

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 and Part 663 of Title 6 of the
Official Compilation of Codes, Rules and Regulations
of the State of New York

- by -

FRANCESCA SCADUTO,

Applicant.

Permit Application No. 1-4720-03454/00001

DECISION OF THE COMMISSIONER

December 18, 2008

DECISION OF THE COMMISSIONER

Francesca Scaduto ("applicant") filed an application for a freshwater wetlands permit with the New York State Department of Environmental Conservation ("Department") for the construction of a single-family residence and associated activities on property located at 425 Idaho Street, Village of Lindenhurst, Suffolk County (the "project"). The construction of the residence would be within the boundaries of Class I freshwater wetland BW-4, as would most of the associated activities.

Department staff made a determination to deny the application and applicant requested a hearing. Following referral to the Office of Hearings and Mediation Services in 2008, the matter was assigned to Administrative Law Judge ("ALJ") Richard A. Sherman. 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 as my decision in this matter.

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 unless a higher standard has been established by statute or regulation (see 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). Here, because applicant's proposed project would result in the permanent loss of part of a Class I freshwater wetland, the Department may issue a permit in only the most unusual circumstances and the project must satisfy stringent permit issuance standards designed to protect this natural resource (see 6 NYCRR 663.5[e][2]).

As the ALJ's hearing report details, applicant failed to establish by a preponderance of the evidence that the proposed project could satisfy the standards for permit issuance as set forth in 6 NYCRR part 663. Department staff testified that certain activities proposed by applicant were incompatible with the functions and benefits of freshwater wetlands (see, e.g., Hearing Transcript, at 65-73 [Department staff discussion of, among other things, the proposed project's adverse environmental impacts on wetland wildlife habitat, stormwater and flood control, and wetland filtration capability]), and this testimony was not refuted by applicant. Applicant's offer to leave a portion of the site undeveloped does not alter the fact that the project would result in the permanent loss of a part of freshwater wetland BW-4, as well as other adverse environmental impacts to this wetland.

The record in this proceeding demonstrates that applicant failed to carry her 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

/s/

By: _____
Alexander B. Grannis
Commissioner

Albany, New York
December 18, 2008

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DEPARTMENT OF ENVIRONMENTAL CONSERVATION
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FRANCESCA SCADUTO,

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HEARING REPORT

- by -

Richard A. Sherman
Administrative Law Judge

HEARING REPORT

Appearances:

- Alison H. Crocker, Deputy Commissioner and General Counsel (Kari Wilkinson, of counsel), for the Department of Environmental Conservation

- Francesca Scaduto, appearing pro se

SUMMARY

Applicant, Francesca Scaduto, 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 ("site") located at 425 Idaho Street, Village of Lindenhurst, Town of Babylon, Suffolk County, on which she proposes to construct a two story, single-family residence. Applicant's proposed project would also require site clearing, filling and grading in order to construct the residence and associated driveway and yard. The entire residential structure, and nearly the entire driveway and yard, would be located within a State-regulated freshwater wetland.

Because applicant's proposed project does not meet the standards for permit issuance set forth under 6 NYCRR 663.5, I recommend that the permit be denied.

PROCEEDINGS

Department Staff issued a notice of permit denial, dated November 27, 2007, advising applicant that staff had determined that the proposed project did not meet the standards for issuance of a freshwater wetlands permit. By handwritten letter dated December 1, 2007 and typewritten letter dated December 10, 2007, Ms. Scaduto requested a public hearing on the denial of her application. The hearing request was referred to this office from the Division of Environmental Permits, Region 1, in March 2008

and I was assigned as the presiding Administrative Law Judge ("ALJ").

The Department received a separate request for hearing from the property owner of an undeveloped lot adjacent to the site. The applicant for the project on the adjacent property, Vincenzo Anzisi, requested that the public hearings on the two applications be held together. Ms. Scaduto and Mr. Anzisi are acquainted with each other and Ms. Scaduto advised that she was amenable to holding joint hearings. In light of the foregoing, and because the Scaduto and Anzisi applications involved similar issues of fact and law, this office conducted joint public hearings on the two applications.

Although evidence adduced by both applicants is referenced and discussed below, the findings of fact, conclusions and recommendations in this hearing report pertain only to Ms. Scaduto's application. Mr. Anzisi's application will be the subject of a separate hearing report prepared by ALJ Susan DuBois.

The notice of joint public hearing was published by the Department on June 4, 2008 in the Environmental Notice Bulletin and by the applicant on June 18, 2008, in South Bay's Newspaper. In accordance with the hearing notice, a joint legislative hearing, joint issues conference and joint adjudicatory hearing were scheduled for and held on July 31, 2008.

Legislative Hearing

The hearing notice advised that the Department would accept written and oral comments on the proposed projects from interested persons and organizations. Written comments were received from the Town of Babylon and the Village of Lindenhurst. Both municipalities opposed the proposed project.

The Town of Babylon, by its Assistant Waterways Management Supervisor, noted that freshwater wetlands provide many environmental benefits and objected to the "direct destruction of regulated wetlands" proposed by the applicant. The Village of Lindenhurst, by its Mayor and its Deputy Administrator, stated that the site is proximate to Santapogue Creek and that further development in the wetland may exacerbate flooding problems in the area. The

Village also noted that the site is "environmentally sensitive" and provides wildlife habitat that would be destroyed by the proposed project.

At the legislative hearing, the Deputy Administrator, Village of Lindenhurst, also offered oral comment. The Deputy Administrator emphasized the concerns raised in the Village's written comments and added that Santapogue Creek is a "major corridor for drainage" and that the Village has "dealt for the last twenty years with flooding issues adjacent to streams, [Santapogue Creek] especially" (Hearing Transcript ["Tr"], at 11¹).

Issues Conference

The hearing notice also advised that 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 the applicants participated in the issues conference (see 6 NYCRR 624.4[b][3]).

By agreement of the parties, the issues identified for adjudication relate to the reasons Department staff cited for denial of the permit, as set forth in the November 27, 2007 notice of permit denial. The denial notice states that the site is located in a Class I,² State-regulated freshwater wetland and that, pursuant to 6 NYCRR 663.4(d), the proposed construction of a single-family residence and associated clearing of vegetation, filling and grading at the site are all designated as "P(X) or incompatible" activities within the boundaries the wetland. The denial notice also states that applicant's proposed project fails to meet the weighing standards applicable to "P(X)" activities under 6 NYCRR 663.5(e)(2) and, therefore, staff denied the permit.

¹ The hearing transcript contains two sets of page numbers. Citations to the transcript in this hearing report correspond to the page numbers that appear at the far right and above line "1" on each page of the transcript text.

² State wetlands are divided into four categories, designated as Class I, II, III and IV. Class I wetlands, like that at issue here, "provide the most critical of the State's wetland benefits" (6 NYCRR 663.5[e][2]) and are afforded the greatest protection (see id.; Tr, at 50).

At the close of the issues conference, the parties accompanied ALJ DuBois and 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 between the ALJs and any party were impermissible. The purpose of the site visit was to provide the ALJs with a better understanding of the physical layout and attributes of the site.

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 the applicants were parties to the adjudicatory hearing (see 6 NYCRR 624.5[a] and [b]).

The adjudicatory hearing was held on July 31, 2008. The applicant appeared pro se and presented her case jointly with Mr. Anzisi, the applicant proposing to construct a single-family residence on a property adjacent to the site, who also appeared pro se. The applicants testified on their own behalf and did not call additional witnesses. Department staff called as its only witness Robert F. Marsh, Regional Manager, Bureau of Habitat, DEC Region 1.

Close of the Hearing Record

On September 22, 2008, this office received a two page document from Mr. Anzisi. The document and the envelope it was enclosed in were damaged. Subsequently, during a conference call with the parties, applicant and Mr. Anzisi confirmed that the document constituted the closing brief ("applicants' brief") for both Ms. Scaduto and Mr. Anzisi. Additionally, they advised that the hearing transcript, which this office had not received, was enclosed in the same envelope with the applicants' brief at the time it was mailed to this office.

As a result of the conference call, applicant arranged to have another copy of both the hearing transcript and the applicants' brief sent to this office. These materials were received on October 6, 2008. Department staff's closing brief was received on October 7, 2008. In accordance with 6 NYCRR 624.8(a)(5), by letter dated

October 8, 2008, I advised the parties that the hearing record was closed.

FINDINGS OF FACT

1. Ms. Scaduto purchased the site in November 2006 (Tr, at 39; Exhibit ["Exh."] 1 [Joint Application for Permit ("Application"), attached Variance Search]). The purchase price is not established in the record.
2. On March 12, 2007, Ms. Scaduto filed an application with the Department for a freshwater wetlands permit to construct a single-family residence at the site. The site is currently vacant and undeveloped (see Exh. 1 [Application and attached site photographs]).
3. The proposed residence would have a footprint of 1,350 square feet and development of the site would include clearing, filling and grading for the residence, driveway and yard. Applicant's proposal also provided for a 30 foot wide buffer along the rear (southern) lot line of the site wherein no clearing or ground disturbance would occur (see Exh. 1 [Application and attached site survey]).
4. The site is located almost entirely within State-regulated freshwater wetland BW-4,³ a Class I wetland. Only about 640 square feet of the site, located along the northwest corner, are outside the wetland, but this area remains subject to regulation as a freshwater wetlands adjacent area (id.; Tr, at 48-49 and 53-54; Exh. 3 [New York State Freshwater Wetlands Map ("Wetlands Map"), Bay Shore West Quadrangle]).
5. Santapogue Creek, located to the east of the site, flows south through freshwater wetland BW-4 and empties into Great South Bay (Tr, at 67; Exh. 3).
6. Department staff conducted a field inspection at the site in April 2007 during which staff delineated and flagged the freshwater wetland boundary (Tr, at 51-52;

³ At times in the record, including throughout the hearing transcript, the wetland is identified as freshwater wetland "DW-4." The State freshwater wetlands map, however, identifies the wetland as "BW-4," as does the Field Inspection Report (Exh. 6).

Exh. 6).⁴ Staff conducted additional field work at the site in July 2008 (Tr, at 51; Exh. 8).

7. The wetland at the site is a deciduous swamp woodland, dominated by red maple and tupelo trees in the canopy, clethra in the shrub layer and cinnamon fern in the understory (Tr, at 54, 61; Exh. 6; Exh. 8).
8. Soil samples taken by Department staff at the site were hydric, consisting of a twelve inch muck layer over low chroma sand (Tr, at 55, 57; Exh. 6).
9. During the field inspections in 2007 and 2008, Department staff observed standing water at the site, consistent with wetlands hydrology (Tr, at 54, 59; Exh. 8-F).
10. The large trees at the site, some with trunks that are twelve to fourteen inches in diameter, and the depth of the hydric soils indicate that the site has been a freshwater wetland for decades (Tr, at 61-62).
11. The site, nearby wetlands and Santapogue Creek all provide open space, stormwater control and wildlife habitat (Tr, at 69-71).

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.

Wetland Boundary Delineation

Applicant proposes to construct a single-family residence and undertake related activities at the site. Department staff determined that nearly the entire site is located within the boundaries of freshwater wetland BW-4, a State-regulated Class I wetland. Applicant did not present expert testimony or other evidence in order to demonstrate

⁴ Department staff testimony indicated that the field inspection was done in May 2007 (Tr, at 51); however, Part 2 of the Field Inspection Report (Exh. 6), which is completed in the field, states that the inspection was done in late April 2007.

that the site, or any significant portion thereof, was outside the regulated wetland.

Department staff witness Robert F. Marsh testified that when a proposed project is located along or near the boundary of a mapped State freshwater wetland, an in-field delineation must be done to determine the precise location of the wetland boundary. This is because the State freshwater wetlands maps are intended only to provide the approximate location of the wetland boundary. The maps themselves are at such a large scale (1:24,000) that the width of the line depicting the wetland boundary on any given map would be equivalent to 70 feet wide in the field (Tr, at 50-51; Exh. 3 [Wetlands Map depicting the "[a]pproximate wetland boundary"]).

Mr. Marsh testified that he conducted an in-field wetland delineation at the site in 2007. Based upon his analysis of the site's soils, hydrology and vegetation, Mr. Marsh delineated and flagged the wetland boundary.⁵ The Department's wetland delineation shows that nearly the entire site is located within the boundaries of State freshwater wetland BW-4. A small portion of the site, along the northwest corner, is located in the adjacent area of the wetland.

Applicant did not proffer expert testimony or other evidence to challenge the Department's delineation, nor did applicant undermine the basis for staff's wetland delineation during cross examination of Mr. Marsh. Accordingly, the wetland boundary delineation is not in dispute.

Standards for Permit Issuance

Department staff determined that certain activities proposed by applicant are designated under 6 NYCRR 663.4(d) as "P(X)" or incompatible with functions and benefits of freshwater wetlands. Specifically, staff determined that constructing a residence (see 6 NYCRR 663.4[d][42]), clearing vegetation (see 6 NYCRR 663.4[d][23]), filling (see 6 NYCRR 663.4[d][20]) and grading (see 6 NYCRR 663.4[d][25]) within the regulated wetland are all "P(X)" activities. Applicant did not challenge Department staff's

⁵ The wetland boundary delineation, as determined by Department staff, is depicted on the applicant's site survey (see Exh. 1).

determination that these activities are designated "P(X)" under the wetlands regulations.

Accordingly, applicant's proposal 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 terms of practicable alternatives, the record indicates that the area surrounding the site is a highly developed residential community. Although there appear to be few, if any, vacant lots in the area that are suitable for development, an individual who desires to live in the community may purchase an existing home. There is some indication in the record that applicant may not currently have the financial means to purchase an existing home, but this alone does not warrant carving out portions of the wetland for development.

Additionally, the site of applicant's proposed project is almost entirely within the State-regulated wetland. As such, the proposed project will unavoidably result in "degradation to, or loss of . . . part of the wetland." Applicant's offer to leave a portion of the site undeveloped does not alter the fact that the project will result in the permanent loss of part of the wetland.

Moreover, with respect to Class I wetlands, like that at issue here, the weighing standards further 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] [emphasis supplied]).

The phrase "compelling economic or social need" when applied to an activity undertaken in a 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 this standard, it is clear that the subject application for a freshwater wetlands permit must be denied. Although applicant's strong desire to build a single-family residence at the site was evident at hearing, construction of a residence within the wetland is plainly not an activity that "must be done." Applicant adduced no evidence to support a conclusion that construction of another residence in the subject community is an actual necessity that cannot be avoided.

440 Idaho Street

During the hearing, applicant noted that the site is located farther from Santapogue Creek, which runs through the wetland, than are other nearby properties that have been developed. Specifically, applicant noted that 440 Idaho Street, a parcel on the opposite side of the street from applicant's site, is considerably closer to the creek and was recently developed after a substantial amount of fill was brought in. Applicant questioned how it was possible that a proposed project to construct a residence at 440 Idaho Street could receive a DEC permit and be built while a similar proposal by applicant was rejected.

Department staff testified that the residence at 440 Idaho Street was constructed entirely within the wetland adjacent area rather than within the wetland proper (Tr, at 86-87). As such, the development of that parcel did not entail activities that are designated "P(X)" (i.e., incompatible) under the freshwater wetlands regulations (id.). To obtain a freshwater wetlands permit, the project sponsor for 440 Idaho Street was required to demonstrate only that the proposed activities would satisfy the "compatibility" standards (see 6 NYCRR 663.5[e][1]). In contrast, applicant's project entails "P(X)" activities

that must satisfy the more stringent "weighing" standards established for the protection of Class I wetlands.

The questions raised by applicant concerning development elsewhere along the wetland do not demonstrate that applicant's project will be in compliance with all applicable laws and regulations administered by the Department and do not establish a basis to challenge Department staff's denial of applicant's permit.

Estoppel

Applicant testified that she contacted the Department by telephone prior to purchasing the site and was advised that the site was not subject to any restrictions. Applicant did not provide specifics regarding the telephone call and did not obtain written confirmation from the Department regarding potential environmental restrictions at the site.

Nevertheless, assuming that applicant, after properly identifying the site, was advised by a member of the Department that the site was not subject to environmental restrictions, the Department's right and obligation to enforce the freshwater wetlands law would be unaffected. To conclude otherwise would run contrary to the long-established rule that a governmental unit may not be estopped from the proper discharge of its statutory duties (see e.g. Matter of Schorr v New York City Dept. of Housing Preserv. and Dev., 10 NY3d 776, 779, [2008] [noting that "[i]t is well settled that estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties" [internal quotation marks and citations omitted]).

The record clearly establishes that most of the site is located within a State-regulated freshwater wetland. The Department is obligated to properly administer and enforce the State's freshwater wetlands law and regulations. A statement made by a member of the Department in response to a telephone inquiry cannot serve to defeat that obligation.

CONCLUSIONS

The site is located, almost entirely, within the boundaries of State-regulated freshwater wetland BW-4, a Class I wetland. Activities proposed by applicant are listed as "P(X)" or incompatible with the functions and benefits of freshwater wetlands.

Applicant, Francesca Scaduto, 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.