

In the Matter of the
Application for a Freshwater
Wetlands Permit and a Tidal
Wetlands Permit pursuant to
Articles 24 and 25 of the
Environmental Conservation Law

Issues Ruling

-by-

DEC #1-4728-04304/00001

Steven Kunreuther,

November 19, 2007

Applicant.

Project Description

Steven Kunreuther (applicant) applied for a tidal wetlands permit, pursuant to article 25 of the Environmental Conservation Law (ECL), and a freshwater wetlands permit, pursuant to article 24 of the ECL, for work he proposes to do at his house located at 111 Pacific Walk, Saltaire, Fire Island. These permits are necessary to expand the existing 2,500 square foot house to construct: (1) a 22' x 25' partial second story addition for use as a media room/office; and (2) an 8' x 25' unenclosed wood deck over an existing wood walk.

Procedural History

The application was received on January 20, 2006 by staff of the New York State Department of Environmental Conservation (DEC). DEC staff deemed the application complete on February 6, 2006 and requested additional information by letter dated March 9, 2006. This information was received on April 21, 2006. By letter dated May 2, 2006, DEC staff informed the applicant that his entire parcel was located in freshwater wetland BE-19, based on an April 14, 2006 field inspection by DEC staff member Robert Marsh. After some additional correspondence between the parties, DEC staff issued a Notice of Permit Denial on October 10, 2006. By letter dated October 24, 2006, the applicant requested a hearing. The file was received in DEC's Office of Hearings and Mediation Services on January 30, 2007 and the matter was assigned to me on February 2, 2007.

After a series of communications with the parties, a hearing notice was drafted and the legislative hearing and issues conference were scheduled for July 31, 2007. Notice of the hearing was published on July 5, 2007 in the *Islip Bulletin* and

on July 4, 2007 in DEC's electronic *Environmental Notice Bulletin*. The hearing notice set a date of July 24, 2007 for the receipt of petitions for party status, and no petitions for party status were received. The legislative hearing and issues conference occurred on July 31, 2007. Transcripts were received on September 13, 2007. After discussing a possible briefing schedule, the parties decided not to submit briefs and the issues conference record closed on October 18, 2007.

Legislative Hearing

The legislative hearing began at 10:20 a.m. on July 31, 2007 in the Saltaire Fire House Meeting Room, 105 Broadway, Fire Island, NY. At the legislative hearing, five people spoke. The first speaker was Mario Posillico, the Village Administrator for the Village of Saltaire. Mr. Posillico spoke in favor of the project and argued on behalf of the Village that this application should be exempt from DEC permitting pursuant to ECL 24-1305 (the applicant does not make this argument [t. 35]). The second speaker, Nicholas Petschek, a long time resident of Saltaire and architect, discussed: the history of freshwater wetland BE-19; his contention that without the pumping of freshwater from the aquifer to the homes in Saltaire and its disposal, freshwater wetland BE-19 would cease to exist; and the lack of studies to support DEC Staff's position that increased sewage effluent would harm BE-19. The third speaker, Bonnie Selterman, a resident and property owner in Saltaire, spoke about the arbitrariness of DEC's freshwater wetlands regulations and their impact on property owners' rights. The fourth speaker, Mr. Kunreuther, the applicant, spoke regarding the fact that two years ago his next door neighbor had applied for and received a DEC permit for construction similar to the instant application and no administrative hearing had been held. Fifth, Ken Selterman, a resident and property owner in Saltaire, questioned DEC's regulatory authority to require a permit in this case where the footprint of the house was not changing. Finally, Mr. Petschek again spoke, this time addressing a change he noted on the part of DEC Staff in 2003 when applications for second floor expansions (without changes to building footprints) began to be denied. He questioned DEC Staff's increasingly stringent interpretation of the freshwater wetlands regulations.

Following the legislative hearing, the parties and I walked several blocks from the hearing site to the project site and conducted a site visit. After the site visit, we returned to the hearing location and conducted the issues conference.

Issues Conference

At the issues conference, DEC staff was represented by Kari Wilkinson, Esq., Assistant Regional Attorney. The applicant was represented by Lark Shlimbaum, Esq. of the firm Shlimbaum & Shlimbaum.

Mr. Kunreuther's application requests both a freshwater wetland permit and a tidal wetland permit to construct: (1) a 22' x 25' partial second story addition for use as a media room/office; and (2) an 8' x 25' unenclosed wood deck over an existing wood walk. DEC staff does not object to the issuance of the tidal wetlands permit nor does DEC staff object to the construction of the wood deck. The controversy only involves the issuance of a freshwater wetlands permit to construct the partial second story addition.

A factual dispute exists between DEC staff and the applicant regarding whether Mr. Kunreuther's entire lot is in regulated freshwater wetland BE-19 or whether the wetland boundary passes through the lot. DEC staff asserts the entire lot is in BE-19 based on the field observation of DEC staff member Marsh made on April 4, 2006 and information contained in DEC's habitat database (Issues Conference Exh. 4). The applicant argues that the boundary of BE-19 is approximately 100 feet to the east. The applicant's counsel stated that the applicant's expert, Roy Haje of En-Consultants, Inc., would testify that the wetland's boundary passes beneath the Kunreuther home and the half of the house where the partial second floor addition is proposed is outside of BE-19 and in the adjacent area. Mr. Haje's opinion would be based, at least in part, on a 1991 delineation of BE-19 done by DEC staff and maps derived from this delineation (Issues Conference Exh. 2 & 5). Mr. Haje would testify that the wetland boundary has not significantly shifted since 1991. This factual dispute relates to the reason for DEC Staff's denial and it meets the standards for adjudication in 6 NYCRR 624.4(c)(1)(ii). Therefore, the first issue for adjudication is: whether the location of the proposed project is within freshwater wetland BE-19 or its adjacent area.

A second dispute exists regarding the correct categorization of the land-use type for Mr. Kunreuther's proposed second story addition. DEC's freshwater wetlands regulations [6 NYCRR 663.4(d)] set forth 43 land-use categories. This dispute is the second issue for adjudication: which activities under 6 NYCRR 663.4 apply to the project, and consequently, what levels of compatibility with freshwater wetlands apply when considering the standards for issuance of a freshwater wetlands permit?

In its denial of the permit application, DEC staff categorized the proposed project as "[c]onstructing a residence or related structures or facilities" which is #42 on the list in 663.4(d). DEC staff also cited "[i]ntroducing ... sewage effluent" which is #38 on the list. The applicant challenges DEC staff's categorization and argues that the appropriate land-use category is "[r]estoring, reconstructing or modifying existing functional structures or facilities which involves the temporary disturbance of less than 50 square meters (approximately 540 square feet) of ground surface" which is #13 on the list. To support this contention, the applicant proposes to call Mr. Kenneth Larson, who has worked as a building contractor in Saltaire for approximately 30 years, as a witness. Mr. Larson, who attended the issues conference, stated he had done a previous renovation to this house fifteen years ago and provided a sketch to show the proposed delivery area and work areas at the site (Issues Conference Exh. 1). He estimated the area to be impacted at less than 500 square feet and the time to complete the project at about three weeks. In response to Mr. Larson's description of how the work would progress, DEC staff stated that this information was not included in the application materials and it raised additional concerns. Specifically, the 500 square foot area to be impacted around the area of the house by the construction would result in another land-use category "[c]lear-cutting vegetation other than trees, except as part of an agricultural activity," which is #23 on the freshwater wetlands list. DEC staff stated that, based on the application materials, it believed all work would be done on the existing roof and from existing walkways. As the issues conference discussion continued, DEC Staff stated it might agree to a compromise land-use categorization "[e]xpanding or substantially modifying existing functional structures or facilities..." which is #14 on the list.

While it is true that there is no factual dispute regarding what the applicant proposes, a second story addition on an existing house, the method of its proposed execution is not fully described in either the application materials or the issues conference record. These facts will be helpful in developing a full record which can form the basis for the determination as to which land-use category is applicable in this case.

The third and final issue for adjudication is: whether the project complies with the applicable standards for issuance of a freshwater wetlands permit (6 NYCRR 663.5(e)(1) and (2)). This issue will be decided once the evidence is evaluated and the first two issues are decided.

Appeals

Pursuant to 6 NYCRR 624.6(e) and 624.8(d)(2)(i), this issues ruling may be appealed in writing to the Commissioner. Appeals must be received on or before Tuesday, December 11, 2007. Any replies to appeals must be received on or before Tuesday, December 18, 2007. Any appeals and replies must be addressed to the office of the Commissioner, NYSDEC, 625 Broadway, Albany, New York 12233-5500 (to the attention of Assistant Commissioner Louis A. Alexander), and must be received by that office by 4:00 p.m. on the dates indicated herein. One copy of all such appeals, briefs and related filings must also be sent to the Chief ALJ and one copy to the ALJ at the Department's Office of Hearings and Mediation Services, and one copy to the other party. Transmittal of documents shall be made at the same time and in the same manner to all persons.

November 19, 2007
Albany, NY

_____/s/ _____
P. Nicholas Garlick
Administrative Law Judge

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