

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

In the Matter

- of -

the Application for a Freshwater Wetlands Permit
Pursuant to Article 24 of the Environmental
Conservation Law

- by -

**GHP DEVELOPMENT CORP. AND
GREGORY H. PECORARO,**

Applicants.

DEC #1-4728-02177/00004

DECISION OF THE COMMISSIONER

April 22, 2009

DECISION OF THE COMMISSIONER

GHP Development Corp. and Gregory H. Pecoraro (applicants) filed an application for a freshwater wetlands permit with the New York State Department of Environmental Conservation (“Department” or “DEC”) for the construction of a single family residence and associated structures on property located on Kime Avenue, Town of Islip, Suffolk County, abutting Deer Lake (the “project”). The project would be located within the adjacent area to Class I freshwater wetland BW-2.

Department staff denied the permit application and applicants requested a hearing. Following referral to the Office of Hearings and Mediation Services, the matter was assigned to Administrative Law Judge (“ALJ”) P. Nicholas Garlick, and an adjudicatory hearing was held. For the reasons stated in the ALJ's hearing report, a copy of which is attached, the determination of Department staff to deny the application for a freshwater wetlands permit is confirmed. I adopt the ALJ's hearing report (“Hearing Report”) as my decision in this matter, subject to my comments below.

In proceedings conducted pursuant to the Department’s Part 624 permit hearing procedures, the applicant bears the burden of proof to demonstrate that its proposal will be in compliance with all applicable laws and regulations administered by the Department (see section 624.9[b][1] of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York [“6 NYCRR”]). Whenever factual matters are involved, the party bearing the burden of proof must sustain that burden by a preponderance of the evidence (6 NYCRR 624.9[c]).

To receive a freshwater wetlands permit from the Department, an applicant is required to demonstrate that a proposed project is compatible with the policy of the Freshwater Wetlands Act to preserve, protect and conserve freshwater wetlands and prevent their despoliation and destruction (see Environmental Conservation Law § 24-0103). In this matter, applicants’ proposed project involves constructing a residence in the adjacent area of regulated wetland BW-2, clearing and grading, which activities are identified as “P(N)”, or “usually incompatible with a wetland and its functions or benefits” (see 6 NYCRR 663.4[d]).

Pursuant to the DEC’s freshwater wetland regulations, activities identified as P(N) are evaluated to determine whether they meet three tests of compatibility (see 6 NYCRR 663.5[e][1]). For those projects that fail to meet the compatibility tests, designated weighing standards are then considered (see 6 NYCRR 663.5[e][2]).

Department staff, in its notice of permit denial and testimony, addressed the incompatibility of the proposed activities with the functions and benefits of freshwater wetlands and the project’s failure to satisfy the regulatory weighing standards (see, e.g., Exh 17 [Notice of Permit Denial]; Hearing Transcript, at 27-39 [Testimony of Robert F. Marsh, DEC Regional Manager of Bureau of Habitat, addressing adverse impacts on the wetland that would be caused by clearing portions of the adjacent area at this location, grading of portions of the adjacent area,

and constructing the proposed residence in the adjacent area]).

Based on the record before me, the proposed project would significantly impact various functions and benefits of freshwater wetland BW-2. I note, in particular, the close proximity of various proposed activities to the wetland itself. The record also shows that the wetland's adjacent area would be significantly affected, including but not limited to wildlife habitat and the area's buffering capabilities. See, e.g., Hearing Report, at 16-20.

The record clearly demonstrates that applicants failed to meet the tests of compatibility or the weighing standards, and did not carry their burden of establishing that the proposed project would comply with all applicable laws and regulations administered by the Department. Accordingly, the application for the proposed project is denied.

For the New York State Department
Environmental of Conservation

By: _____/s/_____
Alexander B. Grannis
Commissioner

Albany, New York
April 22, 2009

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application for a Freshwater Wetlands Permit
pursuant to Article 24 of the Environmental Conservation Law

by

GHP Development Corp. and
Gregory H. Pecoraro,

Applicants.

DEC #1-4728-02177/00004

Hearing Report

_____/s/_____

P. Nicholas Garlick
Administrative Law Judge

April 17, 2009

SUMMARY

An adjudicatory hearing was held at the request of GHP Development Corp. and Gregory H. Pecoraro (applicants) to review the decision of the Staff of the Department of Environmental Conservation (DEC Staff) to deny the applicants' freshwater wetlands permit application to construct a house and associated structures (proposed project) on Suffolk County Tax Map lot #500-335-1-3.5 (site). Based on the evidence in the record, I recommend that the Commissioner conclude that the applicants have failed to show that the proposed project meets the permit issuance standards in 6 NYCRR 663.5.

PROCEEDINGS

This application is one in a series made by the applicants to construct homes on Long Island. At issue in this case is a freshwater wetlands permit application for a proposed house and associated structures on the site, which is located in the Town of Islip, Suffolk County. The house would be in the adjacent area of freshwater wetland BW-2 (Deer Lake). BW-2 lies across the border of the Towns of Babylon and Islip.

More than ten years ago, the applicants applied for and received a DEC freshwater wetlands permit (#1-4728-02177/00001), effective June 22, 1998, which authorized the creation of a grassed area, the installation of a vinyl clad chain link fence and a vegetated buffer zone on the site. DEC Staff authorized minor amendments to this permit on September 9, 1999 (Exh. 2).

In April 2002, the applicants filed an application (#1-4728-02177/00003) with DEC Staff to construct a house on the site (this application is not included in the record of this proceeding).

By letter dated May 28, 2002, DEC Staff notified the applicants that the application was incomplete (Exh. 2).

By letter received by DEC Staff on September 21 2005, the applicants responded to the 2002 notice of incomplete application and provided information and asked to meet with DEC Staff (Exh. 2).

By letter dated September 22, 2005, DEC Staff issued another notice of incomplete application and requested that the applicants file a new application, given the length of time since the original application had been submitted (Exh. 3).

With a cover letter dated October 18, 2005, the applicants filed a new application (DEC #1-4728-02177/00004) and associated materials with DEC Staff to construct a two-story house and associated structures on the site (Exh. 40).

By letter dated November 15, 2005, DEC Staff informed the applicants that the application was complete (Exh. 8).

By letter dated November 21, 2005, Mr. Pecoraro wrote to DEC Staff and provided additional information (Exh. 13).

A Notice of Complete Application was published in the *Suffolk County News* on December 1, 2005 and in DEC's electronic *Environmental Notice Bulletin* on November 30, 2005 (Exh. 10).

On February 3, 2006, DEC Staff member Robert Marsh conducted a site visit and verified the wetland boundary (Exh. 16). The applicants were informed of this by letter dated March 1, 2006 (Exh. 14).

A meeting between the applicants and DEC Staff occurred on May 15, 2006 and by letter dated June 6, 2006, the applicants proposed changes in the project in an attempt to address DEC Staff's concerns (Exh. 15).

By letter dated July 21, 2006, DEC Staff denied the application (Exh. 17).

By letter received by DEC Staff on August 16, 2006, the applicants requested a hearing on the denial (Exh. 18).

On December 15, 2006, the matter was referred to DEC's Office of Hearings and Mediation Services. On December 18, 2006, I was assigned as the administrative law judge (ALJ) for this matter.

A conference call was held with the applicants and DEC Staff on January 10, 2007. On this call it was agreed DEC Staff would propose hearing dates.

After a series of emails, another conference call was held on April 4, 2007, and on this call it was agreed that the hearing would occur on October 23 and 24, 2007, the earliest date DEC Staff was available. During this call, the applicants disclosed that they would be appearing *pro se* through Mr. Pecoraro and that he intended to call as a witness DEC Staff member Steven Lorence, who in the past had served as a manager of DEC's Bureau of

Habitat in DEC's Region 1.

By letter dated April 12, 2007, DEC Staff requested a demonstration from the applicants of the relevance of Mr. Lorence's testimony before inquiring as to the availability of Mr. Lorence to testify at the hearing.

By e-mail dated April 18, 2007, the applicants responded.

By e-mail dated June 4, 2007, DEC Staff responded that it believed Mr. Lorence's testimony would not be material to the hearing and should be excluded.

Two conference calls were held on September 20 and 24, 2007 during which the dispute regarding Mr. Lorence's testimony was discussed and not resolved. In addition, the parties could not agree on what the issue to be adjudicated should be. Because of these disputes, it was determined that only the legislative hearing and issues conference would be held on October 23, 2007. The adjudicatory hearing would be held at a later date, after a written issues ruling and appeals had been decided. This was memorialized in an October 1, 2007 email from the ALJ.

A Notice of Legislative Public Hearing and Issues Conference was published in DEC's electronic *Environmental Notice Bulletin* on September 26, 2007 and in *Newsday* on October 2, 2007.

By email dated October 15, 2007, DEC Staff changed its position on both Mr. Lorence's testimony and the issue for adjudication. In this email, DEC Staff requested that the adjudicatory hearing begin after the issues conference. However, Mr. Lorence was not available on October 23, 2007 and discovery was not complete, so the adjudicatory hearing could not be convened.

By letter dated October 16, 2007, the Town of Islip stated its opposition to the proposed project (Exh. 31). The Town listed two grounds for its opposition: (1) that the development would adversely impact a scenic view corridor along the Southern State Parkway; and (2) that the lot is substandard for building in terms of lot size and the presence of freshwater wetlands at the site.

On October 23, 2007, the legislative hearing occurred at 10:00 a.m. at the West Islip Fire Department, 177 Watts Place, West Islip, NY. No members of the public attended. The applicants provided a packet of information for the legislative hearing record, including four letters in support of the

application, the written comments by Joseph Guarino, aerial photographs of the proposed project's site, a copy of a February 1994 DEC permit to construct three homes on property adjacent to the site in Babylon, and copies of June 22, 1998 DEC permits for construction of three other homes in Islip.

Immediately following the legislative hearing, a site visit occurred. DEC Staff representatives and Mr. Pecoraro walked the site.

Following the site visit, the issues conference was convened. Since the issue for adjudication was agreed upon¹ and no petitions for party status were received, no written issues ruling was necessary.

The transcripts of the legislative hearing and issues conference were received on November 13, 2007.

By email dated November 21, 2007, the applicants requested permission to allow a local church to use the site for a community garden while the hearing process continued. DEC Staff responded later that day that the proposed garden was acceptable, if kept out of the buffer area described in earlier permits and no pesticides were used.

In several emails following the issues conference, the applicants requested information from DEC Staff. In order to more efficiently manage this matter, by email dated December 20, 2007, I directed the applicants to consolidate their information requests into a single, written discovery demand.

The applicants responded with a letter dated December 20, 2007 in which four discovery demands were made.

By papers dated January 17, 2008, DEC Staff filed a motion seeking a protective order pursuant to 6 NYCRR 624.7(d) for items described in applicants' discovery demands #1 and #3. The grounds cited by DEC Staff for such protective order included that these demands: were vague and overbroad; were not relevant to the issue for adjudication; failed to describe the requested documents with reasonable particularity; and represented a

¹ Does the instant application to construct a home on Suffolk County tax map #500-335-1-3.5 meet permit issuance standards, in light of the instant application materials and information regarding the previous applications for homes on lots #500-335-1-2, #500-335-1-3.1 and #500-335-1-3.2?

"fishing expedition."

By email dated January 23, 2008, the applicants responded that the documents requested are relevant because the instant application is tied to previous applications involving neighboring lots owned by the applicants. The applicants also maintained that they were not seeking privileged information.

By email dated February 12, 2008, the applicants confirmed that the January 23, 2008 email was the complete response to DEC Staff's motion.

By ruling dated April 22, 2008, I denied DEC Staff's motion for a protective order regarding the two discovery demands made by the applicants and directed DEC Staff to comply with the applicants' discovery demands within thirty days of the ruling, which it did.

The adjudicatory hearing was scheduled for October 21, 2008, however, DEC Staff counsel encountered difficulty arranging for Mr. Lorence's appearance at the adjudicatory hearing and could not produce him voluntarily. After a request by the applicants, I provided a subpoena to the applicants with a cover letter dated September 12, 2008. This subpoena was never served on Mr. Lorence by the applicants, but he did receive a copy of it from me.

After additional discussions about Mr. Lorence's testimony, by letter dated October 14, 2008, I ruled that Mr. Lorence's testimony would be taken by video conference. My rationale for this decision was that Mr. Lorence's testimony was expected to be brief and travel from Albany to Long Island would present a burden to him and his family. The video conference, though never used before in an DEC adjudication, would allow the parties to observe the witness's demeanor while being questioned. Mr. Lorence was directed to appear at DEC's Office of Hearings the morning of the hearing and ALJ Richard A. Sherman assisted with the hearing from Albany.

The adjudicatory hearing in this matter was held on October 21, 2008, at DEC's sub-office located at 205 Belle Mead Road, East Setauket, New York. Mr. Lorence appeared by video conference.

After the hearing concluded, by email dated October 28, 2008, the applicants submitted a revised survey (Exh. 45) of the proposed site, which included changes to the proposed project and corrections to the survey in the record.

The transcript of the adjudicatory hearing was received on November 28, 2008.

A conference call was held on December 24, 2008. During this call a schedule was established for the submission of closing briefs and replies. Also discussed was the status of the applicants' revised survey, submitted on October 28, 2008. It was tentatively agreed to include this item in the record as Exh. 45. Following the conference call, DEC Staff examined the revised survey and objected to its inclusion in the record. In an email dated January 5, 2009, I ruled that the revised survey would be accepted into evidence as Exh. 45 and allowed DEC Staff to respond to the survey in its closing brief.

By letter dated December 24, 2008, DEC Staff submitted errata sheets for the hearing transcript.

With a cover letter dated January 29, 2009, DEC Staff submitted its closing brief.

By email dated January 30, 2009, the applicants submitted their closing brief.

By email dated February 20, 2009, applicants submitted a reply brief.

By letter dated February 20, 2009, DEC Staff declined to submit a reply brief and rested on the prior submissions.

By letter dated February 23, 2009, I informed the parties that the administrative record in this matter was closed, pursuant to 6 NYCRR 624.8(a)(5).

APPEARANCES

At the October 21, 2008, adjudicatory hearing, the applicants were represented by Gregory H. Pecoraro, pro se. The applicants called two witnesses, DEC Staff member Steven Lorence and the applicants' expert, Joseph Guarino.

DEC Staff appeared through Gail Rowan, Esq. DEC Staff called two witnesses, DEC Staff members Heather Amster, a Real Property Supervisor, and Robert Marsh, Regional Manager of the Bureau of Habitat.

FINDINGS OF FACT

The Applicants

1. GHP Development Corp. is a New York State corporation created on July 6, 1995. Gregory H. Pecoraro is the president of GHP Development Corp. (Exh. 2).

The Site

2. The lot located in the Town of Islip known as Suffolk County Tax Map #500-335-1-3.5 is the subject of the instant application (site) and is currently owned by Gregory Pecoraro. The site contains a portion of DEC regulated freshwater wetland BW-2, which is also known as Deer Lake, and is within the adjacent area of BW-2 (Exh. 42).
3. The site is located on the southern side of Deer Lake and is partially bulkheaded and filled. The site has been heavily disturbed in the past and parts of the shoreline that are not bulkheaded are heavily eroded. There is a limited plant community on the site, including purple loosestrife (M. 21). The western portion of the site contains a recently replaced weir (M. 65) and spillway for Deer Lake (Exh. 45).

The Wetland

4. The site contains a portion of freshwater wetland BW-2, as shown on the Bay Shore West Quadrangle. BW-2 is a Class 1 freshwater wetland (Exh 41).
5. Deer Lake is a manmade lake that was created when the waters of Sumpwams Creek were dammed, sometime between 1938 and 1984 (Exh 23, p. 2). A recently replaced weir now contains the waters of Deer Lake. Deer Lake is located across the border of the Towns of Babylon (to the west) and Islip (to the east).
6. Deer Lake has approximately 5050 feet of shoreline and at present 57 homes encircle the lake. The site is the last undeveloped lot on the lake's shoreline (Exh. 23, p. 5).

Applicants' Past Development on Deer Lake (Babylon)

7. On February 15, 1994, DEC Staff issued a freshwater wetlands permit (DEC #10-85-1520) to Richard Dittmer authorizing the construction of three single family dwellings and associated

driveways on the south shore of Deer Lake (Exh. 26). The applicants subsequently acquired the property and permits from Mr. Dittmer and constructed these homes. These homes are located to the west of the site of the proposed project.

Applicants' Past Development on Deer Lake (Islip)

8. In July 1998,² GHP Development Corp. purchased two lots at a tax sale, Suffolk County tax map numbers 500-335-1-2 and 500-335-1-3. These lots were along the shoreline of Deer Lake in the Town of Islip and are located to the east of the Babylon properties. The total cost for these two lots was \$83,000 (Exh. 35).
9. The applicants applied for and received a freshwater wetlands permit on June 22, 1998, DEC permit #1-4728-02179/00001 (Exh. 29), to construct a single family dwelling, deck, dock, driveway and fence on lot #500-335-1-2 (4 Arbour Street, Islip). The house was built and on October 2, 2002, it was transferred to John and Marjorie Hohmann for \$440,000 (Exh. 35).
10. Lot #500-335-1-3 was subsequently subdivided into three lots, #500-335-1-3.1, #500-335-1-3.2 and #500-335-1-3.3 (IC t. 23).
11. The applicants applied for and received a freshwater wetlands permit on June 22, 1998, DEC permit #1-4728-02175/00001 (Exh. 27), to construct a single family dwelling, deck, dock, driveway and fence on lot #500-335-1-3.1 (399 Kime Avenue, Islip). The house was built and on October 31, 2001, it was transferred to Michael and Jennifer Kennedy for \$305,800 (Exh. 35).
12. The applicants applied for and received a freshwater wetlands permit on June 22, 1998, DEC permit #1-4728-02173/00001 (Exh. 28), to construct a single family dwelling, deck, dock, driveway and fence on lot #500-335-1-3.2 (401 Kime Avenue, Islip). The house was built and on May 30, 2002 it was transferred to Mansoor and Saima Malik for \$375,000 (Exh. 35).
13. Lot #500-335-1-3.3 was transferred from GHP Development

² Exh. 35 indicates that the applicants contracted for the purchase of this property on November 14, 1996.

Corporation to Gregory H. Pecoraro on November 6, 2000 (Exh. 36.6).

14. Lot #500-335-1-3.3 was then subdivided into two lots #500-335-1-3.4, and #500-335-1-3.5.
15. Lot #500-335-1-3.4 is approximately five feet wide and lies on the west side of the weir and spillway. The record is unclear as to the ownership of this parcel. The applicants claim it was transferred to an adjoining neighbor in Babylon, but DEC Staff indicates that the applicants continue to pay property taxes on it.

As stated above, lot #500-335-1-3.5 is the site of the instant application.

Past Permits Issued for activities on the Site

16. The applicants received a DEC freshwater wetlands permit (#1-4728-02177/00001), effective June 22, 1998, for activities on the site. This permit authorized the creation of a grassed area, the installation of a vinyl clad chain link fence and a vegetated buffer zone. DEC Staff authorized minor amendments to this permit, including the relocation of a buffer area on September 9, 1999 (Exh. 2).

Past Permit Applications to Construct a House on the Site

17. In April 2002 (Exh. 23, p.2), the applicants applied to put a dwelling on the site (DEC application #1-4728-2177/00003). By letter dated May 28, 2002, DEC Staff notified the applicants that the application was incomplete. The applicants provided the information requested by DEC Staff in a letter received by DEC Staff on September 21, 2005. By letter dated September 22, 2005, DEC Staff responded stating that because a timely response was not received with respect to the previous notice of incomplete application, the previous application had been deemed withdrawn. The applicants then submitted a new application, which was subsequently amended and became the subject of this hearing.

The Proposed Project

18. The applicants have applied for a freshwater wetlands permit, #1-4728-02177-00004 (Exh. 40) to construct a

dwelling, driveway and floating dock on the site. The application which is the subject of this hearing³ proposes that the single family dwelling and driveway would be located in the adjacent area of Class I regulated freshwater wetland BW-2, known as Deer Lake. The house would have a footprint of about 1,000 square feet and be two stories. The dwelling would be within sixteen feet of the wetland boundary. The floating dock would be located in the freshwater wetland. Clearing and ground disturbance is proposed within the adjacent area and two feet of the freshwater wetland.

DISCUSSION

There are eight contiguous parcels of land along the south and southeastern shore of Deer Lake (freshwater wetland BW-2) that are relevant to this discussion, four to the west, in Babylon and four to the east, in Islip. A weir and spillway sits in about the middle of the shoreline, in the Town of Islip. The three westernmost parcels in Babylon contain houses built by the applicants pursuant to 1994 DEC freshwater wetlands permit #10-85-1520. The remaining Babylon parcel is approximately five feet wide, on the western side of the weir. Three of the easternmost parcels in Islip contain houses built by the applicants pursuant to DEC freshwater wetland permits issued in 1998 (#1-4728-02173/00001, #1-4728-02175/00001, and #1-4728-02179/00001). The remaining parcel, the westernmost Islip parcel, contains the weir and spillway, and is the site of the instant application.

The parcel where the proposed project would be built is triangular and contains a portion of land that is covered by the waters of Deer Lake. The upland portion of the site is approximately 14,000 square feet. The lot contains approximately 220 linear feet of shoreline on Deer Lake and is partially bulkheaded. Approximately 100 feet of bulkhead are present. To the west of the bulkhead approximately 70 feet of natural shoreline is present and to the east, approximately 50 feet. The site has been heavily disturbed in the past and parts of the shoreline that are not bulkheaded are heavily eroded. There is a limited plant community on the site, including purple loosestrife (M. 21). The western portion of the site contains a recently

³ After the conclusion of the adjudicatory hearing, the applicants submitted a new survey which corrected and altered aspects of the proposed project. Please see discussion of Exhibit 45, below.

replaced weir and spillway for Deer Lake (Exh. 45).

The freshwater wetland boundary on the site was delineated on a field inspection conducted by DEC Staff member Marsh on February 3, 2006. During this visit, Mr. Marsh determined that the boundary of BW-2 at the site was the bulkhead and the fence west of the bulkhead (Exh. 42). Thus, BW-2 encompasses all the underwater land and a part of the upland portion of the parcel. The maximum distance from Kime Avenue to the edge of Deer Lake is approximately 75 feet, so the entire site is either in the wetland or within the adjacent area of BW-2.

In the application reviewed by DEC Staff, the applicants proposed to construct a single family house, driveway and floating dock. The hearing notice stated that the proposed project would place the house within 16 feet of the freshwater wetland and create ground disturbance with 10 feet of the wetland. At the hearing, DEC Staff member Marsh stated that the disturbance, clearing and grading activities, would actually occur 2 feet from the wetland boundary at its northwest corner.

Evidence in the record indicates that as a condition of receiving the permits for the three homes the applicants constructed in Islip, the site of this application was to remain a recreational area (Exh. 2, p.3), and DEC Staff member Lorence stated that the site should remain undeveloped in perpetuity (L. 16). The applicants state that they never agreed to this condition (Exh. 2, p.1).

Before discussing whether or not the applicants have met their burden of proof demonstrating that they are entitled to the freshwater wetlands permit they seek, two preliminary matters need to be addressed: (1) how much weight should be given to Exhibit 45, the applicants' revised survey; and (2) the alleged misconduct of DEC Staff in this matter.

Exhibit 45

As discussed above, the applicants submitted a revised survey⁴ of the proposed site by email after the adjudicatory

⁴ The signed survey which was the subject of the hearing is in the record as Exh. 43 and contains eight revisions to an original survey that was conducted on May 25, 1997 by William R. Simmons III, L.S.P.C.: (1) April 17, 1998; (2) January 21, 1999; (3) January 28, 2002; (4) March 27, 2002; (5) September 5, 2003; (6) October 12, 2005; (7) March 9, 2006; and (8) May 29, 2006.

hearing concluded. In his cover email, dated October 28, 2008, Mr. Pecoraro explained

"During my cross examination of Robert Marsh, he made me aware of something amiss in the survey. Somewhere along the way through the many revisions, the buffer along the bulkhead was incorrectly labeled as 10'. I had the surveyor return to the site and recheck his measurements. The buffer along the bulkheading is actually 15' as per the original approval. There is also an additional 2' in the grassed area between this buffer and the front property line. With these changes in mind, the rear setback to the wetland boundary is now 20' as opposed to 15'. The additional 2' in the grassed area was added to the house depth to make that 22' as opposed to 20'. Please also note that the survey was drawn on CAD to aid in clarity."

"Additionally, other noted concerns have been addressed.

--The proposed floating dock has been changed to proposed fixed dock.

--The proposed driveway and walk have been clearly labeled as gravel.

--The proposed setback from the house to the east and north boundary have been clearly labeled as 5'.

--The limit of clearing has also been clearly defined.

--The upland area has increased slightly."

"Also, please note that several items such as test bore data, guarantees, dates of survey revisions etc. have been purposefully left off the new survey as to not clutter it up with information that isn't necessarily relevant to the issues. Please keep previous survey with the new one for any missing information."

A conference call was held on December 24, 2008, during which the parties discussed the status of the applicants' revised survey. It was tentatively agreed to include this new item in the record as Exh. 45.⁵ Following the conference call, DEC Staff

Copies of Exh. 43 also occur in the record in Exh. 40 and Exh. 15. Earlier versions of the survey also exist in the record in Exh. 2 and Exh. 4.

⁵ At the adjudicatory hearing, plans of the modified weir were marked for identification as Exh. 45. After an off-the-record

examined the revised survey and objected to its inclusion in the record. In an email dated January 5, 2009, I ruled that the revised survey would be accepted into evidence as Exhibit 45 and allowed DEC Staff to respond in its closing brief.

In its closing brief, DEC Staff again objects to Exhibit 45 and argues that even if the information presented in Exhibit 45 is accurate, the proposed project fails to meet permit issuance standards. In addition, after reviewing Exhibit 45, DEC Staff states that the plan: (1) is not to scale; (2) fails to accurately represent the property boundaries; (3) fails to accurately represent the freshwater wetlands boundaries; and (4) fails to accurately represent disturbance limits.

In his reply brief, Mr. Pecoraro asserts that Exhibit 45 is indeed an accurate survey and that it corrects mistakes on the previous survey, clarifies other concerns, and corrects setbacks.

The proper time for the submission of exhibits is before or during the hearing, which allows for notice to the parties and examination of the exhibit at hearing. Due to the disputes about the veracity of the information included in Exhibit 45 and the fact that the adjudicatory hearing has concluded, I have no way of evaluating whether Mr. Pecoraro's claim or DEC Staff's claim is accurate. Accordingly, since the applicants had the burden of timely producing their evidence, and failed to do so in the case of Exhibit 45, I have no choice but to give it very little evidentiary weight. It should be noted that even if the information on Exhibit 45 were assumed to be accurate, the proposed project does not meet permit issuance standards and the permit should be denied because the edge of the area to be cleared and graded is very close, perhaps as close as two feet, to the wetland boundary at the northwest corner of the disturbed area.

DEC Staff's Alleged Misconduct

Mr. Pecoraro argues in his closing brief and reply that there has been a pattern of improper actions by DEC Staff to deny him the ability to develop the site of the proposed project. These actions have led to the delay in receiving a final decision from the Commissioner regarding this permit application. DEC

conversation, the parties agreed that the plans should not be placed in evidence. The plans were returned to Mr. Pecoraro and are not part of this record.

Staff does not address Mr. Pecoraro's claims in its closing brief.

Addressing Mr. Pecoraro's claim that DEC Staff have improperly delayed action on this application for a period of ten years, the evidence in the record shows that the first permit for activities (which did not involve constructing a residence) at the site was issued in June 1998 and modified in September 1999. At some point before May 2002, applicants filed another permit application which DEC Staff deemed incomplete by letter dated May 28, 2002 (neither this application nor letter are in the record of this hearing). The matter appears to have lain dormant until a phone call of August 1, 2005 when the applicants contacted DEC Staff to discuss this application. Following discussions in early August 2005, DEC Staff issued a second notice of incomplete application and requested a new application, based on the time that had passed since the original application. The new application was received by DEC Staff on October 24, 2005. Based on this information in the record, I conclude that for the period up to the receipt of the pending application, there is insufficient evidence to support the claim by the applicants that DEC Staff acted improperly and caused the delay.

Following receipt of the new application, a Notice of Complete Application was issued by DEC Staff on November 15, 2005 and published in the *Environmental Notice Bulletin* on November 30, 2005. After the end of the public comment period, DEC Staff inspected the site in February of 2006. A meeting between the applicants and DEC Staff occurred on May 15, 2006 and in June of that year, the applicants provided additional information to DEC Staff. By letter dated July 21, 2006, DEC Staff denied this permit application. Based on this information in the record, I conclude that there is insufficient evidence to support the claim by the applicants that DEC Staff acted improperly to cause the delay.

The applicants requested a hearing by letter received August 16, 2006. DEC Staff's hearing request form was received in the Office of Hearings and Mediation Services on December 15, 2006 and three days later, I was assigned to this matter. Conference calls with the parties were held on January 10, 2007 and on April 4, 2007, and the legislative hearing, issues conference and adjudicatory hearing were scheduled to occur on October 23 and 24, 2007. Because the parties could not agree to stipulate to the issue for adjudication and a written issues ruling would be necessary, the adjudicatory hearing was cancelled. Shortly before the legislative hearing and issues conference were to occur, by letter dated October 15, 2007, DEC Staff agreed to the

issues for adjudication proposed by the applicants. However, given the fact that witnesses were not available and discovery was not complete, the parties were not ready for adjudication. After the legislative hearing and issues conference, a discovery dispute arose between the parties which I ruled on April 22, 2008. The adjudicatory hearing occurred on October 21, 2008 and the hearing record closed on February 23, 2009. Given the course of the hearing process, I conclude there is insufficient evidence to support the claim by the applicants that DEC Staff acted improperly and created the delay.

Mr. Pecoraro also argues that many actions undertaken by DEC Staff were improper and designed to deny him his right to a timely and fair decision. He questions the tactics of DEC Staff counsel and points to: (1) counsel's attempt to limit his discovery (which required a ruling); (2) certain questions that counsel asked at the adjudicatory hearing; and (3) arguments counsel made at and after the hearing. He questions the testimony of DEC Staff's wetlands expert. He questions the actions of past and present DEC Staff permit administrators. In fact, there is little that DEC Staff does that Mr. Pecoraro does not criticize.

While it is true that it has taken years for the applicants to receive a final decision on this application, at least a portion of this time was the result of the applicants' delay and desire for negotiations. The fact that the negotiations did not result in permit issuance does not indicate that DEC Staff acted improperly. The remainder of the delay is normal in DEC's administrative hearing process, where the availability of witnesses and discovery disputes dictate the timing of hearings. Finally, none of DEC Staff's actions that Mr. Pecoraro points to, either alone or in combination, indicate improper actions by DEC Staff. The fact that the applicants do not agree with DEC Staff does not lead to the conclusion that DEC Staff acted improperly.

Does the Propose Project Meet Permit Issuance Standards?

In this case, the hearing was held at the applicants' request to review DEC Staff's denial of their permit application to build a single family house and related structures at the site. According to DEC's Permit Hearing Procedures (6 NYCRR 624), the applicants have the burden of proof to demonstrate that their proposed project will be in compliance with all applicable laws and regulations administered by DEC (6 NYCRR 624.9(b)(1)).

At the issues conference, the parties stipulated to the

issue for adjudication: does the instant application to construct a home on Suffolk County tax map #500-335-1-3.5 meet permit issuance standards, in light of the instant application materials and information regarding the previous applications for homes on lots #500-335-1-2, #500-335-1-3.1 and #500-335-1-3.2 (the lots located to the west of the proposed project in Islip)? However, at the hearing, the applicants also introduced evidence and arguments regarding the three lots they developed to the west of the site in Babylon.

There is no dispute that the proposed project would be located in the adjacent area of freshwater wetland BW-2 (Deer Lake), nor is there any dispute that BW-2 is a Class 1 freshwater wetland. According to DEC's regulations, "Class 1 wetlands provide the most critical of the State's wetland benefits, reduction of which is acceptable only in the most unusual circumstances. A permit shall be issued only if it is determined that the proposed activity satisfies a compelling economic or social need that clearly and substantially outweighs the loss of or detriment to the benefit(s) of the Class 1 wetland" (see 6 NYCRR 663.5(e)(2)).

The proposed project would involve clearing, grading and constructing a residence in the adjacent area of BW-2; these activities are categorized as P(N) pursuant to 6 NYCRR 663.4(d)(23), (25) and (42), respectively. This means that a permit is required and that these activities in the adjacent area are usually incompatible with a wetland and its functions or benefits, although in some cases the proposed action may be insignificant enough to be compatible (see 6 NYCRR 663.4(d)).

DEC's freshwater wetlands regulations provide a three part compatibility test to determine if this proposed project should receive a permit: (i) would it be compatible with preservation, protection and conservation of the wetland and its benefits? (ii) would it result in no more than insubstantial degradation to, or loss of, any part of the wetland?; and (iii) would it be compatible with the public health and welfare? (6 NYCRR 663.5(e)(1)).

If the applicants' proposed project cannot meet these three tests of compatibility, the weighing standards in 6 NYCRR 663.5(e)(2) must be used. This section states that with respect to Class 1 freshwater wetlands: (1) the proposed activity must be compatible with the public health and welfare, be the only practicable alternative that could accomplish the applicant's objectives and have no practicable alternative on a site that is not a freshwater wetland or adjacent area; and (2) the proposed

activity must minimize degradation to, or loss of, any part of the wetland or its adjacent area and must minimize any adverse impacts on the functions and benefits that the wetland provides.

In its Notice of Permit Denial dated July 21, 2006 (Exh. 17), DEC Staff stated that the application failed to satisfy the standards for permit issuance found in 6 NYCRR 663.5 and denied the application. Specifically, DEC Staff stated that the proposed project was not compatible with the preservation, protection and conservation of the wetland and its benefits. DEC Staff stated that the proposed project would significantly reduce or eliminate many of the functions and benefits provided by BW-2, including wildlife habitat, open space, and pollution control, as well as the wetland's ability to provide the opportunity for recreation, education and aesthetic appreciation. In addition, DEC Staff stated that the proposed project would result in cumulative impacts to the wetland by setting an undesirable precedent for proposals located extremely close to wetland boundaries. DEC Staff also stated that the proposed project would considerably impact the adjacent area by permanently occupying a portion of it. The adjacent area significantly contributes to maintaining the function and benefits provided by the wetland and the proposed project would greatly impact the wildlife habitat and wetland buffering values the wetland provides. Accordingly, DEC Staff concluded that the application failed to meet both the compatibility tests (6 NYCRR 663.5(e)(1)) and the weighing standards (6 NYCRR 663.5(e)(2)). DEC Staff's Notice also stated that the applicants failed to demonstrate that the proposed project would satisfy a compelling economic or social need that clearly outweighs the impacts to BW-2 and its adjacent area.

To support its case, at the hearing DEC Staff called DEC Staff member Marsh who testified that the proposed project would not be compatible with the preservation, protection and conservation of the wetland. Specifically, Mr. Marsh estimated that the area of clearing and grading required would be approximately 83 feet by 41 feet and occur approximately 2 feet from the upland wetland boundary and within 10 feet of Deer Lake. The removal of vegetation and grading would reduce wildlife habitat, allow more pollutants into the wetland, and increase erosion. Mr. Marsh continued that while the entire proposed project is in the adjacent area it would result in degradation to the wetland, especially considering the cumulative impacts of this project and similarly situated ones. Finally, Mr. Marsh stated that the impact on the public health and welfare would be minimal, but cumulative impacts needed to be considered, and these could have an enormous impact. Mr. Marsh concluded that

the proposed project did not meet the compatibility tests set forth in 6 NYCRR 663.5(e).

The only evidence submitted by the applicants regarding whether the proposed project meets permit issuance standards was the testimony of Mr. Guarino and his report (Exhs. 23-30). In his testimony, Mr. Guarino summarized his report and stated that: (1) the impacts of placing a home on this site are less than those from the other six homes developed in the area by the applicants; (2) if DEC Staff was concerned about cumulative impacts of development, it should have denied the applications for the other six houses and left the south shore of Deer Lake undeveloped; (3) the proposed project would be behind the existing bulkhead, and that areas of the lot with greater wetlands values are avoided; (4) the proposed home would have no greater impact than the six already constructed; (5) this is the only practicable alternative that would accomplish the applicants' objectives; and (6) the impacts from this proposed project would be less than those caused by the Babylon homes, because of the bulkhead.

The text of Mr. Guarino's report (Exh. 23) provides additional details of his argument, that the site of this application is better, environmentally, than the other six lots for which DEC Staff issued freshwater wetlands permits in 1994 and 1998. He argues that the rationale used by DEC Staff to deny this permit application could have equally be used to deny the other six permits, and yet, the earlier permit applications were deemed to have met permit issuance standards by DEC Staff.

Mr. Guarino states that the upland portion of the site is approximately 14,000 square feet, which is more than any of the Babylon properties (which ranged from about 7,500 to 10,000 square feet). In addition, the site is partially bulkheaded whereas the Babylon properties all have natural shoreline. Further, the rear setback for the Babylon homes, set at 20-25 feet in the DEC permits, is not accurate because the homes were built during a time of drought and the homes are actually closer to Deer Lake. Similarly, the three homes built in Islip all have natural shoreline. In contrast the site is partially bulkheaded with approximately 100 feet of bulkhead and 70 feet of natural shoreline to the west and 50 feet to the east. Mr. Guarino argues that the proposed house could be situated behind the hardened bulkhead and buffer areas provided (similar to the buffers described in the permits for the other six houses) for the natural shoreline. Given the bulkhead at the site, Mr. Guarino argues that granting this permit would have less potential impact on the wetland than those previously issued.

Mr. Guarino notes that the site is the last remaining undeveloped lot on Deer Lake and along the approximate 5050 linear feet of shoreline, 57 homes have been constructed.

While Mr. Guarino addresses the proximity of the house built in the past to Deer Lake, he does not address the fact that this parcel also contains portions of BW-2 that are not submerged and that the proposed activity would cause disturbance 2 feet from the wetland boundary at the northwest corner of the disturbance. The record indicates that this proposed house would be closer to Deer Lake (16 feet) than those in built in Islip (estimated at 30 to 40 feet (L. 22)) or those in Babylon (more than 20 feet (Exh. 26)). There is nothing in the record that indicates that the earlier DEC permits authorized activities as close as 2 feet from the edge of BW-2. Mr. Guarino's argument is rejected because the important factor is the proximity of activity to the wetland, not to Deer Lake.

The applicants argue that their objective is to place a home on the site and the only way to accomplish this objective is issuance of the permit. However, this is a strained interpretation of the regulations. The applicants' objective when it purchased the Islip lots was to develop the property with single family homes, which it did by constructing three homes on these properties.⁶ The decision to create four lots on the Islip properties was the applicants and DEC Staff had no control as to the number of lots created. Thus, the applicants accomplished their objective, that three houses were built. The fact that a fourth lot remains was the applicants' decision and the condition that they seek relief from is essentially self-created.

DEC Staff witness Marsh also noted that the application does not address issues related to stormwater at the site (M. 38). In its revised survey (Exh. 45), the applicants clarified that the

⁶ In its opening statement and its closing brief, DEC Staff calculates that the applicants realized a 1249% return on their investment in the Islip properties. DEC Staff calculates this return by adding the sales prices of the three homes and dividing it by the initial cost of the land. The applicants respond, correctly, that this fails to incorporate the cost of constructing the three homes. For this reason, DEC Staff's calculation is rejected. However, from these facts it is reasonable to infer that the applicants enjoyed some return on their investment, and thus, have made reasonable use of their Islip property. Certainly, they have not shown a compelling economic need, based on this information.

driveway and walk would be pervious, but the revised plan still does not show any stormwater retainment, such as dry wells, recharge basins or retention swells. In its briefs, applicants assert that stormwater would be contained on site but this is not demonstrated in the application materials or the evidentiary record.

Mr. Marsh also testified that instead of the proposed floating dock, it would be better to have a similarly-sized fixed dock. The revised survey (Exh. 45) and the applicants' closing papers indicate that this change is acceptable; accordingly, no further discussion is necessary.

In conclusion, the applicants have failed to demonstrate a compelling economic need. The applicants have also failed to demonstrate that the proposed project is compatible with preservation, protection and conservation of the wetland and its benefits, or that it would result in no more than insubstantial degradation to, or loss of, any part of the wetland. In addition they have failed to prove that it would be compatible with the public health and welfare. Accordingly, the proposed project fails the compatibility tests in 6 NYCRR 663.5(e)(1). Further, for the reasons set forth above, the applicants have failed to demonstrate that the proposed project meets the weighing standards in 6 NYCRR 663.5(e)(2). DEC Staff correctly rejected this application and the Commissioner should uphold DEC Staff's decision.

The Applicants' Other Arguments

The applicants make several other arguments in favor of permit issuance. None of these arguments warrants issuance of the permit.

First, the applicants argue they never agreed to keep the site as open space in perpetuity. Mr. Lorence testified that when he worked as a DEC Staff member in Region 1, he had many conversations with Mr. Pecoraro, beginning in the late 1990s. Mr. Lorence stated his recollection of DEC Staff's decision in approving the construction of three houses on the applicants' land in Islip was conditioned upon the fourth lot, the site of the instant application, remaining green space in perpetuity. DEC Staff's letter of May 28, 2002 (Exh. 2) also references the fact that the parcel was to remain undeveloped. Apparently, there was no mention of any agreement or limit on development recorded in the deed (Mr. Lorence could not recall if DEC Staff required that either a restrictive or a notice covenant be filed

with the deed for the site and there is nothing in the record on this point). Whether there was an agreement not to develop this parcel in the past is really not dispositive. As explained above, the proposed project does not meet permit issuance standards.

Second, applicants argue that DEC Staff had discussed and approved placing a house on this lot in 1998. When questioned about this at the hearing, Mr. Lorence stated that he did not have a specific recollection of recommending a house be placed on the site and only two other homes being built elsewhere on the applicants' Islip properties (for a total of three houses), but he stated DEC Staff would often discuss alternative plans with applicants that allowed for maximizing protection of natural resources while granting applicants a reasonable opportunity for development. Throughout the hearing process, Mr. Pecoraro has repeatedly argued that during the negotiations prior to the issuance of the 1998 permits, that DEC Staff, specifically Mr. Lorence, had stated that putting a home on the site was acceptable. Since it was acceptable in 1998, Mr. Pecoraro argues, it should be acceptable now. Whether or not discussions were held regarding different configurations of houses on the Islip properties or not in 1998 is not relevant to the question in this case. As stated above, the applicants have failed to demonstrate that they meet permit issuance standards for the site.

Third, the applicants argue that the site in its present state is a nuisance. In his closing brief, Mr. Pecoraro argues that the site is now used for illegal dumping and parties and it creates a nuisance to the neighbors, who support the development of the site. Some of the neighbors raise this point in their comment letters on the proposed project (Exh. 12, 19, 20 & 22). While this may be a problem, the proposed project does not meet permit issuance standards and another solution needs to be found.

Fourth, the applicants argue that the site is worthless unless a house can be put on it. DEC Staff member Marsh testified that there are alternative uses that the property could be used for, such as a volleyball court or other recreational area, and in addition a fixed dock and shed could be placed on the site for boating on Deer Lake. The record indicates that the applicants created this lot, after consulting DEC Staff, with the knowledge that the site could not be used for constructing a home on it. The applicants' problem of a lack of value for the property is a self-created condition.

CONCLUSIONS

The applicants have failed to meet their burden of proof that the freshwater wetland permit applied for in this case should be granted. Specifically,

1. applicants failed to demonstrate that they meet the compatibility tests for permit issuance found in 6 NYCRR 663.5(e) (1); and
2. applicants failed to demonstrate that they meet the weighing standards for permit issuance found in 6 NYCRR 663.5(e) (2).

RECOMMENDATION

Based on the information in the record, I recommend that the Commissioner uphold DEC Staff's decision to deny the applicants' permit application. The applicants have failed to demonstrate their proposed project would meet the applicable permit standards.