

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

In the Matter

- of -

the Application for Permits  
Pursuant to Articles 24 and 34 of the Environmental  
Conservation Law and Parts 505 and 663 of  
Title 6 of the Official Compilation of  
Codes, Rules and Regulations of  
the State of New York

- by -

**ROCHESTER REDEVELOPMENT, LLC,**

Applicant.

DEC Permit Application ID No. 8-2634-00365/00001

INTERIM DECISION OF THE COMMISSIONER

November 2, 2016

## INTERIM DECISION OF THE COMMISSIONER

Rochester Redevelopment, LLC (applicant) filed an application for a freshwater wetlands permit and a coastal erosion management permit with the New York State Department of Environmental Conservation (Department) for the construction of a single family residence and associated improvements, including improvements to an access road, installation of utilities, and creation of a stonedust walking path with a retaining wall, on property that applicant owns on the shore of Irondequoit Bay at 1570 Bay Shore Boulevard, Town of Irondequoit, Monroe County (property). The property that applicant owns is slightly less than one half-acre in size.

Development of the property would entail clearing, filling and grading. The proposed residence and a majority of the associated improvements would be located within the adjacent area of a State-regulated freshwater wetland known as "RE-1," a Class I wetland.

Department staff denied the application for both permits, and applicant requested a hearing. Following a referral to the Department's Office of Hearings and Mediation Services (OHMS), the matter was assigned to Administrative Law Judge (ALJ) Richard A. Sherman, and an adjudicatory hearing was held.

The ALJ, in his hearing report (a copy of which is attached), concluded that applicant does not require a coastal erosion management permit. With respect to the freshwater wetlands permit application, the ALJ recommended that it be denied. Based upon my review of the record, I am hereby remanding this matter to OHMS for further development of the record with respect to both applications. Issues to be addressed upon remand are set forth below.

### Applicant's Burden

At the outset, it is important to underscore that applicant has the burden of establishing that its application meets the statutory and regulatory requirements administered by the Department (see 6 NYCRR 624.9[b][1] [applicant has burden of proof to demonstrate that its proposal will comply with all applicable laws and regulations administered by the Department] and 6 NYCRR 663.5[a][burden of showing that a proposed activity complies with the policies and provisions of the Freshwater Wetlands Act and its regulations rests "entirely on the applicant"]).

As the ALJ states, the activities associated with applicant's project have been identified by Department staff as "P(N)," that is, they are "usually incompatible with a wetland and its functions or benefits" (see 6 NYCRR 663.4[d], item 42). Pursuant to the Department's regulations, activities identified as "P(N)" are evaluated to determine whether they meet three tests of compatibility (see 6 NYCRR 663.5[e][1]), that is, whether the activity would:

- be compatible with preservation, protection and conservation of the wetland and its benefits;
- result in no more than insubstantial degradation to, or loss of, any part of the wetland; and
- be compatible with public health and welfare.

Applications for projects that fail to meet any one or more of the three compatibility tests, are not automatically denied; they are then subject to the consideration of regulatory "weighing standards" (6 NYCRR 663.5[e][2]). Where a Class I wetland is concerned, a permit is to be issued "only if it is determined that the proposed activity satisfies a compelling economic or social need that clearly and substantially outweighs the loss of or detriment to the benefit(s) of the Class I wetland" (6 NYCRR 663.5[e][2]).

#### Matters to Be Addressed on Remand

The ALJ concludes that applicant does not require a coastal erosion management permit. The extent to which Department staff and applicant seek to raise further arguments in support, or in opposition to the ALJ's conclusion, such arguments should be offered on remand.

Applicant should reconfirm whether the only structure within the wetland will be a dock (see Hearing Transcript, at 84 [construction of a dock in the wetland]), and that the remaining structures will be in the adjacent area.

Applicant should consider presenting alternative configurations to the proposed residence and associated improvements to reduce the impacts of the proposed project on the property's wildlife habitat and to minimize construction on the steeper slopes of the property. Applicant may, however, seek a final decision on its existing proposal without any modification but if it pursues that course, it needs, on the remand, to address the ALJ's analysis that the proposal does not comply with the legal standards that apply to Class I wetlands.

The ALJ states that, from an engineering perspective, the property presents significant difficulties related to erosion and stormwater control, in part due to the site's steep slopes (see Hearing Report at 12; see also Hearing Transcript, at 270-272). Although it may be possible to engineer sufficient safeguards against post-construction erosion and slope failure at the property, the ALJ concludes that the application before the Department does not include the necessary engineering plans (see Hearing Report at 12; see also Hearing Transcript at 276-278 [erodible nature and instability of soils]). Applicant should consider further developing its engineering plans to address the deficiencies that the ALJ identified or demonstrate how its current engineering plans are satisfactory.

Applicant should also review with Department staff the viability of a wetland mitigation plan, which may include on- and off-site mitigation in the Irondequoit Bay area, as part of consideration of its freshwater wetlands permit application.<sup>1</sup>

#### ALJ's Hearing Report

The ALJ, in his hearing report, addresses the compatibility tests and the weighing standards and concluded that applicant did not meet the compatibility tests<sup>2</sup> and the weighing standards (see Hearing Report at 9-16). The ALJ noted that the proposed project includes the clearing of natural vegetation and grading on steep slopes which will reduce the function and benefits of the wetland. The project was seen to adversely impact wetland wildlife, including mammals, birds and fish and their respective habitats (see, e.g., Hearing Transcript at 263-266, 279, 283). Applicant and Department staff need to address whether any modifications to the project and any offered mitigation would lessen these habitat impacts and otherwise affect the applicable regulatory compatibility tests and weighing standards.

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<sup>1</sup>Applicant proposes to install a forced main sewer line (see Hearing Transcript at 81) to which neighbors would be allowed to connect (see id. at 105). Although this could have a potential environmental benefit, applicant has provided no indication that any neighbors would so connect to the line (see id.). More importantly, applicant has not demonstrated that these connections would have a positive impact on the wetland or its adjacent area. On remand, applicant should indicate what, if any, impact these connections would have on the wetland and its adjacent area.

<sup>2</sup> Department staff did not address the third compatibility test (compatibility with public health and welfare) (see Hearing Report at 13).

This matter is hereby remanded to the Department's Office of Hearings and Mediation Services for further consideration in accordance with this Interim Decision.

For the New York State Department  
of Environmental Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Basil Seggos  
Commissioner

Dated: Albany, New York  
November 2, 2016

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**ROCHESTER REDEVELOPMENT, LLC,**

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Permit Application No. 8-2634-00365/00001

**HEARING REPORT**

- by -

\_\_\_\_\_/s/\_\_\_\_\_  
Richard A. Sherman  
Administrative Law Judge

May 27, 2016

## HEARING REPORT

### SUMMARY

Applicant, Rochester Redevelopment, LLC, applied to the Department of Environmental Conservation (DEC or Department) for a freshwater wetlands permit pursuant to article 24 of the Environmental Conservation Law (ECL) and part 663 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR). Applicant is the owner of a property (property) located on the shore of Irondequoit Bay at 1570 Bay Shore Boulevard, Town of Irondequoit, Monroe County (tax map number 77.20-1-39). The property is reached by a deeded right-of-way for an existing access road. Applicant proposes to construct a single-family residence, improve the access road, install utilities, and create a stonedust walking path with a retaining wall. The project site (site) includes the property and the access road. The entire residential structure and much of the associated work would be located within the adjacent area of State-regulated freshwater wetland RE-1.

During the course of the Department's review of the application, Department staff directed applicant to submit materials necessary to evaluate whether applicant's proposed improvements to the access road would require a coastal erosion management permit pursuant to ECL article 34 and 6 NYCRR part 505. Those materials, and Department staff's determinations regarding the requirement for a coastal erosion management permit, are also considered in this report.

As discussed below, I conclude that applicant's proposed improvements to the access road do not require a coastal erosion management permit. However, because applicant's proposed project does not meet the standards for issuance of a freshwater wetlands permit set forth under 6 NYCRR 663.5, I recommend that the freshwater wetlands permit be denied.

### PROCEEDINGS

Department staff issued a letter of denial, dated September 4, 2015, advising applicant that staff had determined that the proposed project did not meet the standards for issuance of either a freshwater wetlands permit or a coastal erosion management permit. By letter dated September 25, 2015, applicant requested a hearing on the denial of its application. The matter was assigned to me on October 7, 2015.

After consultation with the parties, I scheduled a hearing on the application to commence on December 7, 2015. A notice of public hearing was published by the Department on November 11, 2015 in the Environmental Notice Bulletin and by applicant on November 13, 2015 in The Daily Record newspaper. In accordance with the hearing notice, a legislative hearing, issues conference and adjudicatory hearing were scheduled for and held on December 7, 2015. The adjudicatory hearing continued and was completed on December 8, 2015.

### Legislative Hearing

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

### Issues Conference

The hearing notice also advised that, on or before November 30, 2015, interested persons and organizations could file for party status and propose issues for adjudication. No filings for party status were received. Accordingly, only staff and applicant participated in the issues conference (see 6 NYCRR 624.4[b][3]).

By agreement of the parties, the issues identified for adjudication are the reasons cited by Department staff for denying the permit, as set forth in the September 4, 2015 letter of denial. The letter of denial states that the property is located in the adjacent area of a Class I,<sup>1</sup> State-regulated freshwater wetland and that Department staff determined that the proposed project failed to satisfy the standards for issuance of a freshwater wetlands permit (see 6 NYCRR 663.5[e]). Specifically, staff determined that the proposed project is incompatible with the wetland and its benefits and that the proposed construction on, and permanent disturbance of, the property would cause substantial degradation to the wetland and wetland adjacent area (see 6 NYCRR 663.5[e][1][i], [ii]). Staff further determined that the proposed project did not meet the weighing standards applicable to a Class I wetland because there is no compelling economic or social need for the project, it is not applicant's only practicable alternative, and it does not minimize degradation to, or loss of, the wetland or adjacent area (see 6 NYCRR 663.5[e][2]). Staff also determined that the proposed project failed to satisfy the standards for issuance of a coastal erosion management permit or a variance (see 6 NYCRR 505.6, 505.13) since the proposed improvements to the access road are not necessary unless the property is developed.

### Adjudicatory Hearing

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

The adjudicatory hearing was held on December 7 and 8, 2015. Amy Kendall, Esq., Knauf Shaw LLP, appeared on behalf of applicant and called the following witnesses: Thomas Gangemi, sole member, Rochester Redevelopment, LLC; Gregory W. McMahon, P.E., Principal, McMahon LaRue Associates, P.C.; and Frances Reese, MS. James Mahoney, Esq., appeared on behalf of Department staff and called one witness: W. Scott Jones, Regional Habitat Conservation Manager, DEC Region 8. A list of the exhibits proffered at the hearing is appended to this hearing report.

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

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

On January 28, 2016, this office received applicant's closing brief (applicant brief) and Department staff's closing brief (staff brief). At the close of the hearing, I advised the parties that no responses to closing briefs would be authorized unless a motion to respond was made and the motion was granted. Neither party filed a motion to respond. Accordingly, by letter dated February 10, 2016, I advised the parties that the hearing record was officially closed (see 6 NYCRR 624.8[a][5]).

### FINDINGS OF FACT

1. Applicant is a limited liability company and Thomas Gangemi is its sole member (transcript [tr] at 17; exhibit 1 [attached NYS Department of State, Division of Corporations, entity information for applicant]).
2. Applicant purchased the property by quitclaim deed in October 2011 (exhibit 4 at 2; tr at 35).
3. The deed into applicant states that applicant acquired the property for one dollar (exhibit 4, at 2). Thomas Gangemi testified that, at the time applicant acquired the property, the seller owed approximately \$28,000 in back taxes on the property and that the seller deeded the property to applicant "for the back taxes" (tr at 34-35).
4. The property is currently vacant and undeveloped except for a former "ice house" and the remnants of a foundation from a cottage that once stood at the property (see tr at 31 [Gangemi testimony that there are structures on the property, consisting of "[a]n ice house and a foundation from a former cottage"], 98 [Gangemi testimony indicating that only a few feet of the cottage foundation remains visible]; exhibits 1 [application and attached site photographs], 2 [site plan depicting "existing ice house"], 19 [photographs 1, 10-17], 27, 28).
5. The remnants from the foundation of the former cottage are unusable for construction of the proposed residence (tr at 164 [McMahon testimony that the foundation "is very old [and] [s]tructurally, it just would not be suitable for new construction"]).
6. On November 2, 2012, Thomas Gangemi filed a joint application, on behalf of applicant, for a DEC freshwater wetlands permit to construct a single-family residence and associated structures at the site (see exhibit 1).
7. The proposed residence would have a footprint of approximately 900 square feet and development of the property would entail clearing, filling and grading (see exhibit 2 [site plan]; tr at 77-79 [Gangemi testimony describing the site plan], 162-164 [McMahon testimony that the footprint is "approximately 900 square feet" and describing site work related to construction of the proposed residence]).

8. The property is roughly rectangular in shape, is less than one half-acre in size, and slopes steeply down to the bay (see exhibit 2 [site plan]; tr at 136 [McMahon testimony that "[b]ased on our calculations, [the property is] just under a half-acre"], 164 [McMahon testimony that "[t]he approximate slope [in the area where the residence is proposed] is about 30 percent"]; 224 [Reese testimony that "in this case, the adjacent area . . . we have a very steep slope"]).

9. Nearly the entire property is located within State-regulated freshwater wetland RE-1, a Class I wetland, or its adjacent area (see exhibit 2 [site plan]; tr at 85).

10. A small triangular portion of the upland area at the southwest corner of the property is located outside the wetland and its adjacent area, but it is not suitable for construction (see exhibit 2 [site plan]; tr at 85-86 [Gangemi testimony that the construction of a residence within the boundaries of the "southern triangle" would not likely "meet the minimum square footage [of] 600 square feet on the first floor that the town requires" even with a variance from the town setback requirements], 142-143 [McMahon testimony that the area of the "triangular piece" is only "560 square feet" and that construction in that area "would cause major disturbance" because of the steep slope and lack of vehicle access]).

11. Access to the property is by a dirt and gravel road (access road) that generally runs perpendicular to the slope of the hill to the north and west of the property (exhibit 2 [access to the property is labeled "DIRT LANE"]; tr at 21-22 [Gangemi testimony describing access to the property]; see also exhibit 19 [photographs 7-13]).

12. The access road is used and maintained by the Bay Bluff Lane Homeowners Association to gain access to a shared dock that is located on land adjacent to, and south of, the property (tr at 22, 27, 86; exhibits 3 [1977 subdivision plot identifying the location where the dock is located as "LAND IN COMMON TO ALL FOUR LOTS"], 24).

13. Applicant's proposed project includes improvements to the access road and installation of a water line and a forced main sewer line along the course of the access road (exhibit 2; McMahon testimony at 155).

14. A short section of the access road runs along the boundary of a designated Coastal Erosion Hazard Area (CEHA) (exhibit 2 [the CEHA is indicated by a thick black line identified on the exhibit as the "NPFA<sup>2</sup> line"]; tr at 120 [McMahon testimony at 120-123]).

15. In or about August 2014, applicant gave permission to an upland neighbor to prune trees on applicant's property to remove "some branches that were in [the neighbor's] view" to the bay (tr at 68). The neighbor caused the trees on the property to be "topped" to a height of approximately ten feet (tr [Gangemi testimony that the neighbor "cut most of the trees to like a height of 10 feet tall"], 318 [Jones testimony that it was "unfortunate that those trees were topped in the manner in which they were, but they will in time grow back"]; exhibit 13 [applicant's report of the incident to the Department]).

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<sup>2</sup> As discussed below (infra at 6), "NPFA" stands for Natural Protective Feature Area.

## POSITIONS OF THE PARTIES

### Coastal Erosion Hazard Area

Department staff argues that applicant is proposing road improvements and vehicular traffic within the CEHA and that these activities are prohibited under the regulations (staff brief at 9). Staff also argues that, because a freshwater wetlands permit should not be issued for the proposed project, vehicular access to the property is unnecessary (id.).

Applicant argues that the encroachment, if any, of the access road into the CEHA is minimal (tr at 12; applicant brief at 22-23). Applicant further argues that, assuming that the access road encroaches on the CEHA, maintenance of the access road is an exempt activity for which no permit is necessary (id.).

### Freshwater Wetland

Department staff determined that certain of the activities proposed by applicant are designated under 6 NYCRR 663.4(d) as P(N), or "usually incompatible with a wetland and its functions or benefits." Specifically, staff determined that constructing a residence or related structures or facilities (see 6 NYCRR 663.4[d][42]) within the regulated adjacent area are P(N) activities (exhibit 15 at 2; tr at 252). Staff notes that activities designated as P(N) are subject to the three-part test for compatibility set forth at 6 NYCRR 663.5(e)(1), and maintains that applicant's proposed project fails to meet that test (exhibit 15 at 2; tr at 254). Staff argues that the property is among the last undeveloped parcels on Irondequoit Bay and that the proposed construction in, and permanent disturbance of, the wetland and adjacent area represents an unacceptable degradation to the wetland benefits (exhibit 15 at 2; tr at 334; staff brief at 5). Staff also argues that issuance of a permit in this matter would set an unacceptable precedent that would increase pressure to continue development on the bay (staff brief at 5; tr at 284).

Department staff notes that, where a proposed project fails to satisfy the compatibility standards, it must meet the weighing standards set forth at 6 NYCRR 663.5(e)(2), and staff maintains that applicant's proposed project fails to meet those standards. Specifically, staff argues that applicant has not demonstrated that (i) there is a compelling economic or social need for the proposed project, (ii) the proposed project is the only practicable alternative that could accomplish applicant's objectives, and (iii) the proposed project minimizes degradation or loss of the wetland or adjacent area (exhibit 15 at 3; staff brief at 7-9).

Applicant does not dispute that certain of the proposed activities at the property are designated as P(N) under 6 NYCRR 663.4(d) (applicant brief at 11 [noting that "item # 42 ["Constructing a residence or related structures or facilities"] is listed there as . . . P(N) for adjacent areas"]). Applicant argues, however, that the proposed project is "permissible because [it] meets the three tests for compatibility" (applicant brief at 12).

Applicant argues that the proposed project is compatible with preservation, protection and conservation of the wetland and its benefits, in part, because the wetland on the property "is only a very small portion (about .02%) of the 522-acre RE-1 freshwater wetland that surrounds Irondequoit Bay" (applicant brief at 12). Applicant also argues that the proposed project would

not impact wetland benefits at the property, such as shoreline protection and fishery value (id.). Applicant also argues that the proposed project will result in no loss to the wetland "or any substantial degradation to any part of the wetland" (id. at 13) and that "[t]he benefits provided by the Adjacent Area as identified by the Department . . . have already been substantially impacted by the illegal clear-cutting [by a neighbor] on the Applicant's Property" (id.). Lastly, applicant argues that the proposed project is compatible with public health and welfare because it will not impact the wetland and will avoid use of an on-site septic system by connecting the proposed residence to the public sewer system (id. at 14).

## DISCUSSION

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

### Coastal Erosion Hazard Area

Pursuant to 6 NYCRR 505.5(a), any person proposing to undertake a regulated activity within a designated "erosion hazard area" must obtain a coastal erosion management permit. Erosion hazard areas include any coastal area that has been designated as "a natural protective feature area" (NPFA) (see 6 NYCRR 505.2[o]). In accordance with 6 NYCRR 505.2(z), all NPFAs must be "delineated as such on coastal erosion hazard area maps." In this matter, although the property itself is well outside the NPFA, applicant's proposed project includes improvements to the access road, and a short section of the access road runs along the boundary of the NPFA (findings of fact ¶¶ 11, 14).

On December 22, 2014, applicant submitted a response (December response) to a notice of incomplete application from the Department (see exhibit 20). As part of its December response, applicant updated the survey map for the proposed project to depict the location of the NPFA line (id.; see exhibit 2 [the NPFA line is depicted as a wide black line on the northwest quadrant of the map]). Applicant's expert testified that the survey map was updated using an aerial photograph, provided by Department staff, that depicted the location of the NPFA line in the vicinity of the proposed project (tr at 120-121). The expert testified that he used the DEC aerial photograph to plot the NPFA line on survey maps that he had previously prepared for the site (tr at 121-122).

In its December response, applicant states that the portion of the access road that encroaches into the NPFA is limited to "a length of 13 feet with a maximum incursion of 0.20 feet [i.e., 2.4]" (exhibit 20 at 1). The response also states that the "access road has existed for many years" and that it is shown on historical maps "dating to 1924" (id.). Further, the response states that the proposed utilities for the project would be installed outside the NPFA and that work within the 2.4" incursion into the NPFA would be limited to placing "a new gravel/stone layer on the existing [access] road base" (id. at 2).

At the hearing, applicant's expert testified that "historic mapping had shown [that the access road] had been in existence for quite a while" (tr at 145). Applicant's expert further

testified that the access road is depicted on a Monroe County plat book from 1924 (tr at 146-148; exhibit 21 [map from the 1924 Monroe County plat book]; see also exhibit 3 [subdivision final site plan, dated May 1977, depicting the access road]). Mr. Gangemi testified that his title research for the property indicated that there was a cottage and ice house on the property as of 1879 (tr at 39-40; see also exhibits 6 [abstract of title], 7 [historical maps of the property]). Mr. Gangemi also testified that the access road remains in use today and that the section of the road where it encroaches into the NPFA is used for vehicular access (tr at 21 [Gangemi testimony that he parks his car at a "turnaround" to the east of where the access road passes the NPFA]). With respect to the proposed project, applicant's expert testified that "no clearing or roadway improvements within the NPFA line" are proposed (tr at 145) and that, "assuming there would be some work on [the access road,]" it would entail "additional stone placed to stabilize it, just define it a little more" (tr at 155; see also exhibits 2, 20).

Department staff did not proffer a witness on the issue of the proposed project's impacts on the Coastal Erosion Hazard Area (see tr at 287 [Jones testimony that his role is "to review freshwater wetland permit applications" and he "had no involvement in" the Coastal Erosion Hazard Area component of the application]). Nor did staff contest applicant's direct case with regard to the history and use of the access road, or the extent to which applicant's proposed activities would encroach upon the NPFA (see tr at 165-167 [staff counsel stating that he did not "want to get more into this NPF[A] line" and proceeding to ask applicant's witness questions relating to the "general condition of the area" within the NPFA]).

The restoration of an existing structure is not a "regulated activity" unless the cost of the restoration "equals or exceeds 50 percent of the estimated full replacement cost of the structure at the time of restoration" (6 NYCRR 505.2[hh], [jj]; see also 6 NYCRR 505.2[bb] [providing that the "periodic replacement or repair of same-kind structural elements . . . which do not change the size, design, or function of a functioning structure" does not require a permit]). Here, applicant proffered evidence demonstrating that the section of the access road where it encroaches upon the NPFA is an existing structure (see 6 NYCRR 505.2[q][2]) and that, within the 2.4" incursion into the NPFA, the proposed project would entail only the placement of stone or gravel on the existing base of the access road. Staff proffered no evidence to refute applicant's evidence on these issues nor did staff challenge applicant's evidence regarding the history of the access road or the extent of applicant's proposed activities within the NPFA.

On this record, I conclude that applicant has demonstrated that its proposed activity within the NPFA does not require a permit. Specifically, I conclude that applicant's proposal to place additional gravel or stone on the existing base of the access road does not require a coastal erosion management permit. This holding does not authorize applicant to undertake any other activity within the NPFA.

## Freshwater Wetlands

### Permit Standards

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

Activities proposed by an applicant that are designated as P(N) and fail to meet one or more of the compatibility tests, or that are designated as P(X) (i.e., incompatible with a wetland and its functions and benefits), must meet the weighing standards set forth under 6 NYCRR 663.5(e)(2), or the permit must be denied. For wetland Classes I, II and III, the weighing standards require that:

"the proposed activity must be . . . the only practi[ca]ble alternative that could accomplish the applicant's objectives and have no practicable alternative on a site that is not a freshwater wetland or adjacent area . . . [and] must minimize degradation to, or loss of, any part of the wetland or [its] adjacent area and must minimize any adverse impacts on the functions and benefits that the wetland provides" (6 NYCRR 663.5[e][2]).

In addition, with respect to Class I wetlands, like the wetland at issue here, the weighing standards state that such wetlands:

"provide the most critical of the State's wetland benefits, reduction of which is acceptable only in the most unusual circumstances. A permit shall be issued only if it is determined that the proposed activity satisfies a compelling economic or social need that clearly and substantially outweighs the loss of or detriment to the benefit(s) of the Class I wetland" (6 NYCRR 663.5[e][2]).

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

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

## Wetland Boundary

Department staff witness Scott Jones testified that he visited the property in June of 2013 to verify the accuracy of the wetland delineation that had been done by a consultant for the applicant (tr at 250; see also tr at 63-64). Mr. Jones determined that the delineation was largely correct, but he identified "an additional area of wetland" that needed to be included (tr at 250). Applicant used the revised wetland boundary on subsequent site plans (id.) and applicant's wetland expert testified that she visited the property and found the delineation to be "accurate based on what's out there" (tr at 180). Accordingly, the wetland boundary on the property is not in dispute.

## Proposed Activities

The Department's letter of denial states that applicant's proposed "residential construction and road improvements" are P(N), or usually incompatible, activities in a wetland adjacent area (exhibit 15 at 2; see 6 NYCRR 663.4[d][42] [designating construction of a residence "or related structures or facilities" in an adjacent area as "P(N)"]). At hearing, staff established that the construction of the proposed residence and related structures will necessarily entail clear-cutting vegetation, grading and filling at the property (see tr at 163-164 [McMahon testimony on cross examination regarding proposed site-work related to construction of the residence and related structures], 252 [Jones testimony that "the regulations characterized the construction of a residential dwelling and associated facilities as P(N)"]; see also exhibit 2 [site plan]). As noted by staff in its closing brief, filling, clear-cutting vegetation, and grading are all designated as P(N) activities in an adjacent area (staff brief at 4; see 6 NYCRR 663.4[d][20], [23], [25], respectively).

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

## Compatibility Tests

The compatibility tests consider whether the proposed activity would (i) be compatible with preservation, protection and conservation of the wetland and its benefits, (ii) result in no more than insubstantial degradation to, or loss of, any part of the wetland, and (iii) be compatible with public health and welfare (6 NYCRR 663.5[e][1]). A permit may be issued for the proposed activity, regardless of the wetland class, if all three of the compatibility tests are met (id.). Applicant argues that its proposed project satisfies all of the compatibility tests (applicant brief at 11-14). In its denial of the permit, Department staff states that applicant's proposed project is "incompatible with [the] site and would cause substantial degradation to the wetland and wetland adjacent area through the construction and permanent disturbance of the freshwater wetland adjacent area" (exhibit 15 at 2). The letter of denial did not address the third element of the compatibility test (id.).

With regard to the first test, applicant argues that several factors make the proposed project compatible with the preservation, protection, and conservation of the wetland and its benefits. First, applicant argues that wetland on the property "is only a very small portion (about .02%) of the 522-acre RE-1 freshwater wetland that surrounds Irondequoit Bay" (applicant brief at 12).

Applicant's attempt to equate the percentage of a wetland affected with the preservation of the wetland benefits is misguided. Followed to its logical end, the complete elimination of the wetland on applicant's property (and, by extension, other small properties around the bay) would be compatible with the preservation of wetland RE-1. As Department staff's habitat expert, Mr. Jones, made clear at the hearing, determinations on wetland applications are made on the basis of the unique factors of each site and the wetland functions and benefits that the site provides (see e.g. tr at 331-332 [Jones testimony that the determination of an impact on a wetland function or benefit is "not quantifiable nor is it intended to be"], 343 [Jones testimony that "the regulations don't ask us to provide some quantification or percentage or slice"]). Mr. Jones testified that:

"[w]hat we have a hard time doing in natural sciences is forecasting the effect of something. We[] typically don't find what the tipping point was until we notice the absence of something, after which it doesn't come back. That's one of the very difficult things about trying to assess what a habitat's function is . . . and at what point might it still be used or altered or changed such that it's not -- no longer there for the species of concern" (tr at 336).

Department staff's approach of considering the unique factors of each proposed project and the site involved is consistent with prior determinations of the Department. In Matter of Gans (Decision of the Commissioner, July 21, 1997), for example, the Commissioner acknowledged applicant's assertion that the proposed project would reduce the "contiguous wetland area" by only 0.0036%, but held that "statistics of this nature need to be evaluated in context," including such factors as prior development affecting the wetland and pressure to continue development (id. at 1-2). The Commissioner held that the Freshwater Wetlands Act "establish[es] controls to mute the otherwise inevitable destructive effect on important wetland resources that would result if each different owner of a small lot could pursue his or her own interests without restraint" (id. at 2; see ECL 3-0301[1][b][stating that the Commissioner shall "take into account the cumulative impact upon [environmental] resources in making any determination in connection with any . . . permit"]). More recently, in Matter of Simonelli (Decision of the Commissioner, July 25, 2011), the Commissioner granted a permit for a proposed project that would impact a "small fraction" of the wetland (id. at 1). The Commissioner stressed, however, that the decision "should not be construed as establishing a general policy that would permit construction of residences along the edge of wetland boundaries or in small, separated portions of wetlands" and reiterated that "[e]ach permit application must be judged on its own merits and based on its potential environmental impacts" (id. at 2).

Here, because some of the proposed activities at the property are designated as P(N), applicant must overcome the presumption that the activities are "usually incompatible with a wetland and its functions or benefits" (see 6 NYCRR 663.4[d] ["Levels of Compatibility"]; tr at 252-253 [Jones testimony that staff "began [its] review under the assumption this was not a

usually compatible activity [and] was basically looking at what, if any, adverse impacts would occur as a result of the proposed construction").

Department staff's primary concern with the proposed project is its impact on the wetland wildlife habitat (tr at 263-266; staff brief at 4; see ECL 24-0105[7][b]). At the hearing, Mr. Jones testified that "[a]ny development, residential development and subsequent full-time occupation within a naturally vegetative 100 foot adjacent area, particularly in a wetland upland complex such as Irondequoit Bay, . . . will have a reduction in the amount of available habitat for wildlife" (tr at 263-264). Mr. Jones testified that many species benefit from even relatively small areas of undeveloped uplands along the bay. He noted that bald eagles are known to perch "in the taller deciduous trees around the bay while they're hunting or watching for prey in the water [and] [t]hat's almost unique to the undeveloped portions, where there are no residential dwellings" (tr at 264 [also noting that ospreys "use trees the same way"). Other species that may use undeveloped sites along the bay include beaver, mink, and neotropical migrant songbirds, "some of which in fact are wetland dependent, some are dependent on uplands adjacent to wetlands" (tr at 264-266).

Mr. Jones testified that applicant's property is, "along with all the other pieces of adjacent upland around the bay, important because of the degree of development that has occurred, much of it prior to the Wetland Act" (tr at 335). He further testified that each "remaining [undeveloped] piece from a habitat protection standpoint has a higher value than if all of those pieces were undeveloped all the way around the bay" (id.). Mr. Jones also testified that the two parcels on the bay and immediately to the north of the property remain undeveloped, and would be "very difficult site[s] to permit" for reasons similar to those at issue here (tr at 283).

Additionally, Mr. Jones noted that disturbances along the shore that typically follow residential development of a site, such as the removal of "logs, overhang, dead snags," would adversely impact "common species [of freshwater fish] that would utilize these areas" by removing cover and reducing spawning habitat (tr at 279; see ECL 24-0105[7][i]).

Applicant's wetland expert, Ms. Reese, testified that she did not witness wildlife on the property during her visits to the site (tr at 197). She further testified that, because of the topping of tall trees on the property by applicant's neighbor, the property "does not provide the wildlife benefits that it otherwise could have [and] that function in value of the adjacent area is not there to the extent that it would be if it had been -- if the tree canopy had been left in place" (tr at 199). I note, however, that Ms. Reese only visited the site in late November and early December, 2015 (tr at 179). On cross examination, she acknowledged that this was not the ideal time to observe wildlife at the site (tr at 229). Further, when questioned about typical bird species seen in the area of the proposed project, she testified that her "specialty is soil scienc[ce] and botany, so I really can't comment too much on the ornithology of things" (tr at 229).

I note that Department staff's habitat expert acknowledged that the topping of the taller trees on the property degraded the site's wildlife habitat benefit (tr at 318). He also testified, however, "that because the trees were not fully removed, the land not cleared, [the impacts are] predictably relatively short . . . in the terms of the life of the bay and those trees -- it's a temporary disturbance, a temporary alteration of the habitat and its value to the wildlife

accustomed to using it" (*id.*). The purposes of the Freshwater Wetlands Act would be ill-served if the temporary degradation of the wetland habitat caused by the actions of applicant's neighbor were to result in the permanent degradation of the habitat value of the property.

I conclude that applicant failed to satisfy its burden to demonstrate that the proposed project is compatible with the preservation, protection, and conservation of the wetland habitat benefit derived from the property.

Department staff also presented evidence concerning the erosion control benefit of the property (tr at 270-272; see ECL 24-0105[7][f]). Although staff's expert acknowledged that he is not a soil scientist (tr at 271), he also testified that in his experience, construction on steep slopes along the bay "has been . . . very difficult" because "of the highly erodible nature, inherent, I think, instability of these soils, combined with steep slopes and alterations to the vegetative community both above and on the slopes, the change of the course and velocity and frequency of water that flows through them and over them" (tr at 275-276; see also exhibit 33 [identifying the soil type and characteristics in the vicinity of the site]). He testified that he is "aware of at least three structural collapses on permitted sites in my tenure with the department on both sides of the bay in these areas despite having been engineered" (tr at 276-277). Additionally, he testified that all of these failures "resulted in an uncontrolled and distinctly adverse impact to the bay when the sediments reached the bay down the steep gullies" (tr at 277).

Applicant's soil expert testified that the property "is a very difficult site to develop, and attention to detail and designing this properly is going to be key to the success of any type of home development on this site" (tr at 215-216). Applicant's engineer testified that there are measures that can be taken to address the potential erosion and stormwater issues associated with building a residence on a steeply sloped property (tr at 157-158). On cross examination, however, he testified that the site plans that applicant submitted to the Department did not incorporate the permanent mitigation measures needed to address post-construction erosion and stormwater control at the property (tr at 168 [McMahon testimony that "with the exception of -- the riprap swale is potentially one, but there are certainly many more [permanent mitigation measures] that would need to be incorporated into a final plan"]).

On this record, it is clear that, from an engineering perspective, the property presents significant difficulties related to erosion and stormwater control. Although it may be possible to engineer sufficient safeguards against post-construction erosion and slope failure at the property, the application before the Department does not include the necessary engineering plans.<sup>3</sup> Erosion control is one of the enumerated wetland benefits under the Freshwater Wetlands Act (see ECL 24-0105[7][f]) and, pursuant to 6 NYCRR 663.5(a), "[t]he burden of showing that the proposed activity will comply with the policies and provisions of the act and [6 NYCRR part 663] rest entirely on the applicant."

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<sup>3</sup> Applicant's closing brief, at 7, states that "[o]n December 22, 2014, [applicant's engineer provided] certification that the proposed plan incorporates necessary erosion control measures to mitigate adverse environmental impacts." The engineer's statement referred to, however, is not a certification and, as applicant's engineer testified, the proposed plans include erosion control measures necessary for construction, not post-construction (exhibit 20 at 2; tr at 168).

I conclude that applicant failed to satisfy its burden to demonstrate that the proposed project is compatible with the preservation, protection, and conservation of the erosion control benefit derived from the property.

The second compatibility test considers whether the proposed project would result in no more than insubstantial degradation to, or loss of, any part of the wetland (6 NYCRR 663.5[e][1][ii]). The Department's letter of denial states that staff determined that "[c]onstruction within and permanent disturbance of the wetland adjacent area, to the degree proposed, in an otherwise undeveloped site, cannot be considered insubstantial" (exhibit 15 at 2). Department staff's habitat expert testified that, although the project would not result in the loss of any part of the wetland, it would result in the unacceptable degradation to the wetland because of the "substantial adverse impact on wetland function and benefits" (tr at 258).

Applicant argues that "[t]he benefits provided by the Adjacent Area . . . have already been substantially impacted by the illegal clear-cutting [by a neighbor] on the Applicant's Property" (applicant brief at 13). Applicant's wetland expert, Frances Reese, testified that the adjacent area at the site consists of largely disturbed lands, including an ice house and the remnants of a cottage (tr at 200), and that she "also observed quite a number of invasive species growing on and around the property" (tr at 187). She further testified that the adjacent area "has been pretty severely degraded" by the removal of the tree canopy and that she did not consider the adjacent area to be in its natural state "[b]ecause there is evidence of man's involvement with the site throughout the property" (tr 199-200). Applicant argues that "any benefit that could have existed before the tree cutting, has been removed [and] the Applicant has offered to use native landscaping methods to assist in rectifying loss that has already occurred, and mitigate any that may be furthered by the Project" (applicant brief at 13).

As discussed above, Department staff acknowledges the unfortunate topping of the taller trees on the property by applicant's neighbor, but considers it to be "a temporary disturbance, a temporary alteration of the habitat" (tr at 318). The record also establishes that the parcels along the bay to the north and south of the property are largely undeveloped (tr at 283 [noting that the two parcels on the bay immediately to the north of the property are undeveloped and would be "very difficult site[s] to permit"], 259-260 [noting that the parcel immediately south of the property has a dock, but no residence]; exhibits 2, 3).

I conclude that applicant failed to satisfy its burden to demonstrate that the proposed project would result in no more than insubstantial degradation to any part of the wetland.

Department staff's letter of denial did not address the issue of whether applicant's proposed project would be compatible with public health and welfare (the third compatibility test) (see exhibit 15 at 2 [stating the proposed project was determined to be "incompatible with [the] site," and "would cause substantial degradation," but not addressing the third test]). Nor did staff's expert offer an opinion on this issue at the hearing. Nevertheless, because the proposed project fails to meet either the first or second compatibility tests, the weighing standards must be met and are discussed below.

## Weighing Standards

Because the proposed project fails to satisfy two of the compatibility tests, a permit may be issued only if the proposed activity meets each of the weighing standards (6 NYCRR 663.5[e][2]). Accordingly, applicant must demonstrate that the proposed project is the only practicable alternative and that there is no alternative on a site that is not a wetland or adjacent area (*id.*). Further, the proposed project must minimize degradation to, or loss of, any part of the wetland or its adjacent area, and must minimize adverse impacts on the functions and benefits of the wetland (*id.*). Additionally, because wetland RE-1 is a Class I wetland, a permit may be issued only if the proposed activity satisfies a compelling economic or social need that clearly and substantially outweighs the loss of or detriment to the wetland (*id.*).

With respect to alternatives, applicant must show that the proposed project is the only alternative that is physically or economically feasible (6 NYCRR 663.5 [f][2]). This standard does not mean that "the most profitable or least costly alternative is the only feasible one nor that the least profitable or more costly alternative is the only feasible one" (*id.*). Applicant did not meet its burden to demonstrate that it has no practicable alternative that will accomplish the objective of constructing a single-family residence in the area.

Mr. Gangemi is the sole member of applicant (tr at 17). He testified that he is a licensed real estate broker and that buying and selling real estate is part of his normal business activity (tr at 16). He further testified that applicant, Rochester Redevelopment, LLC, is "my holding company that I put properties in" (tr at 17). Given the foregoing, there is little basis to conclude that applicant could not acquire other vacant properties suitable for the construction of a single family residence on a site that is not a freshwater wetland or adjacent area. Applicant did not establish a record with regard to whether it is financially able to purchase an existing home or a vacant lot that is not within a regulated wetland or adjacent area.

Department staff's expert testified that the alternatives proposed by applicant "appear to be economic and real estate based without either a true consideration or perhaps understanding of the type of analysis required in terms of looking for another site that is not a wetland or adjacent area" (tr at 255-256). He also testified that "if [applicant] would like to develop a house on an undeveloped lot, then [applicant] should look for someplace not within the 100 foot adjacent area" (tr at 321).

Applicant states that it considered two other sites on Irondequoit Bay that were outside of the adjacent area but "concluded that neither property was viable because the Applicant could not comply with the Town Zoning Code and stay out of the adjacent area" (applicant brief at 21). Applicant also argues that, because it did not own either of those properties, "they were not alternatives that even needed to be considered" (*id.*). In support of this argument, applicant cites 6 NYCRR 617.9(b)(5)(v), which provides, in part, that "alternatives may be limited to parcels owned by, or under option to, a private project sponsor." The instant application is not subject to 6 NYCRR part 617 (the State Environmental Quality Review [SEQR] regulations) review and, therefore, the cited provision is inapposite. Moreover, the freshwater wetlands regulations expressly state that there must be "no practicable alternative on a site that is not a freshwater wetland or adjacent area" (6 NYCRR 663.5[e][2]).

Applicant also cites to Matter of Rampulla Associates Architects (Decision of the Commissioner, Nov. 8, 1988) in support of its position that applicant need not consider alternative sites that it does not own. Applicant argues that "[i]n Rampulla, the Commissioner stated that, 'It cannot be considered a practicable alternative for a small landowner to seek another non-wetland site for obvious economic reasons'" (applicant brief at 21). The text quoted by applicant is not from the Commissioner's decision in Rampulla, but rather from the ALJ's hearing report (see Rampulla, Hearing Report at 14). In addition, as noted above, the applicant here is a holding company for properties purchased by Mr. Gangemi and the record does not establish whether "economic reasons" would prevent applicant from using an alternative site.

The weighing standards also require that an applicant demonstrate that the proposed project will minimize degradation to, or loss of, any part of the wetland or the adjacent area and that it will minimize any adverse impacts on the functions and benefits that the wetland provides (6 NYCRR 663.5[e][2]). With regard to minimizing impacts, applicant argues that it "has done exactly what the Commissioner suggested in Rampulla, and more" (applicant brief at 21). Applicant argues that its mitigation measures include moving the residence completely out of the wetland and reducing the footprint of the "original concept" by 75% (id.).

In Rampulla, however, the Commissioner held that the applicant had demonstrated that there would be "no adverse impact on the wetland functions and benefits on the Site and in its vicinity" (Rampulla at 1). Among other things, the Commissioner noted that the on-site wetland was isolated from the main body of the wetland (id. [stating that main wetland "centers on Wolfes Pond Park across Lutten Avenue from the Site"].) The Commissioner again emphasized that "[t]he primary responsibility of the Department is to ensure that adverse impacts on wetlands and degradation of their functions and benefits are eliminated or minimized through application of permit issuance standards" (id.).

Here, applicant did not meet its burden to demonstrate that adverse impacts on the wildlife habitat function of the property would be eliminated or minimized (cf. Rampulla, Hearing Report at 12-13 [stating that the applicant had "produced three well-qualified environmental scientists who were unanimous in their conclusions that the Project would cause virtually no adverse impact on the several functions and benefits of the freshwater wetlands in the vicinity of the Site"]). As discussed above, Department staff's habitat expert testified to the value of the property as wetland wildlife habitat and applicant's expert was not persuasive on that issue (see supra at 9-10).

With regard to whether applicant's proposal minimizes degradation or loss of the freshwater wetland or its adjacent area, here too, applicant fails to meet its burden. Among other things, applicant argues that it has minimized loss of the wetland by moving the proposed residence out of the wetland and reducing its size (applicant brief at 12-13, 21-22). The application submitted to the Department, however, never included site plans or architectural drawings to construct a larger residence directly in the wetland (see exhibit 1; tr at 256-257). Notably, such a proposal would be designated as a "P(X)" activity under the freshwater wetlands regulations, meaning that the "activity is incompatible with a wetland and its functions and benefits" (6 NYCRR 663.4[d], [d][42]).

Moreover, the primary concern of Department staff with regard to the degradation or loss of wetland benefits was the loss of wildlife habitat engendered in applicant's proposal. Staff's expert testified that "residential development and subsequent full-time occupation within a naturally vegetative 100 foot adjacent area, particularly in a wetland upland complex such as Irondequoit Bay . . . will have a reduction in the amount of available habitat for wildlife" (tr 263-264). Although applicant proposed some mitigation measures, it did not propose any mitigation in relation to the impact on wildlife habitat caused by the full-time occupation of the property. Accordingly, applicant has failed to minimize this adverse impact on the habitat function of the wetland (see 6 NYCRR 663.5[e][2]).

Importantly, freshwater wetland RE-1 is designated as a Class I wetland, the most protected of the State's freshwater wetlands. Where such wetlands are involved, the vast majority of proposed projects that cannot avoid the loss or reduction of a wetland benefit must be rejected (6 NYCRR 663.5[f][4][i]). The proposed activity must satisfy a social or economic need of such a compelling nature as to make it tantamount to an actual necessity, something that must be done (6 NYCRR 663.5[f][4][ii]). Additionally, the need for the project must clearly outweigh the loss or detriment to the wetland benefits by a large or significant margin (6 NYCRR 663.5[f][4].) Applicant's proposal to build a single-family residence on the property is plainly not an activity that "must be done."

Applicant noted that there may be an environmental benefit derived from the project because of the proposed sewer line. Specifically, applicant argues that nearby neighbors may elect to connect to the proposed sewer line, thereby eliminating the need for individual septic systems (applicant brief at 14). As noted by applicant's expert, use of a sewer system is preferred because it reduces the likelihood of nutrients and pathogens from sewage reaching the bay (tr at 213-215; see also 6 NYCRR 663.4[d][38] [noting that "[i]ntroducing or storing . . . sewage effluent" is an incompatible activity]). This potential benefit is speculative, however, because applicant has not discussed the possibility with neighboring property owners in several years and has no commitments from any neighbor that they will tie-in to the sewer line if it is installed (tr at 105-106). Such a speculative benefit falls well short of demonstrating the proposed project would satisfy a social or economic need of such a compelling nature as to make it tantamount to an actual necessity that the proposed project be undertaken.

Applicant's proposal to build a single-family residence at the property is clearly not an activity that "must be done." Applicant adduced no evidence to support the conclusion that construction of a residence on the property is an actual necessity that cannot be avoided.

#### Other Freshwater Wetlands Projects

Applicant argues that "[t]he reality is that the Department commonly allows construction in wetlands, not to mention adjacent areas—including in RE-1" and attaches materials relating to other freshwater wetlands projects to its closing brief (applicant brief at 18, exhibits A and B). The attachments to applicant's closing brief provide few details of the projects that were under consideration by the Department. Nevertheless, it is apparent that most of the attached materials

relate to projects on sites that were already developed (see applicant brief exhibits A, B) and, therefore, are not analogous to the instant application.

Applicant states that the "most notable" project identified in the attached materials concerns "the issuance of a freshwater wetlands permit for three single-family homes on lots located partially within the adjacent area for RE-1" (applicant brief at 18, exhibit B). The limited information provided in the materials supplied by applicant indicates that the project under consideration involved the "re-issuance of [an] expired permit" for three residences on sites that were "partially within the regulated adjacent area" and, aside from the installation of a fence, would cause "no ground disturbance within the first 50 feet" of the adjacent area. By comparison, applicant is seeking issuance of a permit for construction on a property that is located almost entirely within the adjacent area (and partially within the wetland) and that would result in ground disturbance for a residential structure within approximately 20' of the wetland and for a retaining wall within approximately 10' of the wetland (see exhibit 2).

By their nature, freshwater wetlands permits are site specific. Therefore, the issuance of a permit at one site will generally have little bearing on the permit determination at another site. Further, although there was some discussion of other projects along Irondequoit Bay during the hearing (see tr at 258-259, 292-293), the materials attached to applicant's brief were not offered into evidence. Therefore, staff was not afforded an opportunity to address the specifics of those permits at the hearing. Accordingly, the permits cited by applicant in his closing brief will not be considered further.

#### Takings Claim

In its closing brief, applicant argues that the Department's denial of its freshwater wetlands permit may effect a regulatory taking and that applicant may seek judicial review. Although applicant acknowledges that "[t]his procedure does not apply at this stage of the proceedings," applicant argues that "certainly the likelihood of the Applicant's eventual success on a takings claim should be considered at this juncture" (applicant brief at 24). Applicant further states that "the refusal to allow the Applicant to build a single-family home, leaving only recreational uses, would destroy all economically beneficial use of the Property and constitute a taking" (id. [internal quotation marks omitted]).

Department staff did not introduce evidence with regard to the takings issue at the hearing nor did staff discuss the issue in its closing brief. Although staff notes that applicant obtained the property "upon [its] paying of back taxes in the amount of approximately \$28,000," staff makes this comment in the context of its discussion of practicable alternatives and not as part of a discussion of whether permit denial would "destroy all economically beneficial use of the Property" (staff brief at 7).

The determination of applicant's takings claim is not a proper matter for adjudication in this administrative proceeding. Such claims must be determined by a civil court (see ECL 24-0705[6], [7] [providing that Commissioner determinations regarding freshwater wetland permit applications are subject to judicial review and "[i]n the event that the court finds the action reviewed constitutes a taking . . . the court may, at the election of the commissioner, either

(i) set aside the order or (ii) require the commissioner to proceed under the condemnation law to acquire the wetlands"]; see also Smith v Williams, 166 AD2d 536, 536-537 [2d Dept 1990] [noting that the court had previously confirmed the Commissioner's denial of a freshwater wetlands permit and had "remitted the matter [to supreme court], pursuant to ECL 24-0705(7), for a hearing on the petitioner's claim that the denial constituted an unconstitutional taking of his property"]; Matter of Haines v Flacke, 104 AD2d 26, 33 [2d Dept 1984] [denying a petitioner's request in a tidal wetlands matter for an order directing the Department "to hold an evidentiary hearing for the purpose of receiving testimony and evidence bearing on the taking issue" and holding that "[t]he proper practice is to assert such a claim in the proceeding seeking judicial review")].

Accordingly, the takings issue will not be considered further in this administrative proceeding.

## CONCLUSIONS

### Coastal Erosion Hazard Area

Applicant's proposal to place additional gravel or stone on the existing base of the access road at the site does not require a coastal erosion management permit.

### Freshwater Wetlands

The property is located almost entirely within the boundaries of the wetland and the adjacent area of State-regulated freshwater wetland RE-1, a Class I wetland. A small portion of the property is located upland of the adjacent area. Activities proposed by applicant are listed as P(N), usually incompatible with the freshwater wetland and its functions and benefits. The proposed P(N) activities do not satisfy the compatibility tests nor do they meet the weighing standards.

Applicant, Rochester Redevelopment, LLC, did not demonstrate that the proposed project meets the standards at 6 NYCRR 663.5 for issuance of a freshwater wetlands permit.

## RECOMMENDATION

The application for a freshwater wetlands permit should be denied.

EXHIBIT LIST

Matter of Rochester Redevelopment, LLC  
 Application No. 8-2634-00365/00001

Exhibit No.	Description
1	Joint Application Form, dated November 2, 2012, with attachments
2	Detail Site Plan, McMahan LaRue Associates, P.C. (McMahan LaRue), Engineers & Surveyors, dated December 2014
3	Shadow Wood Subdivision, Final Site Plan, Passero-Scardetta Associates, Engineers-Planners-Surveyors, dated May 1977
4	Quitclaim Deed into Applicant for Property, dated October 31, 2011
5	Zoning Map, Town of Irondequoit
6	Abstract of Title for Property
7	Historical Maps of Site and Vicinity
8	Preliminary Site Plan & Elevations and Concept Photographs
9	Excerpt from Joint Application Form
10	DEC Notice of Incomplete Application (NOIA), dated November 15, 2012
11	Response to NOIA, dated November 20, 2012
12	DEC Request for Additional Information, dated June 27, 2013
13	Responses to Request for Additional Information, dated August 11 & 13, 2014
14	DEC NOIA & Request for Additional Information, September 9, 2014
15	DEC Letter of Denial, dated September 4, 2015
16	Irondequoit Town Code (excerpts)
17	Gregory W. McMahan, P.E., Resume
18	Overall Site Plan, McMahan LaRue, dated December 2014
19	Photographs of Site and Vicinity
20	McMahan LaRue Letter to DEC, dated December 22, 2014
21	Plat Book Map, 1924
22	DEC NOIA, dated January 8, 2015
23	Response to NOIA, dated February 10, 2015
24	Declaration of Covenants, Conditions and Restrictions, dated October 5, 1977
25	Frances Reese, MS, Resume
26	DEC Environmental Resource Mapper (depicting wetland & "Wetland Checkzone" in vicinity of site)
27	Photograph at Site (depicting remnant of a foundation)
28	Photograph at Site (depicting ice house)
29	DEC Wetlands Map, Prepared by Monroe County, Department of Planning and Development (for general planning purposes), dated December 4, 2006
30	Applicant Email to DEC, dated October 6, 2014 (with attached plans)
31	DEC NOIA, dated November 21, 2014
32	DEC Notice of Complete Application, dated June 22, 2015
33	Excerpt from USDA, Soil Conservation Service, Soil Survey, Monroe County (1973)