

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
625 BROADWAY  
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Application for a Tidal Wetlands Permit  
and a Water Quality Certification To Develop  
Property on Ocean Avenue in Seaford, Town of  
Hempstead, Nassau County,

- by -

**MARY PALMERI,**

Applicant.

DEC Project No. 1-2820-02875/00006

DECISION OF THE ACTING EXECUTIVE DEPUTY COMMISSIONER

March 26, 2007

DECISION OF THE ACTING EXECUTIVE DEPUTY COMMISSIONER

Mary Palmeri ("applicant") filed an application for a tidal wetlands permit with the New York State Department of Environmental Conservation ("Department" or "DEC") pursuant to article 25 of the Environmental Conservation Law and part 661 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). In addition, applicant applied for a water quality certification pursuant to section 401 of the Federal Water Pollution Control Act and 6 NYCRR 608.9.

Applicant proposes to construct a single family residence on a lot that she owns on the east side of Ocean Avenue in Seaford, Town of Hempstead, Nassau County ("project"). The residence would be served by public water and sewer and, accordingly, no septic system is required or proposed. The project also includes the placement of fill on the lot, and the construction of other features incidental to the residence including four dry wells, two retaining walls, a pervious driveway, a bulkhead (with bulkhead returns), and a timber catwalk.

As part of the application for a tidal wetlands permit,

applicant requests a variance from the development restriction at 6 NYCRR 661.6(a)(1) that requires a minimum setback of principal buildings and all other structures that are in excess of 100 square feet of at least seventy-five feet landward from the most landward edge of the tidal wetland.

Department staff denied the permit application for the project on the ground that the project failed to comply with the development restrictions set forth at 6 NYCRR part 661 (see Adjudicatory Hearing Exhibit ["Exh"] 24). Following this determination, applicant requested a hearing.

The matter was assigned to Administrative Law Judge ("ALJ") Edward Buhrmaster. In his hearing report, a copy of which is attached, ALJ Buhrmaster recommends that, subject to the incorporation of special permit conditions and the adoption of various project-related recommendations, the tidal wetlands permit, the requested variance, and the water quality certification be issued to applicant. The ALJ's hearing report is hereby adopted as my decision in this matter subject to the following comments.

As described in the hearing report, applicant's lot is fifty feet wide and ninety-five feet deep. Applicant's lot

consists of three biological zones: an upland area; a high marsh that is flooded during extreme lunar tides and occasional storms; and an intertidal zone. Both the high marsh area and the intertidal zone are part of the tidal wetland. The upland area is part of the tidal wetland's adjacent area.

For a tidal wetlands permit, an applicant must demonstrate, among other things, that the proposed project is compatible with the policy of the Tidal Wetlands Act to preserve and protect tidal wetlands and to prevent their despoliation and destruction (see 6 NYCRR 661.9[b][1][i]). As discussed in the ALJ's hearing report, assuming that certain modifications are made, applicant's project would serve to enhance wetland values.

Applicant's lot is located in an area where considerable residential development has occurred. Residences have been constructed on both sides of the subject lot. The lot itself is in a degraded state. Substantial debris, including wood, metal, concrete and other rubble was dumped on the upland area of the lot prior to applicant's purchase and remains on the site. No natural substrate exists near the surface (see Hearing Report, at 7 [Finding of Fact No. 8]). In addition, soil from a neighboring property is eroding into the tidal wetland on the lot. Runoff from storm events is carrying silt as well as

contaminants from Ocean Avenue onto the lot and into the wetland (see Hearing Report, at 24).

As proposed, applicant's residence, driveway and dry wells would be located in the adjacent area to the tidal wetland. Although filling would occur and the timber retaining walls would be constructed primarily in the adjacent area, a small portion of each activity is proposed to occur in the tidal wetland. Also, the proposed bulkhead would be constructed in the tidal wetland, as would the bulkhead returns and catwalk (see Hearing Report, at 10 [Finding of Fact No. 27]).

Section 661.9 of 6 NYCRR establishes the standards for permits for activities on tidal wetlands and on adjacent areas (see 6 NYCRR 661.9[b] & [c], respectively). The ALJ has evaluated in detail the permitting standards for the activities proposed in the tidal wetland and for the activities proposed in the adjacent area in considering whether a permit may be issued (see Hearing Report, at 26-34).

#### Activities in the Tidal Wetland Area

The ALJ concludes that the proposed construction of the bulkhead returns into the tidal wetland would be reasonable and necessary to protect the wetland from further siltation (see id.

at 26). I concur that such placement of the bulkhead returns, as well as the placement, as necessary, of portions of the retaining walls into the wetland, would assist in protecting the wetland from further siltation and would be a benefit to the environment.

However, the ALJ proposes that the north-south bulkhead, rather than being constructed in the tidal wetland, be moved to the adjacent area (see also Adjudicatory Hearing Transcript, November 14, 2006, at 190 [consultant to applicant stating that bulkhead could be moved entirely outside of the wetland]). Based upon my review of the record, I concur with the ALJ's assessment that the bulkhead should be placed in the adjacent area rather than in the wetland. Moreover, by moving the placement of the bulkhead to the adjacent area, an otherwise presumptively incompatible use in a tidal wetland (installation of bulkheads) would become a generally compatible use in the adjacent area (see 6 NYCRR 661.5[b][29]).

The construction of an open-pile catwalk not greater than four feet in width for any principal building is a generally compatible use in either a tidal wetland or its adjacent area (see 6 NYCRR 661.5[b][14]). At the hearing, Department staff discussed a modified design for the catwalk that would reduce its impacts. Adopting Department staff's modifications, as

recommended by the ALJ, would further ensure that the catwalk would not have an undue adverse impact on wetland values.

#### Activities in the Adjacent Area

Applicant's proposed activities in the adjacent area include the construction of a residence, a pervious driveway, four dry wells and two timber retaining walls. Each of these activities is identified as a generally compatible use in an adjacent area (see 6 NYCRR 661.5[b][29] [construction of bulkheads and other shoreline stabilization structures], [30] [filling], [43] [installation of dry wells], [46] [construction of a single-family dwelling], and [49] [construction of accessory structures or facilities]).

Although Department staff argued that these activities would have an undue adverse impact on present and potential tidal wetland values, I concur with the ALJ's evaluation that the present condition of the property does not serve to enhance wetland values. The presence of debris, the siltation of the wetland from a neighboring property and street runoff from Ocean Avenue into the wetland are negatively impacting the wetland and its values. The project, as modified by the ALJ, would help mitigate or eliminate these impacts and thereby benefit the wetland (see Hearing Report, at 31-34).

## Variance Request

The Department has the authority to vary or modify the requirements of the regulations governing tidal wetlands. The factors to be considered are whether "the spirit and intent of the pertinent [wetland] provisions shall be observed, the public safety and welfare are secured and substantial justice done and that action pursuant to the variance will not have an undue adverse impact on the present or potential value of any tidal wetland for marine food production, wildlife habitat, flood and hurricane and storm control, cleansing ecosystems, absorption of silt and organic material, recreation, education, research, or open space and aesthetic appreciation" (6 NYCRR 661.11[a]).

In considering the requested variance from the minimum setback of seventy-five feet from the most landward edge of the tidal wetland (see 6 NYCRR 661.6[a][1]), the ALJ concluded that the factors that would support a variance have been satisfied (see Hearing Report, at 20-26). The ALJ acknowledged that if this residence were constructed in the adjacent area, little buffer would remain between the residence and the tidal wetland. However, with respect to this project, the construction of a bulkhead between the residence and the tidal wetland, and the proposed engineering measures to curb the amount of runoff to the tidal wetland, would actually enhance wetland protection (see



id., at 24). Based upon my review of the record, I concur with the reasons set forth by the ALJ that support granting a variance from the setback requirement.

The need to protect and preserve the State's remaining tidal wetlands, no matter what their size, is well-recognized. The protection and preservation of the resource is of paramount concern whenever application is made for a permit or variance to allow for an activity to occur in a tidal wetland or its adjacent area. In any determination, the factors relevant to the specific site for which the activity is proposed must be considered.

In this matter, because of applicant's fairly recent purchase of the site, she had actual or constructive notice of the development restrictions applicable to tidal wetlands and their adjacent areas. I also recognize that, in neighborhoods such as this, in light of past development (much of which occurred prior to the passage of the Tidal Wetlands Act), the remaining tidal wetlands may be limited to portions of small, isolated lots. These wetlands require continued protection.

However, the negative wetland impacts presently occurring at this site arising from the ongoing siltation of the wetland, the runoff into the wetland and the on-site debris, must

also be considered. Based upon my review of the record, once all factors are considered, this specific project, on balance, would result in an overall benefit to the tidal wetland. The activities proposed, as modified by the conditions and other recommendations proposed by the ALJ (as discussed below), would address and reduce the aforementioned impacts, thereby resulting in improvements to the environment. Accordingly, in these unique circumstances, the benefits to the wetland associated with this project support issuing a permit and the variance.

#### Permit Conditions

Department staff did not prepare a draft permit for this application. As a result, the ALJ, in proposing that a permit be issued, recommended that various conditions be incorporated (see Hearing Report, at 35-36) to minimize or eliminate environmental impacts that might otherwise arise from the project.

I have reviewed the conditions that the ALJ proposes, including the removal of rubble and debris from the property, replanting of wetland vegetation as necessary in accordance with Department staff's specifications, the manner of construction of the residence, bulkhead and the catwalk, and the maintenance of runoff control features. I conclude that all the conditions that

the ALJ proposes are necessary and appropriate. Accordingly, I direct that these conditions be incorporated into the tidal wetlands permit for the project.

In addition, the ALJ recommended that applicant's site plan be revised and resubmitted to Department staff prior to permit issuance to demonstrate that the bulkhead relocation would not involve any filling in the tidal wetland. The ALJ also recommended that applicant be directed to submit grading and landscaping plans for the upland area, as well as engineering plans for the dry wells to collect and recharge roof runoff and for a French drain system, to staff for review and approval.

I have reviewed these and the other recommendations proposed by the ALJ. The ALJ's recommendations are reasonable and will minimize or otherwise eliminate potential environmental impacts, and I adopt these recommendations in their entirety.

The ALJ also identified various activities, such as the docking of a boat in the wetland area, establishment of a lawn, application of pesticides and the construction of the residence on a slab, that would not be authorized by the issuance of this permit (see id.). I concur with the ALJ that those identified activities are not authorized by this permit and would require

separate approval.

I hereby remand this matter to Department staff and direct that a tidal wetlands permit, the requested variance, and a water quality certification be issued to applicant, consistent with this decision and the ALJ's hearing report. In the event that Department staff and applicant mutually agree to modify any of the recommendations or conditions that the ALJ has proposed in the hearing report, such modifications may be made to the permit.

For the New York State Department of  
Environmental Conservation

/s/

By: \_\_\_\_\_  
Carl Johnson  
Acting Executive Deputy Commissioner

Albany, New York  
March 26, 2007

To: Service List

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

In the Matter

- of -

the Application of **MARY PALMERI** for a  
tidal wetlands permit to develop property  
on Ocean Avenue in Seaford, Town of  
Hempstead, Nassau County

DEC Project No. 1-2820-02875/00006

HEARING REPORT

- by -

/s/

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Edward Buhrmaster  
Administrative Law Judge

## PROCEEDINGS

### Background and Brief Project Description

Mary Palmeri ("the Applicant") proposes to construct a single family dwelling at her property, a vacant lot approximately 50 feet wide and 95 feet deep, located on the east side of Ocean Avenue (between 2711 and 2721 Ocean Avenue), 1,825 feet south of Bayview, on Silver Lagoon in Seaford, Town of Hempstead, Nassau County. The project (the site plan for which was received as Exhibit No. 31) also includes the placement of approximately 348 cubic yards of fill as well as the construction of four dry wells, two 50-foot timber retaining walls, a pervious driveway, approximately 116 feet of steel sheet bulkhead, and a 33-foot by 4-foot timber catwalk on 10-inch-diameter piles with two sets of 4-foot by 4-foot stairs.

To move ahead with the project, Ms. Palmeri requests a tidal wetlands permit pursuant to New York State Environmental Conservation Law ("ECL") Article 25 and Part 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), as well as a water quality certification pursuant to Section 401 of the Federal Water Pollution Control Act (33 USC 1251 et seq.) and 6 NYCRR 608.9. As part of the permit application, Ms. Palmeri requests a variance from a development restriction requiring that the dwelling be set back at least 75 feet landward from the most landward edge of the tidal wetland.

Department Staff determined that the project is a Type II action not subject to review under the State Environmental Quality Review Act ("SEQRA"). A notice of complete application dated January 30, 2006, was issued by Department Staff, and published in Newsday on February 6, 2006. (See Exhibits No. 14 and 15.)

Department Staff issued a letter (Exhibit No. 24) denying the application on May 15, 2006, and Ms. Palmeri, through her attorney, requested a hearing by letter (Exhibit No. 25) dated May 19, 2006.

On October 16, 2006, the Department issued a notice of public hearing (Exhibit "A") announcing a legislative hearing and issues conference to be held on November 14, 2006, at the Town of Hempstead Department of Conservation and Waterways, at 320 Lido Boulevard in Point Lookout, to be followed immediately by an adjudication of identified issues. The Department's Office of Hearings and Mediation Services distributed the notice to Ms. Palmeri's counsel under a cover letter (Exhibit "B"), and to

interested state and local officials (see distribution list, Exhibit "D"). The notice also appeared in the Department's on-line Environmental Notice Bulletin (as shown in Exhibit "C"), and as a legal notice in Newsday on October 23, 2006 (see Exhibit No. 28, an affidavit of publication).

The hearing went forward as announced in the notice.

Department Staff appeared by Megan J. Joplin, assistant Region 1 attorney at the Department's Stony Brook office.

Ms. Palmeri appeared by Frederick Eisenbud, Esq., of Lamb & Barnosky, LLP, in Melville.

### Legislative Hearing

In response to the notice of public hearing, five comment letters were received, and four people, including three members of Ms. Palmeri's family, offered statements at the legislative hearing.

Speakers in favor of the project included Ms. Palmeri's daughter, Adeline Scibelli; her brother, Daniel Palmeri; and her sister, Nancy Burn. Ms. Scibelli, a graduate student at Hofstra University, said her mother wanted to build a house for the two of them and Ms. Palmeri's 83-year-old mother, who is sick and now lives in Florida. She added that it was not her mother's intent to build a house for resale, and that it was her mother's dream to own a house on the water. Ms. Scibelli said that she had spoken to neighbors who would like her mother's lot cleaned up, and that the lot, on which trash has been dumped, is a breeding ground for rats and snakes.

Ms. Burn agreed that Ms. Palmeri's intentions were "genuine" and that she wanted to develop her property consistent with Department regulations. Mr. Palmeri stressed that his sister's lot is blighted and that neighbors would like to see it developed.

Keith Kruzrak owns the property at 2711 Ocean Avenue, immediately to the north of Ms. Palmeri's, also on Silver Lagoon. He wrote a letter saying that, due to his work schedule, he could not appear at the hearing on Ms. Palmeri's behalf. He wrote that he had reviewed and is in favor of Ms. Palmeri's project, but added that her proposed bulkhead should be consistent with and contiguous to the existing bulkheading on the canal.

Mr. Kruzrak wrote that he purchased the property at 2711 Ocean Avenue, on which he has a house, on August 28, 2002. He wrote that over the last four years his property had been severely impacted due to the absence of bulkheading on Ms. Palmeri's property, and that Ms. Palmeri's property continues to erode at each high tide. According to Mr. Kruzrak, water from Ms. Palmeri's property seeps onto his property during high tides, and, as the tide recedes, his property experiences erosion and disposes soil onto Ms. Palmeri's property.

Mr. Kruzrak wrote that Ms. Palmeri's property lacks aesthetic value due to the overgrowth of weeds and accumulated trash from past illegal dumping. In addition, Mr. Kruzrak wrote that he had seen rodents and snakes living in the overgrowth, and that the water's edge is a catch-all of litter such as glass and plastic bottles and bags.

In response to the notice of complete application, Ms. Palmeri collected 25 signatures, 15 from Seaford residents, on a petition supporting her project as "prudent and warranted management" of the tidal wetland under Department regulation. The petition states that bulkheading is necessary to stop erosion from her property and those properties immediately to the north and south, which are bulkheaded. The petition describes Ms. Palmeri's property as infested with rats, mosquitos that could potentially carry the West Nile virus, and poison ivy which is easily spread to adjacent properties, a health hazard particularly to children.

Speaking against the project at the legislative hearing was Stan Stuart of 2733 Ocean Avenue, where he has lived on and off for the last 30 years. Mr. Stuart described the neighborhood as a small fishing village where wetlands were later filled in for homes. He said he opposes filling of Ms. Palmeri's waterfront lot on which marine vegetation shelters young fish, absorbs pollutants, and provides nesting and breeding habitat for ducks, geese and cormorants. He denied that the property is blighted, adding that the "weeds" there are environmentally protective phragmites. According to Mr. Stuart, had Ms. Palmeri "done her homework" and acted "with due diligence" prior to purchasing her property, she could have foreseen the legal obstacles to its development.

Joseph and Ann Andretta, of 3578 Widgeon Place in Seaford, said they have lived at their address for 12 years, close to the Palmeri property. They wrote letters saying that they are against construction on the Palmeri lot because it is filled with tidal wetland vegetation and wildlife, which serve as the vital



breeding grounds for local sea life. The Andrettas wrote that they fish for sport, and can attest that local fishing has declined as protective grasses have been destroyed to accommodate any sort of building. According to the Andrettas, any new house built close to the street would create an eyesore that would be out-of-step with surrounding properties, and, on an undersized lot, would add to neighborhood congestion.

Richard Zimmerman of 2711 Ocean Avenue described himself in a letter as a long-time Seaford resident opposed to construction on the Palmeri lot, which is next door to his residence. He said the Palmeri lot contains the only wetland area that he knows of that is located between residential properties in the vicinity. He said the Palmeri lot contains all sorts of birds and wildlife that he watches regularly, and serves as a breeding ground for bait fish and small sport fish such as snappers, weakfish and bass. He added that the lot is filled with "protected grasses" and that "destruction of such an environmental treasure would be a travesty."

According to Mr. Zimmerman, the neighborhood is getting over-congested, and any structure on the Palmeri lot, due to its small size, would add to the congestion and lead to more over-building in the area, something he contends there is too much of already.

#### Issues Conference and Delineation of Issues

An issues conference was held immediately after the legislative hearing. No petitions for party status were filed before the deadline in the hearing notice, and no late filings were presented at the issues conference or at any other time.

Because there were no petitions for party status, no rulings on party status were required, the applicant and Department Staff being parties as of right for the adjudication of any permitting issues.

According to 6 NYCRR 624.4(c), an issue is adjudicable if it relates to a matter cited by the Department Staff as a basis to deny the permit and is contested by the applicant.

In this case, Department Staff contends that a tidal wetlands permit should be denied on the grounds that the project does not meet the standards for permits for proposed regulated activities on a tidal wetland, as set forth at 6 NYCRR 661.9(b)(1)(i)-(v), or the standards for permits for regulated

activities on areas adjacent to a tidal wetland, as set forth at 6 NYCRR 661.9(c)(1)-(4). Staff also contends that the project does not warrant the requested variance from the setback requirement for development close to a tidal wetland. Overall, Staff maintains that the project is not compatible with the protection and conservation of tidal wetland resources because it would result in filling of the wetland, destruction and degradation of wetland habitat, loss of open space and aesthetic resources, an increase in contaminant introduction to the wetland, and negative effects on water quality.

On the other hand, Ms. Palmeri contends that approval of her application would not harm the wetlands, and would actually enhance their values while eliminating current site conditions which create a neighborhood nuisance. More particularly, she contends that her project is designed to eliminate or reduce stormwater runoff from Ocean Avenue into the tidal wetlands, and that construction of the retaining walls and north-south bulkhead would protect her neighbors' properties and prevent silt from entering the wetlands. Whether the bulkhead is located a few feet into the high marsh portion of the tidal wetland or landward of the wetland's upper limit, Ms. Palmeri contends that her proposed house would have no adverse wetland impact. For that reason, she contends that the requested variance from the 75-foot setback requirement should be granted.

#### Adjudicatory Hearing

The adjudicatory hearing addressing Staff's bases for permit denial was held immediately after the issues conference concluded, on November 14 and 15, 2006, at the Town of Hempstead Department of Conservation and Waterways, 320 Lido Boulevard, Point Lookout.

Ms. Palmeri testified on her own behalf and called as her witness Dr. Ron Abrams of Dru Associates, her consultant on the project.

Department Staff witnesses were Gina Fanelli and Matthew Richards, Staff biologists with the Department's Region 1 office.

On the morning of November 16, 2007, Ms. Palmeri, her attorney Mr. Eisenbud, and Department Staff attorney Ms. Joplin accompanied me on a visit to the project site, which included walking the Palmeri property and a drive-by inspection of the immediate neighborhood.

Closing Statements

Upon receipt of the transcript, the parties submitted written closing statements on December 22, 2006, on which date the record in this matter closed.

**FINDINGS OF FACT**

1. Mary Palmeri, who lives in Bethpage, New York, owns a vacant lot on the east side of Ocean Avenue (between 2711 and 2721 Ocean Avenue) in the village of Seaford, Town of Hempstead, Nassau County.

2. The lot is rectangular, 50 feet wide, with frontage on Ocean Avenue, and 95 feet deep, from Ocean Avenue on the west to Silver Lagoon on the east. The lot is bordered on the north and south by properties developed with single family houses, also with frontage on Ocean Avenue and bulkheaded at the back onto Silver Lagoon. Filling associated with these properties' development has created side slopes into the Palmeri lot, which is at a lower elevation. The sides slopes are unstabilized and subject to erosion.

3. The neighborhood in which the Palmeri lot is located is almost completely developed with lots containing houses, though there are a few lots which, like hers, remain vacant, including one on the other side of Ocean Avenue, almost directly across from the Palmeri lot. (See Exhibit No. 36, an infrared aerial photograph with a red arrow marking the Palmeri lot. See also Exhibit No. 37, a portion of the Department's tidal wetlands map, also noting the Palmeri lot within the larger development of which Ocean Avenue is a small part, as shown in a 1974 photograph.)

4. The Palmeri lot is located within a housing development that includes manmade lagoons or channels which provide residents with water access. The houses are served by public water and sewers. There is extensive bulkheading where the lots connect to the waterways, and recreational boats are maintained at some of the properties.

5. Silver Lagoon, on which the Palmeri property is located, connects at its south end to Seamans Creek, which is also heavily developed, and from there to South Oyster Bay. South Oyster Bay, which comprises one of the largest undeveloped coastal wetland ecosystems in New York State, is located along the south shore of

Long Island, east of the Wantagh State Parkway, and extending to a north-south channel just east of the Nassau-Suffolk county line, in the Towns of Hempstead and Oyster Bay.

6. Development of the neighborhood in which the Palmeri lot is located occurred before the tidal wetlands act took effect in 1977. The development occurred through dredging and channeling, which created a canal system, and bulkheading along the channels. The combination of these activities eliminated what was likely once an extensive network of tidal wetland, so that the few marshy areas that remain are isolated from each other, on small lots like Ms. Palmeri's.

7. The Palmeri lot consists of three biological zones: a disturbed upland closest to Ocean Avenue, a high marsh that receives occasional flooding, and an intertidal zone (or intertidal marsh) that is flooded twice daily.

8. The disturbed upland (the area adjacent to the tidal wetland) covers more than half of the lot, from Ocean Avenue to the landward limit of the high marsh. The disturbed area is almost completely dominated by tall stands of phragmites, with some poison ivy closest to the street. Much of the substrate under the phragmites is comprised of chunks of concrete and other rubble, which was dumped there before Ms. Palmeri purchased the lot. Debris dumped in this area also includes large quantities of wood and metal, as well as some asphalt, plastic and other trash. There is no natural substrate near the surface, and there are voids in the rubble through which street runoff flows during storms. The voids provide shelter for snakes and rodents, including rats. The phragmites provide resting habitat for red-winged blackbirds, but limited habitat for wildlife generally.

9. The high marsh includes about a third of the lot, between the disturbed upland and the intertidal zone. The high marsh is flooded during extreme lunar tides and occasional storms, but not daily. The high marsh contains indicator plant species such as marsh elder (*Iva frutescens*), groundsel bush (*Baccharis halimifolia*), salt meadow grass (*Spartina patens*), and spike grass (*Distichlis spicata*). The wetland vegetation is patchy, suppressed somewhat by a substantial cover of concrete rubble, flotsam, and some rotting creosote timbers. Phragmites have also begun to invade the high marsh from the disturbed upland area.

10. The remainder of the lot is an intertidal zone facing against the lagoon, which includes a healthy fringe of the indicator plant species low marsh cordgrass (*Spartina*

alterniflora), the growth of which is impeded by a significant accumulation of debris and rubble, and sedimentation from stormwater runoff. The intertidal zone is a marshy area that provides a nursery area for finfish, and also some habitat for small invertebrates including fiddler crabs.

11. Because of its small size, the Palmeri lot is not suitable for wildlife breeding, and its location in a housing development limits wildlife visitation. Nonetheless, wildlife has been observed at the site, including muskrats. The site provides temporary habitat for various bird species, including red-winged blackbirds that rest in the phragmites, herons that feed on juvenile fish in the intertidal marsh, and swans that travel along the lagoon.

12. Ms. Palmeri has applied for a tidal wetlands permit that would allow her to develop her lot with a single family dwelling and bulkheading, like most of the properties in the neighborhood. [See Exhibit No. 31, a site plan dated December 5, 2005, prepared by Dru Associates, which depicts the proposed project and delineates the high marsh and intertidal zones.]

13. The project would involve constructing the house in the disturbed upland area, on a building footprint of 1,023 square feet (approximately 32 feet by 32 feet). No accessory structures, such as decks, are intended for the area beyond the footprint.

14. The house is intended to be built on piles due to its closeness to the water, though as an alternative Ms. Palmeri would consider constructing the house on a slab. No house plans have been developed, because Ms. Palmeri has not yet hired an architect or engineer.

15. It is intended that the house would employ gutters and drains, and that dry wells at the four corners of the developed property would collect and recharge water that drains from the roof. The site plan indicates that the area around the house would be landscaped, but there is no indication that a lawn would be established.

16. The house would be connected to Ocean Avenue by a 200-square-foot pervious blue chip stone driveway, also in the disturbed upland, allowing rainwater to percolate into the substrate.

17. The house would have a 20-foot setback from Ocean Avenue, and its eastern edge would be about 52 feet from the

street. The house would be set back slightly further from the lagoon than the house immediately to the north, owned by Mr. Kruzrak, and the house immediately to the south, owned by Mr. Zimmerman.

18. According to the site plan, a steel sheet bulkhead would be constructed at 7 feet above mean sea level in the high marsh within several feet of its landward limit, to retain the fill on which the house would be built. Existing debris would be cleared and then approximately 348 cubic yards of fill would be placed in the disturbed upland and the uppermost part of the high marsh, destroying the vegetation, mostly phragmites, that currently exists there.

19. According to the application as submitted, the house would be separated from the bulkhead by about 12 feet, whereas other houses in the area are generally 10 feet or less from their bulkheads. Though not indicated on the site plan, a French drain system could be installed ahead of the bulkhead to collect and redirect storm runoff. This would limit or prevent sheet flow over the bulkhead, and limit or prevent contaminated street runoff from entering the tidal wetland during storm events, as happens now.

20. As a project alternative, the bulkhead could be moved landward to a location outside the high marsh, leaving a dense stand of phragmites in the marsh. However, Ms. Palmeri's preference is to leave only a thin fringe of phragmites, which could be treated chemically and thereby eliminated to prevent its spread toward the lagoon.

21. The project includes construction of two 50-foot-long retaining walls in the disturbed upland above the high marsh. Each wall would be at 7 feet above mean sea level, one along the border between Ms. Palmeri's lot and the lot to the north, the other between her lot and the lot to the south, both connecting to the steel sheet bulkhead facing onto the lagoon.

22. That bulkhead would be connected to two steel sheet bulkhead returns, each at 7 feet above mean sea level, extending along the sides of the Palmeri property out through the high marsh and intertidal zone, where they would tie in to the neighbors' bulkheads, assuming the neighbors agree.

23. The bulkhead returns are intended to prevent erosion from the neighbors' properties, and their possible collapse, into Palmeri's tidal wetlands. At present, there is no structural control of erosion onto Ms. Palmeri's lot from the property to

the south. The neighbor to the north has piled rubble next to his bulkhead to stabilize it and prevent erosion onto the Palmeri property. However, exposed soil on a slope from his property into Ms. Palmeri's is now eroding into the high marsh during heavy rains.

24. The project includes construction of an elevated open-board timber catwalk (33 feet long and 4 feet wide) with two connecting sets of stairs that would afford Ms. Palmeri the opportunity to access the wetland and clear debris that floats into it from the lagoon. The site plan indicates that the catwalk would be built on piles 10 inches in diameter, though Department Staff says any catwalk should be built on 4-inch-diameter piles, to limit the impact on wetland vegetation. The height of the catwalk is not specified in the application, though Staff says catwalks are generally 3.5 feet above grade, again for the sake of the underlying vegetation.

25. The width of the catwalk is intended to allow sunlight to penetrate beneath the catwalk from different angles during the course of the day, so that vegetation beneath the catwalk is maintained. The open-board construction is intended to allow rainwater to fall through the catwalk into the wetland.

26. When the project application was noticed as complete, it included a stone armor wall across the tidal wetland, which was intended to keep floating debris out of the high marsh. Ms. Palmeri withdrew the wall from her application in light of Staff's objections to it during the adjudicatory hearing.

27. As proposed in her application, Ms. Palmeri's project would take place entirely within a tidal wetland or its regulated adjacent area. The house, driveway and dry wells would be in the adjacent area. The filling and the timber retaining walls would be primarily in the adjacent area, but also in a small portion of the wetland. The bulkhead would be built in the wetland, as would the bulkhead returns and the catwalk.

28. Tidal wetlands constitute one of the most vital and productive areas of the natural world and have many values that include, but are not limited to, marine food production, wildlife habitat, flood and hurricane and storm control, recreation, cleansing ecosystems, sedimentation control, education and research, and open space and aesthetic appreciation. [See 6 NYCRR 661.2(a)].

29. Intertidal marsh is particularly valuable for marine food production. Because it receives twice-daily tidal flushing,

the products of vegetative photosynthetic activity and decomposition in the intertidal marsh are readily transported to adjacent waters for use in the estuarine food chain. [See 6 NYCRR 661.2(d).]

30. At the Palmeri site, the value of the intertidal marsh for marine food production is somewhat diminished due to sedimentation from upland areas. However, the intertidal marsh still provides a nursery for juvenile fish and invertebrates.

31. Since their photosynthetic activity is lower than intertidal marshes and since flushing of the biological products of the high marsh to the estuary is less efficient than in intertidal marshes, high marshes, while critically important for marine food production, are slightly less important in this regard than intertidal marshes. [See 6 NYCRR 661.2(g).]

32. At the Palmeri site, the value of the high marsh for marine food production is limited by the rubble that has been dumped in that area. Because the vegetation is patchy, it provides a limited amount of biomass for delivery to the intertidal marsh.

33. Adjacent areas make insignificant contributions to marine food production. [See 6 NYCRR 661.2(j).]

34. The placement of fill for construction of a house would destroy whatever value the adjacent area at the Palmeri site has for marine food production. The decomposition of phragmites onto the inert substrate now results in excess nutrient production and pollution loading.

35. The Palmeri site currently provides habitat for various bird, fish and animal species, though its small size precludes breeding activity. The intertidal marsh provides a nursery and feeding ground for finfish at high tide. Small invertebrates such as fiddler crabs can use the area, as can waterfowl. Birds, including migrating species, may rest amid the site vegetation, but it is overall too thin to provide them refuge, and there are larger expanses of undeveloped marsh generally south of the site, in South Oyster Bay, which they prefer. In fact, South Oyster Bay is one of the most important waterfowl wintering area on Long Island.

36. Intertidal marsh and high marsh are effective for flood and hurricane and storm protection. [See 6 NYCRR 661.2(d) and 661.2(g).]



37. At the Palmeri site, the intertidal marsh and high marsh help to spread flood waters and dissipate wave energy. Silver Lagoon is sheltered from direct contact with the bay and ocean, but boats moving up and down the lagoon still generate waves that are broken up in the marsh. The location of the lot along the lagoon, between bulkheaded properties, largely protects it from storm surges. However, floating debris collects in the intertidal marsh, as a pocket off the lagoon.

38. The tidal wetland and adjacent area have potential recreational value, though not for the general public, as the lot is privately owned. As an alternative to a house, Department Staff would consider allowing Ms. Palmeri to build a 100-square-foot storage shed and a catwalk from which she could launch a kayak into the lagoon. Many properties in the neighborhood have boats tied to them. Ms. Palmeri's application does not reference a boat or a dock that would accommodate a boat.

39. Both its intertidal location and its highly productive nature make intertidal marsh among the most effective wetland zones for cleansing ecosystems and for absorbing silt and organic material. [See 6 NYCRR 661.2(d).]

40. At the Palmeri site, the intertidal marsh is collecting excess silt which is not being processed inland because the substrate there is too hard and degraded.

41. Because of their size and location high marshes are as important for absorption of silt and organic material and flood and hurricane and storm control as intertidal marshes. [See 6 NYCRR 661.2(g).] At the Palmeri site, however, the high marsh cannot effectively filter runoff since voids in the rubble allow channeled runoff to bypass thinly dispersed plants. Likewise, in the disturbed upland, voids and lack of surface soils impede filtration of water that would normally be expected from the phragmites, and the rubble and other debris are a source of contaminants that adds to the street runoff, laden with petroleum hydrocarbons, that runs over the curb on Ocean Avenue during heavy storms.

42. At the Palmeri property, education and research opportunities are limited due to its private ownership and degraded site conditions, which would present hazards to visitors.

43. As an undeveloped lot, the Palmeri property has open space value, particularly for the neighbors immediately to the north and south. In an area where houses are already set in

close proximity to each other, the development of Ms. Palmeri's property, even in a manner consistent with her neighbors' properties, would contribute to a sense of congestion.

44. Tidal wetlands, maintained in their natural state, are a source of aesthetic appreciation. However, at the Palmeri property, the wetlands and adjacent area are heavily disturbed by an accumulation of rubble and debris that was there when she purchased the lot. The removal of the rubble and debris would undoubtedly be of benefit to the environment and improve the site's appearance, regardless of whether a house is built.

45. The construction of a house would remove the phragmites from the upland area, but the more valuable tidal wetland vegetation beyond the bulkhead would be preserved for appreciation by Ms. Palmeri, her neighbors and boaters in the lagoon.

46. Ms. Palmeri purchased her property on March 17, 2003, from Patricia Forcina of Freeport, New York. [See Exhibit No. 34, a copy of her deed.]

47. Ms. Palmeri paid in the range of \$65,000 to \$68,000 for her property, which she located through a real estate agent to whom she had explained her intention of building a house.

48. Ms. Palmeri looked at other properties before settling on the one she bought. Other properties she looked at were more expensive, in the range of \$300,000 or more. But these other properties were larger than the one she purchased, and one, close to the one she bought, had been developed as a business, and Ms. Palmeri considered buying the property for both business and residential purposes.

49. Ms. Palmeri's property has been in single ownership, separate from the properties to the north and south, from a time prior to when the tidal wetland act took effect in 1977.

50. Prior to purchasing the property, Ms. Palmeri spoke to officials of the Town of Hempstead, who said it was a buildable lot, though a building permit has not yet been secured.

51. Prior to purchasing the property, Ms. Palmeri also consulted an unnamed SUNY Stony Brook environmental science professor, and a representative of Blue Gate Consulting, which ultimately helped her develop a permit application for the lot's development. (A hearing on that application, which predates this one, is being held in abeyance while this second application,

which includes revisions meant to address Staff's concerns, goes forward to decision.)

52. Based on his review of photographs that Ms. Palmeri took at low tide, the professor told Ms. Palmeri that there was evidence of tidal wetlands on the property, and that these wetlands were subject to impacts due to erosion from the properties to the north and south.

53. The Blue Gate representative discussed the property with an environmental analyst at the Department's Region 1 office, who agreed with the professor's assessment of wetland impacts. The Department analyst told the Blue Gate representative that bulkheading would protect the wetlands from further degradation.

54. Based on her discussions with the Town, the SUNY Stony Brook professor and Blue Gate Consulting, which passed along the comments of Department Staff, Ms. Palmeri purchased her property. Ms. Palmeri knew at the time of purchase that she would require a tidal wetlands permit for the construction of a house, but did not think she would have a problem securing the permit or any other approval she needed.

55. Prior to purchasing the property, Ms. Palmeri was unaware of any prior applications to the Department which would allow the property's development. Ms. Forcina, the seller, told her that she had not developed the property herself because she lacked the funding to do so.

56. In 2004, after purchasing the property, Ms. Palmeri became aware that an application had been made to the Department by a prospective purchaser who wanted to develop the lot at some time before Ms. Palmeri purchased it. The details of the application are unknown, it was ultimately withdrawn rather than denied, and the Department never provided notice of the application to the public.

57. Ms. Palmeri purchased the property to build and have a home for herself, her mother and her daughter. She purchased the property with her retirement savings, and is awaiting a decision on this permit application before retaining an architect and engineer.

## DISCUSSION

The central issues in this hearing involve a determination whether Ms. Palmeri's application meets permitting standards for activities in tidal wetlands and their adjacent areas, and whether a variance should be granted in relation to a development restriction requiring that dwellings be set back at least 75 feet landward from the most landward edge of the tidal wetland. Whether the variance can be granted is a threshold question, because the whole point of the project, from Ms. Palmeri's perspective, is to provide a home for her and her family.

### Overview of Testimony

The testimony in the hearing included different assessments of the values provided by the tidal wetlands and their adjacent area, and what impact the project would have on those values. From Department Staff's point of view, the project would have an undue adverse impact on all of the present and potential values that are identified in the Tidal Wetlands Act. However, from Ms. Palmeri's point of view, the project would actually benefit the wetland environment, despite the complete alteration of the adjacent area.

Overall, the case for Ms. Palmeri is more compelling than the one presented by Department Staff. Ms. Palmeri relied on the testimony of Dr. Ron Abrams, principal ecologist with Dru Associates in Glen Cove, where, since 1986, he has consulted on matters involving freshwater and tidal wetlands, coastal zones, endangered species and ecological habitat protection, and environmental regulation and management for both the private and public sectors. Dr. Abrams is a certified environmental professional who has a Ph.D. in Ecology from the zoology department of the University of Capetown, and an M.S. in Biology from West Virginia University. Since 1986, apart from his consulting work, Dr. Abrams has been an adjunct associate professor at Long Island University, C.W. Post Biology Department. Dr. Abrams also worked for the Department between May 1985 and May 1986 as a regional supervisor of its Division of Fish and Wildlife. (A resume for Dr. Abrams was received as Exhibit No. 32.)

Dr. Abrams testified that he visited the Palmeri property six or seven times after being contacted on her behalf in the spring of 2005. His testimony about site ecology was thorough and largely unchallenged by Department Staff, who disagreed with Dr. Abrams more about the impacts of the proposed site development, than about the existing site conditions.

Dr. Abrams explained how he personally observed that during heavy storms and high tides, part of the area along Ocean Avenue floods, and the water drains and runs through the Palmeri property, through the rubble and phragmites in the adjacent area, carrying hydrocarbons, silts and organic contaminants into the wetland. By bulkheading the property, grading the property to impede water from running over the bulkhead, and installing dry wells to collect and recharge roof drainage, Dr. Abrams explained that the water quality in the tidal wetland could be protected. He further explained that the phragmites in the adjacent area, which serve as a wetland buffer, are unable to serve that function well because of the rubble accumulated around them, the voids in that rubble which provide pathways for contaminated runoff, and the lack of surface soils to absorb the runoff and filter the contaminants.

Dr. Abrams explained the key benefits that the project would provide for the wetlands. These include the removal of rubble and trash that has been dumped particularly in the high marsh and adjacent area, which impedes vegetation growth and creates an environmental eyesore. They also include the construction of the bulkhead returns along the wetland's north and south borders, to arrest erosion that is slowing eating away at the marsh.

Department Staff presented two witnesses: Gina Fanelli, a marine biologist in the Department's Bureau of Marine Habitat Protection, who testified about the site's wetland characteristics; and Matthew Richards, another Department marine biologist, who testified not only about site conditions, but about the project's compliance with permitting standards.

Both witnesses have Bachelor of Science degrees, Ms. Fanelli in marine science and biology, and Mr. Richards in natural resources. (Ms. Fanelli's resume is Exhibit No. 39; the resume of Mr. Richards is Exhibit No. 42.) However, they lack the educational background and broad work experience of Dr. Abrams, as well as his familiarity with the site. (Ms. Fanelli and Mr. Richards were at the site together on December 11, 2005, and November 8, 2006, and Mr. Richards was there once by himself, on July 23, 2004.) Though none of this, by itself, is grounds for discrediting their testimony, they did not make a convincing argument for denying the application, though Mr. Richards did make some good points as to how the project could be improved from a wetlands protection standpoint.

Ms. Fanelli and Mr. Richards testified that, using a tape measure, they calculated that the tidal wetland begins 57 feet from the side of Ocean Avenue, not 62 feet as Dr. Abrams

contends. However, the parties appeared to agree on where the wetlands begin in the field, based on plant identification, suggesting that their difference was merely one of measurement, given the difficulty of keeping a tape measure straight while threading it around the phragmites in the disturbed upland. The site plan indicates the inward limit of the high marsh (i.e., the tidal wetland boundary) as determined by Dr. Abrams on October 25, 2005, based on a careful site inspection. I accept this delineation as accurate. Even if the line is moved five feet to the west, it does not change the project significantly, in that the house, the focus of Staff's concern, still has a building footprint that is entirely in the wetland's adjacent area.

If anything, Ms. Fanelli's testimony gives a fuller picture of the existing wetlands vegetation and the wildlife that use it, while not contradicting any of Dr. Abrams' key findings. Mr. Richards' testimony, on the other hand, addresses the permitting standards directly.

Specifically challenging one of Dr. Abrams' key findings, Mr. Richards said that the proposed project "would be detrimental to the public health and welfare by increasing runoff, increasing contaminants and decreasing the water quality of Silver Lagoon and Seamans Creek." He also cast the project as one more development in an already highly developed area, which he said is decreasing the productivity of Seamans Creek and South Oyster Bay for fishing and shellfishing.

Undoubtedly, any decline in the local fishery could be traced to the large-scale dredging and filling that destroyed tidal marsh and created the neighborhood surrounding Ms. Palmeri's property. However, such marsh remains at Ms. Palmeri's property, though somewhat degraded and at risk. An intertidal marsh, of value to fish and small invertebrates, still functions at the site, and contributes in some small way to the local marine ecology.

Though Mr. Richards contends that the project would increase the flow of runoff and contaminants into the intertidal marsh and, from there, into the lagoon, this does not appear likely. The project is actually designed to curb such impacts, as noted in Ms. Palmeri's closing brief. The upland's natural slope to the water would be altered to reduce runoff, debris that facilitates runoff would be removed from the area upland of the intertidal marsh, the pervious driveway would absorb runoff, the house would block runoff, roof runoff would be directed to dry wells, and banking of the land ahead of the bulkhead would prevent property runoff from getting into the high marsh, except,

perhaps, during unusually heavy storms, which currently overwhelm any absorptive capacity the upland now has, not only at Ms. Palmeri's property but elsewhere around the lagoon.

On cross examination, Mr. Richards conceded that, while it is still healthy, silt is running into the intertidal marsh from neighboring property, creating at least a localized risk that the dirt will rise above the water, and, where this happens, that the area will be opened up to invasion by phragmites. Mr. Richards said that salt water from the lagoon would keep phragmites out of the intertidal marsh, but neither he nor Ms. Fanelli had tested the salinity of the water there or in the high marsh. On rebuttal, Dr. Abrams testified about salinity readings he took for water in the high marsh, where phragmites are already invading. These readings indicated that the water there is not highly saline, because it comes not only from the lagoon, but from groundwater near the surface.

Dr. Abrams testified convincingly about how phragmites from the upland area could creep toward the water by raising the substrate. This occurs at sites like Ms. Palmeri's where the substrate is not healthy and lacks the organic material to decompose the phragmites as they collapse and fall. One of the advantages of Ms. Palmeri's proposal, Dr. Abrams points out, is that it would involve removing the phragmites in the upland area, due to filling attendant to the house's construction. Dr. Abrams also thinks it would be preferable to eliminate the phragmites from the high marsh, which could be accomplished by chemically treating them. Once the phragmites are removed, Dr. Abrams argues, other, more valuable wetland vegetation could thrive, particularly with the removal of rubble and flotsam from the marsh and the bulkheading to arrest erosion from neighboring properties.

Mr. Richards stressed that, according to the use guidelines in the Department's tidal wetland regulations, filling and bulkheading in the high marsh, as is contemplated in the site plan, is presumptively incompatible with the wetland benefits that area affords. He also explained that by building the bulkhead in the high marsh, scouring of the tidal wetland may occur as wave energy is reflected off the bulkhead during lunar and storm tides.

These issues would be eliminated by moving the bulkhead to the edge of the wetland adjacent area. This would eliminate all filling within the wetland itself, thus preserving it, and diminish the possibility of scouring. Moving the bulkhead closer to the house heightens the concern about water spilling over the

bulkhead during storms, but it appears there are engineering solutions to this problem, namely the dry wells that are planned for the corners of the house, grading of the fill that can create an upward slope between the house and the bulkhead, and a French drain system along the upland face of the bulkhead to capture and redirect stormwater.

Mr. Richards agreed that one could grade the landward side of the bulkhead so at least some of the runoff does not go over the bulkhead but is instead captured by a French drain system that spreads it along the length of a PVC pipe. He also said permit conditions could be written to require that roof runoff be directed to dry wells, require that the dry wells be maintained so that water does not back up in them or spill over the ground, and forbid the discharge of runoff over the bulkhead and into the wetland, though, as a practical matter, such discharges may be impossible to eliminate under all circumstances.

Dr. Abrams said Ms. Palmeri would prefer to keep the bulkhead a few feet into the high marsh, arguing that this area is dominated by low-value phragmites. However, he agreed that the bulkhead could be moved out of the wetland entirely if this would secure approval of the project. Moving the bulkhead into the adjacent area makes sense in light of the regulatory finding that even small portions of the high marsh are critically important resources, and only very limited types of land use and development are compatible with them. [6 NYCRR 661.2(g).]

Ms. Palmeri has proposed that a catwalk be built in the high marsh and intertidal zone. Staff does not object to this aspect of her project, as it acknowledges her interest, as a waterfront landowner, in exercising her riparian rights. Ms. Palmeri could use the catwalk and the stairs associated with the catwalk to access the wetland and keep it clean of flotsam coming in from the lagoon. This would have some benefit in preserving wetland benefits, though the catwalk itself would be harmful to the extent it displaces wetland vegetation. Mr. Richards said that, to limit this impact, the catwalk should be on 4-inch-diameter piles, not 10-inch-diameter piles, which is a reasonable suggestion, particularly as Ms. Palmeri has not demonstrated why the wider piles are necessary. To allow the marsh to grow, Mr. Richards also said that the catwalk should be 3.5 feet above grade, another reasonable proposal.

Ms. Palmeri would like to chemically treat or pull out the phragmites that would not be lost to filling, to prevent their advance and give other, arguably more valuable species a chance to dominate. Dr. Abrams said he has been involved in projects



where the Department approved the use of chemicals to eradicate phragmites, but Mr. Richards said he would disfavor this at the Palmeri site, since phragmites are naturally occurring and not necessarily a problem in all settings.

On this record, I cannot determine whether chemically treating or hand-pulling of phragmites, as a means to remove them, should be authorized. Though the Department apparently allows this in some situations, such activity was not identified as a specific component of the project, and therefore it needs to be considered under a separate application. This is especially important if chemical treatment is proposed, as the Department would need to know what pesticide would be used, to assess the environmental risks of its application. Also, if the debris is removed from the high marsh, as is intended in the application, and the erosion from the neighboring properties is arrested, a healthy dense stand of phragmites, particularly in the high marsh closest to the bulkhead, may be less likely to spread, and more likely to benefit the wetland, capturing and filtering contaminants from any runoff that cannot be contained within the developed upland area. Therefore, under such circumstances, removing the phragmites may not make sense.

#### Variance from Development Restriction

To secure a tidal wetlands permit, Ms. Palmeri requires a substantial variance from the development restriction at 6 NYCRR 661.6(a)(1), which requires that the minimum setback of all principal buildings and all other structures that are in excess of 100 square feet shall be 75 feet landward from the most landward edge of the tidal wetland, which in this case is the upland border of the high marsh. If the north-south running steel sheet bulkhead is permitted to be constructed where proposed on the site plan, that bulkhead would establish the new upper limit of the tidal wetlands, and the seaward edge of the proposed house would be 12 feet from the upper limit of the tidal wetlands. However, if the Department requires that the bulkhead be constructed in the adjacent area, as I recommend, then the setback from the upper limit of the tidal wetland would be about 7 feet.

According to the variance provisions of the Department's tidal wetland regulations, where there are "practical difficulties" in the way of carrying out any of the provisions of section 661.6, the Department shall have authority in connection with its review of a permit application to vary or modify the application of such provisions in such a manner that "the spirit and intent of the pertinent provisions shall be observed, that

public safety and welfare are secured and substantial justice done and that action pursuant to the variance will not have an undue adverse impact on the present or potential value of any tidal wetland for marine food production, wildlife habitat, flood and hurricane and storm control, cleansing ecosystems, absorption of silt and organic material, recreation, education, research, or open space and aesthetic appreciation." [6 NYCRR 661.11(a).]

The burden of showing that a variance should be granted rests entirely on the permit applicant, who is expected to specify the practical difficulties claimed, and to discuss alternate site possibilities, change of project objective possibilities, and environmental impact reduction or mitigation measures to be employed. [6 NYCRR 661.11(a).]

Ms. Palmeri's variance request is addressed directly in a letter of March 8, 2006, from her attorney, Frederick Eisenbud, to John A. Wieland of the Department's Region 1 office (Exhibit No. 21), and in correspondence annexed to that letter.

According to the variance request, and as confirmed at the hearing, the variance from the setback requirements is necessitated by the size of Ms. Palmeri's property, which makes compliance with the restriction impossible. Ms. Palmeri owns no property other than the lot on Ocean Avenue, and her life savings are wrapped up in the lot, which she testified she purchased with her retirement funds. In light of the residential character of the neighborhood and Ms. Palmeri's need for housing for herself, her daughter and, more recently, her mother, no change in project objective has been considered. In fact, the variance request states that "Ms. Palmeri's reasonable investment backed expectation for this residentially zoned property, surrounded by houses similar to the one she proposes, all of which sit on similar sized lots, is that she be able to construct a house that she and her daughter can live in." [Exhibit No. 21, page 4.]

According to Department Staff, any "practical difficulties" that exist in terms of compliance with the setback restriction are "self-imposed" because Ms. Palmeri should have known that the small size of her lot would preclude the building of a home. In fact, though a Department representative apparently assured Ms. Palmeri that bulkheading would protect the wetlands on her property, she never received assurance, from the Department or anyone else, that the presence of the wetlands would not preclude the construction of a house. The setback requirement has been in place since 1977, and she should have been aware of it, even if she did not review the tidal wetlands law and regulations prior to purchasing her property in 2003.

Even so, the fact that Ms. Palmeri created the compliance problem for herself does not preclude granting the variance, as the Commissioner's August 9, 1994, decision in Matter of Seewald, cited by Staff, makes clear. That decision, involving the same setback restriction, acknowledged (at page 11) that self-imposed hardship "is a factor to be considered in deciding whether or not a variance should be given," but that it is "not determinative in itself." As authority for that statement, Seewald references Matter of Gazza, a Commissioner's interim decision of May 3, 1991, which also addresses the same setback restriction. In Gazza, the Commissioner used as guidance claims of self-imposed hardship in the context of local zoning ordinances, since there was no body of case law concerning the requirement of practical difficulty in the context of the state tidal wetland regulations.

The Commissioner said:

"The cases that analyze the question of self-imposed hardship uniformly recognize that purchase of property with either actual or constructive knowledge of land use restrictions forms a basis to conclude that any hardship in complying with such restrictions in effect at the date of the purchase is self-imposed (Paplow v. Minsker, 43 A.D.2d 122 (4<sup>th</sup> Dept., 1973); Application of Hepner, 152 N.Y.S.2d 984 (Supreme Court, Westchester County 1956); Tharp v. Zoning Bd. Of Appeals, 138 A.D.2d 906 (3<sup>rd</sup> Dept., 1988)). The impact of such self-imposed hardship varies however, depending upon whether the new owner requests a use variance or an area variance from the land use regulation. If a variance is being requested for a prohibited use (i.e., a use variance), the fact that the hardship is self-impose [sic] is fatal (Matter of Clark v. Zoning Board of Appeals, 301 N.Y. 86, (1950) reh. den. 301 N.Y. 681 and cert. den. 340 U.S. 933). If, on the other hand, an area variance is sought, self-imposed hardship is just one of several factors considered in the decision-making process (Snyder v. Scheyer et al 153 A.D.2d 630 (2<sup>nd</sup> Dept., 1989)).

"In this instance, the variance request is analogous to an area variance, since construction of a single family house in an area adjacent to a regulated wetland is not a prohibited use, but merely one that is subject to, among other things, a setback requirement. As such the Applicant's self-imposed hardship is, at most, just one of several factors to be considered. Where, as here, no one has even suggested any other use of the property which would provide the Applicant a reasonable return on his investment, it would be contrary to sound public policy to deny an application that otherwise satisfies the environmental criteria . . . for obtaining variances." [Gazza, pages 1 and 2.]

The Commissioner noted in Gazza that "had the prior owner obtained a final determination of the agency disapproving a comparable variance for the same or similar project, the public policies favoring judicial efficiency would likely have required the rejection of this request because of the self-imposed hardship." In this matter, a prior application for site development apparently was made by a prospective purchaser, but the application, the specifics of which are unknown, was withdrawn before any agency determination was rendered, and Ms. Palmeri had no notice of the application before she purchased the property.

In Seewald, the same type of variance requested by Ms. Palmeri was denied by the Commissioner. The Commissioner adopted the report of the administrative law judge ("ALJ"), who found that because of the self-imposed nature of the hardship, coupled with the undue adverse impact of the proposed house on the tidal wetland's value as wildlife habitat, particularly for waterfowl, the applicant did not qualify for the variance. In reaching his conclusion, the ALJ said that rather than focus on the number of feet of variance requested, it was more germane to consider whether the adjacent area left after giving the variance would fulfill the purpose of a wetland buffer. The ALJ concluded that it had not been shown that the spirit and intent of the setback requirement would be observed, or that no undue adverse impact would result, if the variance was granted for the house. [ALJ's hearing report, page 12.]

According to the tidal wetland regulations, the most important function of adjacent areas is to act as buffers to protect the character, quality and values of tidal wetlands. Consequently, a wide variety of uses may be compatible with these areas, provided such uses do not adversely affect adjacent and nearby tidal wetlands. [See 6 NYCRR 661.2(j).] In particular, construction of a single family dwelling is classified as a use that is generally compatible with an adjacent area [see 6 NYCRR 661.5(b)(46)], though it requires a permit and is subject to the development restriction at issue in this case.

In Seewald, a variance from the development restriction was denied because of the perceived impact a house would have on the tidal wetland's value as wildlife habitat. In this case, that value is already diminished because the wetland is bordered by houses on the north and south, and is situated generally in a congested housing development. The Palmeri property and the wetland it contains are too small to support wildlife breeding, and even wildlife visitation is limited due to the dense development that has already occurred.

Adding a house in the upland adjacent area of the property, roughly as close to the wetland as the neighboring houses, would not likely change the wetland's value as wildlife habitat, because, as Dr. Abrams points out, wildlife, including waterfowl, that visit the site are already adapted to human activity. Nor would it change the character of the neighborhood, given how close the surrounding houses are to their canal-fronting bulkheads. As evidenced by the aerial photographs that were received as Exhibits No. 36 and 37, the activities proposed by Ms. Palmeri are consistent with, and would therefore blend into, the pattern of development on all sides of her property.

The spirit and intent of the setback provision are to assure an adequate buffer between a tidal wetland and a house that is built in its adjacent area. At present, the adjacent area, while a buffer to the wetland, performs this function poorly, due largely to the extensive dumping that has occurred there. During heavy storms, water runs through the adjacent area from Ocean Avenue to the wetland, spreading contaminants including petroleum hydrocarbons. The phragmites that dominate in the adjacent area are somewhat helpful in filtering out contaminants. However, runoff is still able to move through voids in the rubble, and the surface soils in the adjacent area are insufficient to absorb it.

If a house is built in the adjacent area, it will supplant most of the buffer, but the construction of a bulkhead between the house and the wetland, and engineering measures to curb the amount of runoff to the wetland, should actually enhance wetland protection. Dry wells would be built in the adjacent area to collect and recharge roof drainage. The upland could be graded, and a French drain system installed, to curb the spillage of water over the bulkhead. In these ways, the spirit and intent of the development restriction would be observed, though the restriction itself would not.

Granting the variance would secure the public safety and welfare by ensuring, as part of the overall project, the removal of the rubble and other debris from the Palmeri property. The site is apparently infested with rats and poison ivy, and the rubble presents hazards to anyone entering from the street.

Granting the variance would also do substantial justice in this matter, because it would allow Ms. Palmeri to get a reasonable return on her investment and realize her objective in purchasing the property, which is, after all, in a residential neighborhood. These things would not be accomplished by Staff's counterproposal to a house: that Ms. Palmeri build a small

storage shed and a catwalk leading to the water, so that she could launch a kayak into the lagoon.

According to Department Staff, the property's purchase price reflects its value subject to the tidal wetlands law, including limited development rights, when that price is compared to the much higher list prices of other properties she had considered. This may be true, but it is difficult to confirm on this record, since the purchase price likely also reflects the property's degradation from years of dumping. As for the other, higher-priced properties Ms. Palmeri also considered, she testified that they were larger or had features, such as a former business, that this one does not. These factors, too, likely account for the price variation she described.

Ms. Palmeri testified about the circumstances surrounding her acquisition of her property, as well as understandings she had about its development potential, based on information she collected from the Town, a SUNY Stony Brook professor, and Blue Gate, her former consultant, including a conversation that the consultant allegedly had with a named member of Department Staff. Though the consultant did not testify and no correspondence was presented to confirm these understandings, Ms. Palmeri's testimony was not rebutted by Department Staff, whose witnesses challenged only Dr. Abrams' testimony assessing conditions at the site and its present and potential wetland values.

Dr. Abrams convincingly explained that granting the variance would not have an undue adverse impact on these values, given the intended bulkheading between the house and the tidal wetland. Moving the bulkhead upland and out of the high marsh, as I recommend, would be even more protective, since it would limit the filling associated with the project to the adjacent area, ensuring that no wetland is destroyed in association with the house's development.

It is clear from the evidence that the lot, though small, is big enough to accommodate both a house and a wetland marsh that is not diminished by the house's close proximity. If anything, by bringing the landowner to the property, the house assures that the wetland's potential values are enhanced, by cleaning out the rubble and other trash, and generally restoring the wetland so it can be aesthetically appreciated, if only by Ms. Palmeri, her neighbors, and boaters on the lagoon. The view of the wetland from Ocean Avenue would be lost after the house is constructed, but that view is obscured now by vegetation, and diminished by the unkempt appearance of the property. If the house were not allowed and Ms. Palmeri, on her own or under order, performed a

cleanup of her property, the opportunity for new dumping would persist as long as the property remains vacant and accessible from the street, and Ms. Palmeri is not present to police it.

### Permitting Standards

As noted in the findings above, Ms. Palmeri's project would take place entirely within a tidal wetland or its regulated adjacent area, which in this case extends from the wetland to Ocean Avenue.

#### - - Activities in Tidal Wetland

The activities proposed to occur entirely in the wetland include construction of the bulkhead facing toward the lagoon, the bulkhead returns along the north and south borders of the property, and the catwalk with its associated stairs leading down to the intertidal zone.

According to the Department's permitting standards, a permit for a proposed regulated activity on any tidal wetland shall be issued only if it is determined that such activity:

- - Is compatible with the policy of the tidal wetlands act to preserve and protect tidal wetlands and to prevent their despoliation and destruction [6 NYCRR 661.9(b)(1)(i)];

- - Is compatible with the public health and welfare [6 NYCRR 661.9(b)(1)(ii)];

- - Is reasonable and necessary, taking into account such factors as reasonable alternatives to the proposed regulated activity and the degree to which the activity requires water access or is water dependent [6 NYCRR 661.9(b)(1)(iii)];

- - Complies with the development restrictions at 6 NYCRR 661.6 [6 NYCRR 661.9(b)(1)(iv)]; and

- - Complies with the use guidelines contained at 6 NYCRR 661.5 [6 NYCRR 661.9(b)(1)(v)].

According to the use guidelines, construction of bulkheads and other shoreline stabilization structures in the intertidal marsh or high marsh is a presumptively incompatible use requiring a permit. Here, however, the placement of the bulkhead returns at the edge of the marsh, and the function of the returns in arresting erosion into the marsh, overcome the presumption of incompatibility. They are reasonable and necessary to protect the wetland from siltation, and compatible with the public health and welfare, to the extent they maintain the integrity of the neighboring properties.

Mr. Richards maintained that erosion from the neighboring properties could be addressed adequately by hay bales or silt fencing, making bulkheading unnecessary. However, these are temporary solutions for a long-term problem, and their success would depend on regular replacement, in the case of hay bales, or maintenance, in the case of silt fencing.

The north-south bulkhead now proposed to be set within the high marsh, if moved to the adjacent area, would be converted from a presumptively incompatible use to one that, according to the use guidelines, is generally compatible. Because it is not necessary for the sake of the project to place the bulkhead in the high marsh, I recommend that it be moved to the edge of the adjacent area, to preserve the entirety of the wetland from filling.

According to the use guidelines, construction of an open-pile catwalk and/or dock not greater than four feet in width for any principal building is a generally compatible use in either the wetland or its adjacent area. Even so, in its May 15, 2006, permit denial letter (Exhibit No. 24), Department Staff said it objected to the catwalk "due to the adverse impacts the structure would cause by its presence and use, which would likely include the docking of a boat." According to Staff, the structure would cause shading of the tidal wetland, resulting in disruption, degradation and loss of vegetated marsh area, and would reduce productivity of the marine environment. Staff also said the "excessively large" 10-inch piles would significantly disrupt the vegetated marsh community. Finally, Staff said the impacts from docking a boat in the very shallow waters at low tide would cause adverse impacts to the wetlands benthic community and juvenile finfish due to prop dredging of bottom sediments, creation of turbidity, and compaction of bottom sediments when a boat sits on the bottom of the waterbody. For all these reasons, Staff said the catwalk failed to satisfy the permitting standards at 6 NYCRR 661.9(b)(1)(i), (ii) and (iii).

In assessing the catwalk, it should be stressed that, at the hearing, Mr. Abrams discussed it as a structure affording Ms. Palmeri pedestrian access to the marsh so she can keep it clean, particularly of debris that floats in from the lagoon. As Ms. Palmeri's representatives confirmed at the hearing, the docking of a boat is not part of this application, and permission is not being sought for such activity. [See November 14 transcript, page 208.] Because of the impacts the docking of a boat would have, as discussed in Staff's denial letter, a condition could be written to confirm that the docking of a boat is not authorized by the permit and would require separate Department approval, consistent



with the understanding that such approval is not now being requested.

According to the closing brief submitted on her behalf, Ms. Palmeri acknowledges that, should she desire to have a boat in the future, she necessarily would have to apply for another tidal wetlands permit allowing her to extend the catwalk out to a new structure that would permit the boat's docking in a manner not harmful to the wetlands. [Closing brief, page 38.] In the meantime, Staff has indicated that it would not oppose her launching a kayak from the catwalk, provided the kayak is stored outside of the wetland area.

As for the catwalk itself, Mr. Richards explained how a modified design would reduce wetland impacts. Mr. Richards said he would like to see the 10-inch-diameter piles reduced to 4 inches in diameter, and the elevation, which was not specified in the application, set at 3.5 feet above grade, to reduce wetland shading. Dr. Abrams said that the wetland would recover perfectly around whatever pilings are set, but there was no indication why the pilings needed to be 10 inches in diameter. Four-inch-diameter pilings would displace less marsh, and it was not established that, with this smaller diameter, more pilings would be required to support the structure. With the design proposed by Mr. Richards, preservation and protection of the wetland would be enhanced, and for that reason his proposals should be adopted.

Applying the permitting standards referenced in the denial letter, the catwalk, as modified by Mr. Richards, would be compatible with the policy of the tidal wetlands act in that it would not have an undue adverse impact on wetland values. If anything, it would enhance the wetland's value for aesthetic appreciation, while enhancing Ms. Palmeri's ability to keep the wetland clean. There was no evidence that the catwalk would be incompatible with the public health and welfare, and while it could be argued that it is not reasonable and necessary, since stairs alone would allow Ms. Palmeri to reach the wetland, the catwalk would allow her a wider range of access, which, if it can be accommodated without undue harm to the wetland, should be encouraged, given her landowner's interest in maintaining and securing the enjoyment of her property.

- - Activities in Adjacent Area

Apart from the activities that would occur in the wetland, the project includes several activities within the adjacent area, the key one being construction of a house, the main purpose of

the application. Department Staff's denial letter references earlier correspondence to Ms. Palmeri, in relation to her initial application, in which Staff said that it remained adamant in its stance not to allow a single family dwelling on the lot, and that if her objectives involved construction of a house on the lot she may wish to proceed directly to hearing. In fact, Ms. Palmeri's initial application, developed by Blue Gate Consulting, was the subject of a hearing request in November, 2004, but the hearing has been held in abeyance while this revised application, which was tailored to address Staff's concerns, proceeds to a determination.

According to Ms. Palmeri's counsel, this revised application differs from the initial one in several ways:

(1) The original application proposed encasing the high and low marsh with bulkheading all around, whereas the present application leaves the intertidal zone fully exposed to Silver Lagoon.

(2) The revised application adds dry wells at the four corners of the building envelope in order to capture roof runoff, whereas no runoff mitigation was originally proposed.

(3) The revised application adds the catwalk to allow access to the lagoon, which was not part of the original application.

As I indicated several times on the record, this hearing was held to determine whether and on what terms the current, revised project can be permitted, and not to determine whether the current proposal is an improvement on the prior one, or whether Department Staff was arbitrary and capricious in denying Ms. Palmeri's applications or failing to propose project modifications that might help secure permit approval. Department Staff took the stance early on that it would not approve a house on this lot under any circumstances, and, for that reason, it did not discuss with Ms. Palmeri, her lawyer or her consultant possible project adjustments that might further mitigate environmental impacts. Such adjustments, however, were discussed at the hearing, recognizing the possibility that if Staff's position did not prevail, the conditions of project approval would have to be established by the Commissioner, Staff having provided no draft permit. Adjustments discussed included the landward relocation of the bulkhead to prevent filling of the wetland, and the addition of a French drain system to address runoff from the adjacent area.

According to the Department's permitting standards, a permit for a proposed activity on an adjacent area of a tidal wetland shall be issued only if it is determined that such activity:

- - Is compatible with the public health and welfare [6 NYCRR 661.9(c)(1)];
- - Complies with the development restrictions at 6 NYCRR 661.6 [6 NYCRR 661.9(c)(2)];
- - Will not have an undue adverse impact on the present or potential values of any adjacent or nearby tidal wetland [6 NYCRR 661.9(c)(3)]; and
- - Complies with the use guidelines contained at 6 NYCRR 661.5 [6 NYCRR 661.9(c)(4)].

Apart from the construction of a house, other activities proposed for the adjacent area include the construction of a pervious driveway, four dry wells, and two timber retaining walls, all incidental to the house's development. If the lagoon-facing bulkhead is moved out of the high marsh, its construction and all the placement of fill on the property would also occur entirely in the adjacent area. Department Staff did not suggest that any of these uses would be presumptively incompatible for the adjacent area; in fact, the use guidelines identify construction of a single-family dwelling (use 46) and its accessory structures or facilities (use 49), the installation of dry wells (use 43), filling (use 30), and the construction of bulkheads and other shoreline stabilization structures (use 29) as generally compatible uses, though a permit is required for them.

In relation to development restrictions, the only one raised by Department Staff involves the placement of the house within 75 feet of the landward edge of the tidal wetland. However, as discussed above, I find that a variance to such restriction is warranted in this case.

According to Department Staff, the activities in the adjacent area would not be compatible with the public health and welfare, since they would increase runoff and contamination, thereby impacting the water quality of Silver Lagoon and Seamans Creek, and since they would decrease the amount of vegetation, causing degradation that can lead to a decrease in both the ability to fish and recreate in those waters. These contentions were belied by Dr. Abrams' testimony, which demonstrated that the adjacent area, in its present degraded condition, does not buffer the wetland adequately, and that the proposed development of this area incorporates features that would better keep contaminants out of the wetland.

As Dr. Abrams explained, debris in the adjacent area now impedes the growth of healthy vegetation there, and provides channels for stormwater to pass from the street to the tidal

wetlands during major storm events. If the project is approved, the debris would be removed and the adjacent area would be filled and graded to create a gentler slope from the street to the proposed bulkhead. The driveway would be pervious so that water would not run across it, but would instead percolate through it. Dry wells would be installed to collect roof runoff, and a French drain system, discussed at the hearing, could be added near the bulkhead to collect water that would otherwise flow over the bulkhead and into the marsh.

Pressed on cross-examination, Mr. Richards could not say that, with its proposed development, runoff from the Palmeri property would present any greater threat to water quality than runoff from any of the other properties on the lagoon, virtually all of which are bulkheaded at the water line and developed with single family houses. Mr. Richards agreed that, even with the existing development, which predates the tidal wetlands act, Silver Lagoon is a healthy ecosystem, one that is flushed twice daily by the tides, and that any contaminants that enter the lagoon are diluted throughout the lagoon and its connecting waters. Even so, he maintained that development of the Palmeri lot, by itself, would adversely affect the lagoon's water quality, and the quality of Seamans Creek, in a significant way. Asked what would cause the impact, Mr. Richards attributed it to the filling of wetland, though no filling is proposed in the intertidal zone, which serves as a finfish nursery, and, with the removal of the bulkhead from the high marsh, no filling would occur in the wetland at all.

Mr. Richards acknowledged that, whatever use Ms. Palmeri's wetland has for the feeding of immature fish, these fish also eat invertebrates and algae that are growing on the bulkheads built directly on the lagoon. This activity would presumably continue even if the intertidal marsh were degraded, though, on this record, it appears the marsh's cleanup in conjunction with permitted activities would actually improve the finfish nursery, particularly at high tides, and make the marsh more attractive to shellfish.

According to Department Staff, the activities in the adjacent area would have an undue adverse impact on all of the present and potential tidal wetland values. I disagree, accepting Dr. Abrams' assessment of the situation, as discussed below:

- - Marine Food Production. According to Department Staff, construction in the adjacent area would entail the removal of vast amounts of natural vegetation that are the basis of the

marine food chain. However, as Dr. Abrams pointed out, the upland phragmites are now decomposing onto a largely inert substrate, where no soils or invertebrates exist to bio-process nutrients, a situation that has resulted in pollution loading.

- - Marine and Wildlife Habitat. According to Department Staff, construction in the adjacent area would remove habitat that wildlife now use. However, as Dr. Abrams pointed out, the small size of the lot, and its location in a congested housing development, limit wildlife's use of the site in its present, undeveloped site, and waterfowl that access the wetland from the lagoon are presumably already acclimated to human activity.

- - Flood and Hurricane and Storm Control. According to Department Staff, construction in the adjacent area will remove that area's ability to absorb flood, hurricane and storm waters, and increase damage caused by those events. However, as Dr. Abrams pointed out, the site's location on a sheltered lagoon isolates it from storm surges, and the adjacent area plays no significant role in storm protection. In fact, during heavy storms, flooding from the road spills contaminants into the wetland, something that the project is intended to impede.

- - Cleansing Ecosystems, and Absorption of Silt and Organic Material. According to Department Staff, the phragmites in the adjacent area filter out and absorb contaminants and excess sediments in runoff. This is somewhat true, though their capacity to do that is degraded because of the dumping of rubble and other debris. To the extent that the phragmites, on a remediated property, can better provide these functions, moving the bulkhead into the adjacent area would leave some phragmites in the high marsh to capture any runoff that spills over the bulkhead, and the question of their eradication can be addressed through a follow-up application, to the extent that the phragmites are perceived to be supplanting other marsh vegetation.

- - Recreation. According to Department Staff, the project site allows water access to Silver Lagoon and other coastal areas. However, because it is privately owned, it does so legally only for Ms. Palmeri. Staff contends that the project involves the eradication of tidal wetland which would likely affect those who may wish to boat and fish in the nearby waters. To the contrary, the project is designed to preserve the tidal wetland, and in no way limits the ability of boaters to access the lagoon as they do now, nor should it decrease the lagoon's fish population.

- - Research and Education. According to Department Staff, the project site provides a suitable setting for research and education, particularly to the extent the site is visited by wildlife. However, as the site is privately owned, access to it is restricted, and nothing suggests that it has any special features that would warrant further investigation.

- - Open Space and Aesthetic Appreciation. According to Department Staff, the project site holds special value as one of the last remaining tracts of vegetated, unspoiled tidal wetlands available in Seaford, and the proposed construction would eradicate the beauty of a natural shoreline. Staff neglects to point out that the site is blighted by the dumping that occurred there before Ms. Palmeri purchased it, and that such dumping seriously diminishes its aesthetic value. Because it is undeveloped, the property qualifies as open space in an otherwise congested neighborhood. However, as open space, it has been used for the illegal disposal of waste and debris, which is not the benefit intended by the regulations.

Overall, the activities in the adjacent area would not have an undue adverse impact on wetland values, particularly when considering the social and economic benefits which may be derived from the proposed activity. As Staff points out, Ms. Palmeri herself, along with her family, would be the main beneficiaries of a house on the property. However, her neighbors would also benefit from the cleanup and restoration of her property, and from the bulkheading that would stem erosion into the wetland, particularly from the Kruzrak property on the north.

- - Enhancement of Wetland Values

In determining whether the permitting standards for regulated activities on or adjacent to a tidal wetland will be fulfilled in a particular case, the Department may in its discretion consider any proposal made by an applicant to enhance the existing values served by a wetland on the project site. [See 6 NYCRR 661.9(e).] Here, such proposals include the removal of rubble and debris from her property, and the bulkheading of the wetland along its north and south borders, which is meant to stop the accumulation of silt in the intertidal zone. Because these measures would enhance existing wetland values, they should be weighed in Ms. Palmeri's favor in the permitting decision.

- - Cumulative Impacts

Department Staff expressed concern that if this project is approved, it will have cumulative impacts upon tidal wetlands

generally, noting that there are other small pockets of undeveloped wetland in the vicinity of the project site, and that other, similar applications could follow from approval of this one. On the other hand, should other, similar applications be made, they would have to be reviewed on their own merits, and issuance of a permit in this matter would not dictate the same result elsewhere, as each project is unique, as is the setting for which it is proposed.

Staff raised its concern under ECL 3-0301(b), which requires the Commissioner to take into account the cumulative impact upon water, land, fish, wildlife and air resources in making any permitting determination. Here, all relevant project impacts have been considered through application of the permitting regulations. ECL 3-0301(b) does not require that impacts of one project be evaluated cumulatively with impacts of other, similar but unrelated projects that may be proposed in the future. For that reason, Staff's reliance on this provision is misplaced.

- - Water Quality Certification

Apart from a tidal wetlands permit, Ms. Palmeri requires a Water Quality Certification pursuant to section 401 of the Federal Water Pollution Control Act (33 USC 1251 et seq.) and 6 NYCRR 608.9. No issues were proposed by Department Staff with regard to issuance of the certification, and therefore it does not require further discussion in this report.

### CONCLUSIONS

1. Because of practical difficulties created when Ms. Palmeri purchased such a small lot on which to build a house, her project requires a substantial variance from a development restriction that a dwelling be set back at least 75 feet landward from the most landward edge of a tidal wetland. Even so, Ms. Palmeri has met her burden under 6 NYCRR 611.11, and for that reason a variance to the development restriction should be granted.

2. Except for the above-referenced development restriction, as to which a variance is warranted, Ms. Palmeri's application meets the standards for a permit for regulated activities in an adjacent area.

3. Ms. Palmeri's application also meets the standards for a permit for regulated activities in a tidal wetland.

### RECOMMENDATIONS

Because a draft tidal wetlands permit was not presented at the hearing by Department Staff, the application should be remanded to Department Staff with direction that it prepare and issue a permit, in association with a water quality certification, to Ms. Palmeri.

Prior to permit issuance, however, Ms. Palmeri should be directed to revise her site plan to indicate relocation of the lagoon-facing bulkhead to the edge of the adjacent area, so that the project involves no filling of wetland. Also before permit issuance, Ms. Palmeri should be directed to submit for review and approval grading and landscaping plans for the upland area, as well as engineering plans for the dry wells to collect and recharge roof runoff, and a French drain system. Final decisions about the French drain system, including whether to require it, should be deferred to Staff, as the French drain system was not identified as a project component, and Mr. Richards, who is not an engineer, conceded only that such a system would be helpful in preventing water from going over the bulkhead.

The permit issued to Ms. Palmeri should contain conditions confirming that:

- - Prior to any filling and construction, all existing rubble and debris shall be removed from the property surface and substrate to the extent directed by Department Staff, according to a plan subject to Staff approval, so that the tidal wetland and its adjacent area are restored by the cleanup and, at the same time, the cleanup avoids harm to the wetland and its existing vegetation as much as practicable.

- - Construction of the bulkhead and the bulkhead returns shall proceed according to a plan approved by Staff addressing how this activity can be performed without causing undue harm to existing vegetation by trampling and other means.

- - To the extent wetland vegetation is harmed as a result of site activities, it shall be replanted according to Department Staff's specifications.

- - The house shall be limited to two stories in height, to ensure compatibility with other houses in the neighborhood and to prevent undue shading of the wetland.



- - The approved building footprint, as shown on the site plan, shall not be exceeded without Department approval, even for accessory structures like rear decking.

- - The house shall be built on piles, as noted in the site plan, and any alternative to that, such as construction on a slab, shall require separate Department approval.

- - Docking of a boat in the wetland area is not part of the application, and is not authorized by the permit.

- - Establishment of a lawn is not a project feature, and shall require separate approval, as shall the application of pesticides anywhere on the property, including the application of chemicals to eradicate phragmites.

- - The catwalk in the intertidal marsh shall be built on 4-inch-diameter piles, at 3.5 feet above grade.

- - All runoff control features, including the roof gutters and drains, the dry wells, and any French drain system along the bulkhead shall be maintained in good working order, so that they achieve their intended purpose.

Other conditions that are typical of tidal wetlands permits, and not having the effect of denying permission for activities identified in the project application, should also be incorporated by Department Staff.

#### **ADDENDUM**

Attached to this report is a list of hearing exhibits, both those received as evidence and those marked for identification but not received. Many exhibits that Ms. Palmeri offered were not received, as they relate to her initial application, rather than the revised application which was the subject of this hearing.

In her closing brief, Ms. Palmeri proposes that I reconsider my ruling denying receipt of Exhibit No. 33 as part of her variance application. I did not receive the exhibit because it was an average setback analysis performed by Dr. Abrams as part of another variance application, albeit for a project not far from Ms. Palmeri's property, and was not offered in support of Ms. Palmeri's application until the hearing, so that its receipt would have surprised and prejudiced Department Staff. I reaffirm that ruling now, for the same reasons given previously. On the

other hand, that ruling did not preclude Dr. Abrams from offering testimony about the character of the neighborhood, including testimony about the separation of other houses from their bulkheads. That testimony was received and considered in making my findings.

## EXHIBIT LIST

MARY PALMERI  
TIDAL WETLANDS PERMIT HEARING  
Application No. 1-2820-02875/00006

### Exhibits Received as Evidence

#### - - ALJ's Exhibits

- A. Notice of Public Hearing (10/16/06)
- B. ALJ's transmittal letter for hearing notice (10/16/06)
- C. Hearing notice, as it appeared in Department's Environmental Notice Bulletin
- D. Hearing notice distribution list (10/16/06)

#### - - Parties' Exhibits

- 2. Revised Site Plan from Initial Application (4/24/04)
- 4. Letter from Mary Palmeri to John Wieland of DEC (7/7/04)
- 11. Letter from Dru Associates to John Pavacic of DEC (11/29/05), with attachments
- 11-A. Palmeri property survey (2/5/03)
- 12. Letter from Frederick Eisenbud to John Pavacic of DEC (1/19/06)
- 13. Letter from Frederick Eisenbud to John Wieland of DEC (1/26/06)
- 14. Letter from John Wieland of DEC to Mary Palmeri (1/30/06), with attached Notice of Complete Application
- 15. Affidavit of publication of notice of complete application in Newsday (2/6/06)
- 16. Notice of Complete Application (2/8/06)
- 17. Letter from Dru Associates to John Wieland of DEC (2/13/06)
- 18. Letter from John Wieland of DEC to Mary Palmeri (2/16/06)
- 19. Letter from Mary Palmeri to John Wieland of DEC (2/22/06)
- 20. E-mail exchange between John Wieland of DEC and Frederick Eisenbud (2/25 and 2/27/06)
- 21. Letter from Frederick Eisenbud to John Wieland of DEC (3/8/06), with attachments
- 22. Letter from Frederick Eisenbud to John Wieland of DEC (4/5/06)
- 23. Letter from Frederick Eisenbud to DEC Chief Permit Administrator (5/4/06)
- 24. Letter from William Adriance of DEC to Frederick Eisenbud (5/15/06), with attachment
- 25. Letter requesting hearing from Frederick Eisenbud to John Pavacic of DEC (5/19/06)
- 26. Hearing request transmittal from DEC Region 1 to DEC Office of Hearings and Mediation Services (approved 8/2/06)

27. Letter from Frederick Eisenbud to DEC Office of Hearings and Mediation Services (8/29/06)
28. Affidavit of publication of hearing notice in Newsday (10/23/06)
31. Site plan prepared by Dru Associates (12/5/05)
32. Curriculum vitae of Dr. Ronald Abrams of Dru Associates
34. Mary Palmeri deed to property (3/17/03)
35. Series of 15 photographs taken at Palmeri property by Dr. Abrams (photographs marked 35-1 to 35-15)
36. Infrared aerial photograph indicating Palmeri property with red arrow (2004)
37. DEC tidal wetlands map (Map 626-500) (1974)
38. Memorandum from Dr. Ronald Abrams to Frederick Eisenbud (11/12/06)
39. Resume of Gina Fanelli of DEC
40. Site plan prepared by Dru Associates (12/5/05), with markings by DEC witnesses
41. Series of 11 photographs taken at Palmeri property by DEC
42. Resume of Matthew Richards of DEC
43. NYS Dept. Of State coastal fish and wildlife habitat rating form for South Oyster Bay

Exhibits marked for identification only (not received in evidence)

1. Letter from Town of Hempstead to Mary Palmeri (3/25/04)
3. Letter from Mary Palmeri to John Wieland of DEC (5/22/04)
5. Memorandum from Matt Richards of DEC to John Wieland of DEC (10/27/04)
6. Letter from William Adriance of DEC to Mary Palmeri (11/1/04)
7. Letter from Mary Palmeri to John Pavacic of DEC (11/22/04)
8. Letter from John Wieland of DEC to Mary Palmeri (2/4/05)
9. Letter from Mary Palmeri to John Wieland of DEC (2/15/05)
10. Letter from ALJ Edward Buhrmaster to Mary Palmeri (6/15/05)
29. Google maps (11/13/06) and permit transmittal letter from Town of Hempstead to Tide Way Homes (3/22/95), with attachments, re: development at 2563 Ocean Avenue
30. Google maps (11/13/06) and permit transmittal letter (4/10/06) from Marilyn Peterson of DEC to 2755 Ocean Avenue LLC, with attachments, re: development at 2755 Ocean Avenue
33. Letter from Dru Associates to Mark Carrara of DEC with average setback analysis re: proposed development at Brazel property on Island Channel Road