting wildlife habitat, and that fertilizers and pesticides from lawns and landscaped areas might reach the river.

Finally, Staff said the variance request was substantial, though I accept the applicant's argument about the location of the river bank, in which case the dwelling would be separated from the bank by 140 feet, not 54 feet as Staff contends.

In relation to changing the character of the river corridor, I agree with Department Staff that construction of the proposed house would adversely impact the river corridor's natural and scenic qualities. Despite clearing and the development of lawns along significant portions of the north river bank near the project site, considerable stretches along the north bank, and all of the south bank, remain uncleared and in a natural state. As Staff argues, the proposed house and the clearing around it would be visible from the river, despite the approximately 30-

foot non-disturbance buffer that Mr. Joachim intends to leave north of the wetland. The wetland itself would provide some screening of the development, but as it is covered with deciduous trees, much of that screening would be lost during leaf-off conditions from November to April. As Mr. Bowman pointed out, recreational use of the river goes down during the winter months. However, there was no evidence that boating, hunting and other activities cease during that period.

Mr. Bowman said that Mr. Joachim intended to work out a plan with the Department by which the non-disturbance buffer would be planted with large white pines or red maples, and that Mr. Joachim would be more than willing to use evergreens as necessary to ensure there would be no impact to the view from the river. However, on the day of the adjudicatory hearing, no plan had been established, nor was a plan part of the application itself. Though trees can be used as a screening device, it was unclear how these trees, particularly the evergreens, would blend in with the background vegetation, and whether their benefit would outweigh possible impacts from ground disturbance related to their planting, and the displacement of existing, naturally-occurring vegetation. It was also unclear how extensive a planting plan would be required, and where the view of the house from the river would be most pronounced.

Mr. Bowman argued, as part of the variance request, that other sites within the regulated Peconic's scenic and recreational river corridors had been permitted for single family dwellings, and provided a list of nine properties where he said this had happened. Prior to the hearing, Mr. Marsh reviewed the files for each of the nine permit applications. He brought the files to the hearing and explained for each case what the project involved and why the permit was granted. As he pointed out, all new dwellings approved by the Department were at least 150 feet from the river bank, and the only permits for houses within 150 feet of the river bank involved additions to existing dwellings, such as a sunroom addition to the river side of a dwelling, 90 feet from the river bank, or an addition to another house, 78 feet from the river bank. Allowing Mr. Joachim to build a house within 150 feet of the river bank would apparently set a precedent for similar variance requests that could be made in the future, with the potential for cumulative impacts along the Peconic River, where, as Staff notes, there are many undeveloped lots held in private ownership, despite the mostly developed character of River Road in the vicinity of the project site.

As explained in the variance application, the septic tank, which has no discharge associated with it, would be set back 144

feet from the river, and the leaching and expansion pools would be set back 152 feet from the river, which is as far from the river as possible. Because of the potential for viruses to reach the river, discussed above in relation to the freshwater wetlands permitting standards, the septic system could have an adverse effect on environmental conditions in the river corridor. However, this is only a potential impact, not a certainty. As Mr. Bowman explained, the septic tank is intended to be watertight, with no associated discharge. For the septic system to back up, he said, the septic tank and the leaching pools would have to fill up. He added that the possibility of failure would exist, but failure would be highly unlikely given the techniques used in the system's construction.

Overall, I conclude that the variance should be denied in light of the impact the house would have on the character of the river corridor, as well as the risk the septic system presents for contaminants, particularly viruses, to enter river waters. On the other hand, I agree with the Applicant that the requested variance is not substantial, and that compliance with the 150 foot separation requirement cannot be achieved at this site, given the fact that moving the house another 10 feet from the river bank would put it so close to the road that town approval would be denied, and even now a front yard variance is required.

Compliance with the Department's setback requirement presents a practical difficulty for the Applicant, but, as Staff argues, this difficulty was created by the Applicant himself when he purchased the site for a house. As Staff counsel argues in his closing brief, dated January 31, 2007, the applicable statutes and regulations that control the development of parcels in proximity to wetlands and wild, scenic and recreational rivers were in place prior to Mr. Joachim's purchase of his property in 2003. Since he purchased his land 10 years after the effective date of the Peconic's designation under the rivers system act, Mr. Joachim at the least had constructive notice, if not actual notice, of the requirement that houses be set back 150 feet from the river bank.

According to Staff's closing brief, 6 NYCRR 666.9(a)(2)(v) prohibits granting the variance when the practical difficulty with regulatory compliance is self-created. Actually, the regulation states that if the practical difficulty is self-created, this will not necessarily preclude granting the variance. Nevertheless, the regulation also states that it is a factor relevant to the Department's decision, and it supports denial of the variance in this instance.

Mr. Bowman argued that the difficulty was not self-created because the size, shape and configuration of the lot have existed in their present conditions since prior to the enactment of the Peconic River boundaries and regulations. Even so, the difficulty for Mr. Joachim was created when he purchased the lot for the purpose of building a house, as he bought the lot subject to the development restrictions that were applicable at that time.

For variances such as this, the regulations provide an applicant the option to prove, by competent financial evidence, that the strict application of the subject provision will result in significant economic injury. Such evidence will be limited to the effect of such provision on the property in question; whether the value would be enhanced were a variance granted will not be relevant. If the applicant demonstrates significant economic injury, the burden is on the Department to establish that the strict application of the provision is reasonably related to the purpose and policy of the rivers system act and regulations. [6 NYCRR 666.9(a)(2).]

Here, Mr. Bowman testified that if the variance is denied and the project is not permitted, Mr. Joachim would suffer economic hardship through the loss of the money he paid for the land (\$17,500, according to a sale detail report received as Exhibit No. 21), as well as the money he has invested in seeking permit approvals. Furthermore, Mr. Bowman explained, Mr. Joachim would suffer the loss of \$988 paid each year in taxes on property for which there would be no investment return.

Department Staff made it clear it would not approve a house on the lot, only a pathway to a small dock, though Mr. Joachim is not seeking a dock, and is willing to covenant that he would never apply for one. Mr. Bowman said that while it had been suggested to Mr. Joachim that he sell his property to a conservation organization, state and local agencies that had been contacted had no interest in acquiring the property, because it is so small and because it is bordered on both sides by lots developed with houses.

Mr. Bowman argued that Mr. Joachim's purchase price for the property did not represent a "steal" but rather a fair market price, recognizing both the risk factor that permits would not be issued as well as the other costs that would be incurred for building a house in this moderate income neighborhood. Mr. Bowman provided a construction cost estimate (Exhibit No. 15) in which he calculated the cost by square foot for the proposed dwelling, and compared it to the sales price by square foot for

dwellings at two nearby properties (at 2441 and 2499 River Road). Staff argued that these other dwellings are not really comparable as they are more than 50 years old, though Mr. Bowman responded that they have other amenities such as clearing to the river and water views that this one would not.

Whatever one may conclude from Mr. Bowman's construction cost estimate, there is no question that Mr. Joachim would suffer economic injury if the variance is denied. However, even if that injury is considered significant, Mr. Marsh also demonstrated for Staff that strict application of the 150-foot separation requirement is reasonably related to the policy of the rivers system act that the Peconic and its immediate environs be protected for the benefit and enjoyment of present and future generations. [See purposes and policies of act at 6 NYCRR 666.1.] Ensuring that the river corridor is protected against inappropriate development outweighs any economic injury the applicant may incur, especially since, as discussed above, the hardship was self-created.

The environmental concerns that arise in consideration of the variance application carry over to consideration of the rivers system permit application more generally. Given that the entire site is within the recreational river corridor, no reasonable alternative exists for modifying or locating the house outside of the designated river area. However, the location of the dwelling within 150 feet of the river bank means that the project is not consistent with the provisions of Part 666, and the fact that the house could be seen from the river, at least during leaf-off conditions, means that the development is not consistent with the policies of the rivers system act.

The rivers system act is intended to preserve the natural and scenic qualities of recreational rivers [6 NYCRR 666.4(c)], and construction of a private dwelling at this location would not be consistent with that objective. Furthermore, operation of the dwelling's sanitary system presents the risk of contaminating the river waters, particularly with viruses.

Department Staff is also concerned about contamination of the river from fuel spills associated with machinery operations during construction of the house, and with the use of fertilizers and pesticides from lawns and landscaped areas. However, I find there is only a minor risk of fuel spilling into the river, and Mr. Joachim pledged not to use fertilizers in the non-disturbance buffer, and to minimize pesticides in the landscaped area, so I see only minor risks there as well.

The use guidelines at 6 NYCRR 666.13 include notes that provide additional standards and restrictions for particular land uses and developments. Among other things, these notes require that all new residential structures constructed within 500 feet of a recreational river bank be screened by vegetation or topographic features as viewed from the river. [See 6 NYCRR 666.13(C), note (i).] This presents a problem for the Applicant, to the extent that recreational users of the Peconic River could see his house, particularly during leaf-off conditions. Also, the notes require that each private dwelling in a recreational river area be on a lot of at least two acres, apparently to prevent overbuilding in the river corridor. [See 6 NYCRR 666.13(C), note (iii).] The application itself indicates that this lot is about one acre, half the necessary size.

As a ground for permit denial, Staff addressed the visibility of the proposed dwelling in relation to the requested variance from the use guideline prohibiting private dwellings within 150 feet of a recreational river bank. Though Staff did not also address the lot size requirement, that requirement would provide a separate basis for permit denial even if the variance from the 150-foot setback requirement were granted.

A note addressing residential structures provides that clustering of such structures will be encouraged and may be allowed by rivers system permit in order to maintain undeveloped and undisturbed open areas. [See 6 NYCRR 666.13(C), note (v).] In his testimony for the Applicant, Mr. Bowman acknowledged that the rivers system regulations prefer residential cluster areas. Based on its character, he also described the section of River Road near the project site as a cluster of seven residential structures, all of them larger than the house proposed by Mr. Joachim. He contrasted this area to other parts of the Peconic River corridor which he referred to as undisturbed and pristine.

As defined under the rivers system regulations, "clustering" includes the varying of area requirements for structures within a specific tract of land from the area requirements of a local zoning ordinance, for the purpose of preserving the natural and scenic qualities of the land [6 NYCRR 666.3(i)]. When clustering is permitted by a locality, the minimum acreage requirement must be satisfied for the parcel as a whole, rather than for each lot individually, and, for a recreational river area, not less than 30 percent of the clustered subdivision must be retained in an undisturbed condition during and after development. [6 NYCRR 666.13(C), note (vi).]

As the aforementioned notes make clear, clustering involves a purposeful design for multiple lots in a subdivision, and is not pertinent to development of a single residence on one lot. The concentration of development near the project site, which occurred in the past and is not connected to this application, is not relevant to consideration of the lot size requirement.

Because the lot size requirement was not cited by Staff as a reason to deny the rivers system permit, it was not adjudicated as an issue in this hearing. Nonetheless, as part of the use guidelines under 6 NYCRR 666.13, it provides an independent basis for permit denial, in that consistency with all provisions of Part 666 must be established before a rivers system permit may be issued. [See 6 NYCRR 666.8(f)(1).] To address the lot size issue, the Applicant would need an area variance under 6 NYCRR 666.9(a)(2), consideration of which would involve the same factors that apply to the dimensional variance that was sought in relation to the dwelling's setback from the river bank. No such variance has been requested in this case.

CONCLUSIONS

1. On the record developed at the hearing, the Applicant, Mr. Joachim, did not demonstrate that his project meets the standards at 6 NYCRR 663.5 for issuance of a freshwater wetlands permit, or the standards at 6 NYCRR 666.8(f) for a rivers system permit.

2. The Applicant, Mr. Joachim, also did not demonstrate that a variance from the provision of 6 NYCRR 666.13 prohibiting private dwellings within 150 feet of a recreational river bank is warranted in this case.

RECOMMENDATION

The permit application should be denied.

EXHIBIT LIST

ALEXANDER JOACHIM

PERMIT HEARING

Application No. 1-4730-01198/00003

1. Combined Notice of Complete Application and Notice of Public Hearing (8/19/05)
2. Affidavit of publication of hearing notice in Riverhead News-Review (9/1/05), with transmittal letter from Land Use Ecological Services (9/27/05)
3. ALJ's transmittal letter for hearing notice (8/19/05)
4. Hearing notice, as it appeared in Department's Environmental Notice Bulletin
5. Hearing notice distribution list (8/19/05)
6. Synopsis of events prior to submission of current application, prepared by DEC's Division of Permits (2/5/05) and marked as Exhibit 6-1. Also includes current application materials, marked 6-1A through 6-1N; a copy of the state's freshwater wetlands map, marked 6-2, with the subject parcel highlighted in yellow; and a stipulation of facts between DEC Staff and the Applicant.
7. Wild, Scenic and Recreational Rivers map, with project site highlighted in yellow.
8. Resume of DEC witness Robert F. Marsh
9. Summary of Operations, Land Use Ecological Services, Inc.
10. Aerial photograph by Aerographics, Inc. (3/7/00)
11. Suffolk County real property tax map 137
12. Suffolk County real property tax map 138
13. Applicant's site description information
14. Applicant's information for variance from 6 NYCRR 666.13
15. Applicant's construction cost estimate for subject property
16. Applicant's information re: freshwater wetland permitting standards
17. Application's information re: water/nitrogen budget
18. Applicant's photographs of project site and vicinity, marked 18-A through 18-F
19. Request for dimensional variance from 6 NYCRR 666.13(C)(1), under cover letter from Land Use Ecological Services, Inc. (1/16/06)
20. Letter of Department Staff addressing variance request (4/27/06)
21. Sales Web sale detail report for Applicant's purchase of project site
22. Property survey for project site