

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

In the Matter

- of -

Applications for a freshwater wetlands  
permit and a tidal wetlands permit  
pursuant to Environmental Conservation  
Law articles 24 and 25

- by -

DAVID WATTS and EDITH WATTS

DEC Application No. 1-4728-03015/00006

HEARING REPORT

- by -

/s/  
Susan J. DuBois  
Administrative Law Judge

## PROCEEDINGS

An application for permits from the New York State Department of Environmental Conservation (the Department or DEC) was made by David Watts and Edith Watts, 33 West 74<sup>th</sup> Street, New York, New York 10023 (the Applicants) for construction at an existing house at 115 Pacific Walk in the Village of Saltaire, Town of Islip, Suffolk County. The site is located on Fire Island. The Applicants propose to construct a 310 square foot two-story addition to an existing single family dwelling built on pilings, remove an existing shed and shower and replace them with approximately 280 square feet of decking, and install a shower. This is DEC Application No. 1-4728-03015/00006.

The project would require a freshwater wetlands permit pursuant to Environmental Conservation Law (ECL) article 24 and part 663 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR part 663) and a tidal wetlands permit pursuant to ECL article 25 and 6 NYCRR part 661. The project site is within freshwater wetland BE-19.

Pursuant to ECL article 8 (State Environmental Quality Review Act, SEQRA) and 6 NYCRR part 617, DEC Staff determined that the proposed project is a Type II action under 6 NYCRR 617.5(c) and that the project is not subject to review under SEQRA.

DEC Staff denied the application by a letter dated January 13, 2003. On January 29, 2003, the Applicants requested a hearing. The matter was referred to the DEC Office of Hearings and Mediation Services to schedule a hearing. The notice of hearing was published in the Department's Environmental Notice Bulletin on October 1, 2003 and in the Islip Bulletin on October 2, 2003. The notice was also distributed as required by 6 NYCRR 624.3(d).

The hearing began on October 28, 2003, at the Saltaire Fire House, before Susan J. DuBois, Administrative Law Judge. The hearing continued on October 29, 2003 at the Islip Public Library and on February 26 and 27, 2004 at the Bayshore American Legion Post 365.

The Applicants were represented by Lark J. Shlimbaum, Esq., of the law firm of Shlimbaum and Shlimbaum, Islip, New York. DEC Staff was represented by Craig L. Elgut, Esq., Assistant Regional Attorney, DEC Region 1, Stony Brook, New York. No other persons, agencies or organizations requested party status in the adjudicatory hearing. On the first day of the hearing, John

Zaccaro, Village Trustee of the Village of Saltaire, stated that the Village of Saltaire (Village) intended to request amicus party status after the October 24, 2003 deadline for such requests. The Village did not, however, submit a petition for party status. The only two parties to the adjudicatory hearing were the Applicants and DEC Staff.

The hearing began with an opportunity for public comment on the application. Five persons presented comments, all of which supported issuance of the permit. Mr. Zaccaro stated that the Village is in favor of the application and of the wetland being exempt from the Freshwater Wetlands Act. He stated that the regulated status of the wetland interferes with the Village's ability to spray pesticides to control disease-bearing insects, with maintenance on houses and with the Village's ability to sell land it owns in the wetland. Nicholas Petschek, the Applicants' architect, and Hugh O'Brien, Chairman of the Saltaire Citizens Advisory Association, both stated that the wetlands act, as applied to the wetland in question, provides very little benefit but serious burdens. Kenneth Larson and Sedat Beqaj agreed with other speakers.

The issues identified for adjudication in the hearing all relate to the freshwater wetlands permit application. The issues concern whether the project is exempt from the Freshwater Wetlands Act (ECL article 24) pursuant to ECL 24-1305, and if not, what standards apply to review of the application and whether it meets the applicable standards (see "Issues for Adjudication" section of this report, below). ECL 24-1305 exempts certain land uses, improvements or developments from ECL article 24 if they received final approval by local authorities prior to the effective date of ECL article 24, as described in section 24-1305. With regard to the tidal wetlands permit application, however, DEC Staff stated that no issues were in dispute and that a tidal wetlands permit could be issued with standard conditions (10/28/03 Transcript pages (Tr.) 11 - 12).

The issues ruling was stated on the record on the first day of the hearing (10/28/03 Tr. 28 - 33). The parties jointly requested that the deadline for appealing the issues ruling be left open as long as the record is open, and I granted this request (10/28/03 Tr. 35). The adjudicatory hearing proceeded on the issues that were identified on the record.

During the issues conference, a question arose about whether the issue of exemption from the Freshwater Wetlands Act should be referred to the Department's General Counsel for a declaratory ruling, pursuant to 6 NYCRR 624.8(b)(1)(ix), instead of being

adjudicated in the hearing. DEC Staff stated that the Village of Saltaire had requested and received a declaratory ruling under 6 NYCRR part 619 on whether projects in the Village are exempt from ECL article 24 under ECL 24-1305 (DEC Declaratory Ruling 24-16 (Village of Saltaire) [July 27, 1995]). DEC Staff argued that the outcome of this issue in the present hearing could be extrapolated to the whole Village and that such an attack on the declaratory ruling should be presented to the General Counsel. The Applicants argued that the declaratory ruling had not considered evidence the Applicants wished to present. At the issues conference, I reserved on whether or not to refer this issue to the General Counsel, but stated that testimony could be presented on it in the hearing. On December 24, 2003, between the second and third days of the hearing, I issued a ruling stating that the issue was not being referred for a declaratory ruling and would be adjudicated in the hearing.

The following witnesses testified on behalf of the Applicants: Mario Posillico, Village Clerk, Treasurer, Administrator, Building Inspector and Assessor of the Village of Saltaire; the Applicants, Edith Watts and David Watts, Esq.; Nicholas Petschek, Registered Architect, New York City; and Ronald W. Abrams, Ph.D., Ecologist, Dru Associates, Inc., Glen Cove, New York.

DEC Staff called as its witness Robert Marsh, Biologist, DEC Region 1, Stony Brook, New York.

The parties submitted briefs on or about May 13 and 14, 2004 and reply briefs on or about May 28, 2004. The hearing record closed on June 1, 2004, with receipt of the reply briefs.

The Applicants' reply brief asked that official notice be taken that "transfers of property and Saltaire and Islip property taxes have been imposed on the basis of the plat descriptions for many decades prior to the 1975 grandfathered effective date of the freshwater wetlands statute." On September 7, 2004, Commissioner Erin M. Crotty directed that the record be reopened for further consideration of this statement.

The Applicants submitted additional documents on September 22 and October 12, 2004. DEC Staff stated it would rely on the existing record and not submit additional material. The record closed again on October 13, 2004.

## POSITIONS OF THE PARTIES

### The Applicants

The Applicants argued that their property is exempt from regulation under the Freshwater Wetlands Act pursuant to ECL 24-1305, based upon a map filed in 1918, the Village zoning code and previously-existing improvements. The Applicants maintain that the project consists of activities that are categorized in 6 NYCRR part 663 as P(N) (permit required; usually incompatible with a wetland and its functions of benefits, although in some cases the proposed action may be insignificant enough to be compatible) or P(C) (permit required, may be compatible with a wetland and its functions and benefits, although in some circumstances the proposed action may be incompatible). The Applicants' position is that if the project is not exempt, it meets the standards for issuance of a freshwater wetlands permit.

### Department Staff

DEC Staff stated that the project is not exempt from the Freshwater Wetlands Act because the Village did not have the necessary authority to grant final approval prior to the effective date of the Freshwater Wetlands Act (September 1, 1975), and that this issue was decided by Declaratory Ruling 24-16. DEC Staff maintains that the project consists of activities that are listed as P(X) (permit required; incompatible with a wetland and its functions and benefits). DEC Staff argued that expanding a house does not justify the impacts of the project and that a permit should not be issued.

## OFFICIAL NOTICE

The Department's permit hearing procedures provide that, "The ALJ or the commissioner may take official notice of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the department. When official notice is taken of a material fact not appearing in the evidence in the record and of which judicial notice could not be taken, every party must be given notice thereof and, on timely request, be afforded an opportunity, prior to decision, to dispute the fact or its materiality" (6 NYCRR 624.9(a)(6)).

Official notice is taken of DEC Declaratory Ruling 24-16 (Village of Saltaire), issued by the General Counsel of the Department of Environmental Conservation on July 27, 1995.

In their May 28, 2004 reply brief, the Applicants requested that judicial notice be taken "that transfers of property and Saltaire and Islip property taxes have been imposed on the basis of the plat descriptions for many decades prior to the 1975 grandfathered effective date of the freshwater wetlands statute" (Reply brief, at 8). Official notice is not taken of this statement. This is not a matter within general knowledge or within the specialized knowledge of the Department. Whether the Applicants proved this statement, through the documents they submitted for the reopened record, is discussed later in this report.

#### ISSUES FOR ADJUDICATION

The following issues were identified for adjudication:

- 1) Whether the project is exempt from the requirement for a freshwater wetlands permit, pursuant to ECL 24-1305;
- 2) Which activities under 6 NYCRR 663.4 apply to the project, and consequently, what levels of compatibility with freshwater wetlands apply when considering the standards for issuance of a freshwater wetlands permit; and
- 3) Whether the project complies with the applicable standards for issuance of a freshwater wetlands permit (6 NYCRR 663.5(e)(1) and (2)).

ECL 24-1305 provides, in part, that, "The provisions of this article [Freshwater Wetlands Act] shall not apply to any land use, improvement or development for which final approval shall have been obtained prior to the effective date of this article from the local governmental authority or authorities having jurisdiction over such land use." ECL 24-1305 also defines "final approval" as used in this section.

With regard to the second issue, 6 NYCRR 663.4 lists 43 categories of activities, occurring in freshwater wetlands or adjacent areas, and the corresponding levels of procedural requirements and levels of compatibility with wetlands. Under the interpretations offered by both parties, the procedural requirement for the activities involved in this project would be that a permit is required (if the project is not exempt under ECL 24-1305). The parties differ, however, on whether the activities can be described as ones that are usually compatible, usually incompatible although sometimes insignificant, or incompatible. For example, the Applicants state that the project involves item

14 (expanding or substantially modifying existing functional structures or facilities in a wetland, except as described in certain other items) which is P(N) (permit required, usually incompatible). DEC Staff states that this same work is under item 42 (constructing a residence or related structures or facilities in a wetland) which is P(X) (permit required, incompatible). The levels of compatibility of the proposed activities affect what standards in 6 NYCRR 663.5 apply in evaluating whether or not to issue a permit.

#### FINDINGS OF FACT

1. David Watts and Edith Watts, 33 West 74<sup>th</sup> Street, New York, New York 10023 (the Applicants) are the owners of a house on a parcel of land located in the northeastern portion of the Village of Saltaire, Town of Islip, Suffolk County, which is the site of the proposed project. The Village of Saltaire is on Fire Island. The site is lots 730 through 735, and 797 through 800 of block 38 of the Village of Saltaire, and the address is 115 Pacific Walk. The entire parcel is within freshwater wetland BE-19, a wetland identified on the New York State Freshwater Wetlands Map of Suffolk County (Exhibits (Ex.) 6, 13 and 17). Freshwater wetland BE-19 is a Class II wetland under the freshwater wetlands classification system set forth in 6 NYCRR part 664 (2/26/04 Tr. 225). The vegetation at the site consists primarily of grasses and other herbaceous plants, shrubs, plus some pitch pines and red maple. The water table is generally within two feet of the ground surface and there is standing water on the site at times (2/26/04 Tr. 79 - 80, 168 - 169, 207-209). The site is also in the adjacent area of a tidal wetland located east of the site. The location of the project is shown on the map attached as Appendix A of this hearing report.

2. Houses in this area of the Village are generally built on pilings over the wetland. Pacific Walk is a large boardwalk, and the houses are connected to it by smaller boardwalks (2/26/04 Tr. 91, 174) .

3. The existing house on the site was built by Ms. Watts's parents in the early 1930's (10/26/03 Tr. 116; see also, documents submitted with Ms. Shlimbaum's letter of October 12, 2004). It is a frame house that originally was a one-story house. The Applicants added decking around the house in the 1960's to provide a place for their children to play. The Applicants also added a second story in the mid-1970's. They removed some of the decking in the winter of 1990-91 once their children were grown, but there is still decking around most of

the exterior of the house as well as some second-floor deck area (10/28/03 Tr. 121-124; Exs. 27, 40-42).

4. In August 2000, the Applicants applied for a freshwater wetlands permit to replace the pilings that support the house, to add an approximately 334 square foot two story addition to the building, to re-pile and re-deck the existing decks and to add 255 square feet of new decking. On February 8, 2001, DEC Region 1 denied the permit, without prejudice to a new application for an alternative project. The denial letter noted that the portion of the project involving only re-piling of existing structures and replacement of existing decking could be permitted. On June 18, 2001, DEC Region 1 issued a permit for re-piling the existing house and for reconstructing the deck and shed (Exs. 49, 3 and 4).

5. The house is not winterized. The Applicants use it seasonally, primarily on weekends, and close the house in November each year. Approximately once a year, the Applicants' children and grandchildren visit for a week at the house. The Applicants have three married children and four grandchildren (10/28/03 Tr. 116; 10/29/04 Tr. 20-22, 144-147).

6. The house currently has four bedrooms and two and half bathrooms. The house also has a kitchen, a living room and an enclosed porch downstairs, as well as other small spaces downstairs, and a second living room on the second floor. An exterior shower is located on the deck. There are two septic tanks at the house, located near the northeast and southeast corners of the house. (10/29/03 Tr. 26, 100-104, 136-137; Ex. 10). The footprint (ground coverage) of the existing house is 1,490 square feet, plus decking that covers 1,320 square feet (Ex. 10; 2/26/04 Tr. 49).

7. The Applicants submitted an additional application on July 1, 2002, which is the subject of this hearing. In response to a request for additional information and a notice of incomplete application, the Applicants submitted additional drawings and narrative that are included in the application (Exs. 6, 8 and 10). Under the current proposal, the Applicants would add a two story, two bedroom structure to the house. This addition would have a footprint of 310 square feet. A total of 280 square feet of additional decking would also be built at locations around the new two story structure. The existing shower and a shed on the deck near the southeast corner of the house would be removed and replaced with decking within the same footprint, and a new shower would be installed on the deck near the northeast corner of the house. All or part of the existing decking would be renovated.

A bathroom in the existing house would be relocated to the addition.

8. The project would add two bedrooms to the house, for a total of six, but would not add any bathrooms. It would also result in a net addition of 235 square feet of deck (280 square feet of additional deck minus 45 square feet of deck that currently exists within the area where the two story structure would be built) (2/26/04 Tr. 44-45). The footprint of the house and decking (the land surface covered by structures) would increase from 2,810 square feet to 3,355 square feet, an increase of 545 square feet in the footprint of these structures (Exs. 6 and 10; 2/26/04 Tr. 44 - 47). If the proposed project were built, there would be 1,800 square feet of enclosed space on the site, which is the maximum amount allowed by the Village of Saltaire Code (2/26/04 Tr. 47 - 49).

9. The new two story structure would be a frame structure located eight feet south of the south wall of the existing house and connected to the existing house by a hallway. It would contain two bedrooms and a bathroom. Building the addition and the additional decking would require clearing the existing vegetation in the areas that are currently wetland and that would become occupied by structures (2/27/04 Tr. 29 - 30). There would also be some disturbance of the vegetation around the edge of the construction (2/26/04 Tr. 189). The vegetation in this area at present consists primarily of *Phragmites australis* (common reed) and three shrub plants of the species *Baccharis halimifolia* (groundsel bush) (2/26/04 Tr. 202 - 204). The three shrubs could be moved to an undisturbed location on the site (2/26/04 Tr. 100-101, 218). No grading would be necessary (2/26/04 Tr. 131). The term "limits of clearing and grading" appears on the plan submitted by the Applicants' architect on October 19, 2002 because DEC Staff required the architect to use this term (10/29/03 Tr. 160 - 164; 2/26/04 Tr. 188; Ex. 10).

10. Wetland BE-19 is a groundwater-driven wetland, in which groundwater rises to near the surface and moves northeast towards Great South Bay. The wetland has been affected by the existence of the Village. The presence of buildings sheltered the area from wind and salt spray, and the input of septic effluent added nutrients to the soil, leading to development of tree and shrub vegetation. Without the Village, the wetland would have been smaller and dominated by grasses and shrubs (2/26/04 Tr. 79-84).

11. The Village of Saltaire was incorporated in 1917. In 1911 and 1913, a map of property in Saltaire and an amendment of the

map, respectively, were filed with Suffolk County. These are also known as Saltaire Map No. 114 and Supplemental Map of Saltaire No. 484, respectively. The testimony in the present hearing does not state who filed these maps (10/28/03 Tr. 103 - 104). Section 55-1 of the Code of the Village of Saltaire identifies the surveyors who made the maps and describes them as maps of the property of Fire Island Beach Development Company, but does not state who filed them with the County Clerk (Ex. 14). In 1918, after the Village was incorporated, the Village Board of Trustees adopted a tax map of the Village, which was approved by the State Board of Tax Commissioners (10/28/03 Tr. 100 - 101; Ex. 17). The dimensions and configuration of the blocks, lots and rights of way on the 1911 and 1913 maps are the same as those on the 1918 tax map (10/28/03 Tr. 104; Ex. 17; September 15, 2004 certification accompanying copies of 1911 and 1913 maps). There is no evidence that the Village Board of Trustees granted approval of a subdivision plat as described in Village Law section 7-728.

12. The Village zoning code makes reference to the 1911 and 1913 maps in the context of defining the bayfront, interior lotted, unlotted acreage, and oceanfront areas of Saltaire, and the business, utility and residence districts of Saltaire, as used in the Village zoning code (Ex. 14, Code of the Village of Saltaire sections 55-1 through 55-8, 55-10 and 55-11, and possibly other sections).

13. In 1995, the Village of Saltaire petitioned for a declaratory ruling pursuant to section 204 of the State Administrative Procedure Act and 6 NYCRR part 619, to determine whether ECL 24-1305 exempted certain properties from designation as freshwater wetlands and from regulation as freshwater wetlands. On July 27, 1995, then-General Counsel Frank V. Bifera issued DEC Declaratory Ruling 24-16 in response to the petition. The declaratory ruling assumed that the pertinent facts submitted by the Village were correct, including the following:

"Freshwater wetland BE-19 includes improved and unimproved lots which are located on the Partition Map of 1878, Saltaire Map No. 114 and Supplemental Map No. 484 which were filed respectively, on July 16, 1878, March 29, 1911, and January 20, 1913, in the Suffolk County Clerk's Office [footnote omitted]. The Village has adopted a Building Construction Administration and Zoning Code ("Saltaire Code") which was in effect prior to September 1, 1975 [footnote in declaratory ruling: Saltaire Code Chapters 18 and 55 as adopted and last amended on September 22, 1973 are pertinent for the purposes of this Ruling.] Prior to

September 1, 1975, Section 18-6 of the Zoning Code specified that a building permit is required in order to construct buildings or structures or portions thereof in the Village. No other permits, approvals or authorizations were required. The Superintendent of Buildings/Building Inspector is responsible for issuing building permits. Saltaire Code, [section] 18-4. Prior to September 1, 1975, the Village Board of Trustees or other appointed body in the Village of Saltaire was not and are currently not authorized to issue conditional approvals of a final plat as the term is defined in [section] 7-728 of the Village Law or to issue site plan approvals for development" (Declaratory Ruling, at 2 - 3).

14. The declaratory ruling states that, "The Partition Map of 1878 was filed by the Fire Island Land Development Company to merely indicate the boundaries of lots depicted thereon. The remaining maps are further versions of the 1878 Map" (Declaratory Ruling, at 9). The declaratory ruling does not state who filed the second and third maps with the Suffolk County Clerk's Office in 1911 and 1913. There is no indication in the hearing record or in the declaratory ruling as to who, if anyone, approved the 1911 and 1913 maps. These actions could not have been taken by the Village of Saltaire because it was not incorporated until 1917.

15. The evidence in this hearing does not include any building permits for the original construction of the house nor for any of the additions and modifications made by the Applicants in the 1960's, 1970's and 1990's. Building permits are required for the construction, enlargement, alteration, or removal of buildings in the Village of Saltaire. This requirement existed in the Village Code as of 1973 and exists at present (Code of the Village of Saltaire section 18-6, Exhibits 14 and 15). The evidence also does not include any building permit for the project that is the subject of this hearing.

16. Wetland BE-19 provides only a limited amount of flood and storm control because the wetland is saturated by groundwater and does not receive runoff that would flood other locations if it did not accumulate in the wetland. The project would have a slight impact on this wetland function. Because the addition would be built on pilings, water could still accumulate under it. The project would, however, cause loss of vegetation in approximately 545 square feet of wetland and would reduce the amount of water removed through transpiration (2/26/04 Tr. 90 - 91, 100 - 102; 2/27/04 Tr. 32).

17. The wetland at the site provides habitat for rodents, deer, songbirds and insects. Although the three shrubs in the construction area could be moved, the project would result in a loss of 545 square feet of wetland vegetation. The vegetation enhances the value of the wetland as habitat and for food cycles, and its removal would have an impact on these wetland benefits. The impact would be small, due to the size of the area affected and because much of the vegetation is *Phragmites*, an invasive species. This vegetation, however, is preferable to no vegetation (2/26/04 Tr. 91, 100 - 101, 217, 221; 2/27/04 Tr. 16-18, 29-32, 37 - 38, 72 - 73).

18. Wetland BE-19 is not hydraulically connected to the aquifer that Saltaire uses for drinking water. As with the flood control function, the project would not affect any recharge of the upper glacial aquifer that occurs at the site because the addition and the deck would be built on pilings (2/26/04 Tr. 91 - 92, 125 - 126; 2/27/04 Tr. 41 - 42).

19. The vegetation in wetland BE-19 takes up nutrients, including nutrients released by septic tanks. Removing vegetation would reduce this function (2/26/04 Tr. 93 - 95; 2/27/04 Tr. 17 - 18).

20. Rain falling on the site pools and drains down through the soil. There are no streams or shorelines on the site, and it is essentially flat. Erosion control is not an issue at the site except during major storms (2/26/04 Tr. 95; 2/27/04 Tr. 32).

21. The site is private property. The only benefit the site provides in terms of recreation or open space is to the Applicants and their family and to members of the public who walk past while in Saltaire. The site is not accessible for educational use and is not a suitable research site (2/26/04 Tr. 92 - 93, 96 - 98; 2/27/04 Tr. 43 - 44) .

22. In the early 1990's, DEC Staff considered the possibility that a special regulation applicable to wetland BE-19 could be adopted under ECL 24-0903(2), (3) and (5), based upon the specific characteristics of that wetland (Ex. 59). The record of this hearing does not demonstrate that any land use regulation specific to BE-19 was proposed or adopted by the DEC or by the Village of Saltaire.

23. When the Applicants' entire family, including children and grandchildren, are staying at the house, there is enough space to accommodate all of them but some family members need to sleep on sofa beds in the upstairs living room or on the enclosed front

porch. The purpose of the proposed project is to add bedroom space to provide more comfortable accommodations when the entire family is staying at the house, which typically occurs for one week each year (10/29/03 Tr. 20 - 26).

24. It would not be practical to expand the second floor of the house, due to the way in which the existing structure was built and expanded. Adding bedrooms where the back deck currently exists would cut off existing rooms from access to the deck and block the windows of the existing rooms. If the upstairs living room were converted to bedrooms, this would eliminate a living room. The house, however, already has a living room downstairs. The Applicants often use the upstairs living room as a sleeping area (10/29/03 Tr. 133 - 143, 167 - 173; 2/27/04 Tr. 35-37).

#### DISCUSSION

##### Exemption from the Freshwater Wetlands Act

Section 24-1305 of the Environmental Conservation Law states:

"The provisions of this article shall not apply to any land use, improvement or development for which final approval shall have been obtained prior to the effective date of this article from the local governmental authority or authorities having jurisdiction over such land use. As used in this section, the term 'final approval' shall mean:

(a) in the case of the subdivision of land, conditional approval of a final plat as the term is defined in section two hundred seventy-six of the town law, and approval as used in section 7-728 of the village law and section thirty-two of the general cities law;

(b) in the case of a site plan not involving the subdivision of land, approval by the appropriate body or office of a city, village or town of the site plan; and

(c) in those cases not covered by subdivision (a) or (b) above, the issuance of a building permit or other authorization for the commencement of the use, improvement or development for which such permit or authorization was issued or in those local governments which do not require such permits or authorizations, the actual commencement of the use, improvement or development of the land."

Several DEC declaratory rulings have interpreted this section, including Declaratory Ruling 24-16 requested by the Village of Saltaire. That declaratory ruling arrived at three conclusions: (1) ECL 24-1305 applies to permit requirements and does not apply to the designation of freshwater wetlands pursuant to ECL 24-0301; (2) the provisions of ECL 24-1305 are not applicable to the Village-owned lots; and (3) the Village failed to demonstrate that all of the lots in the Village are "grandfathered" (i.e., exempt from freshwater wetlands permit requirements) solely by virtue of the filed maps and the adoption of zoning code prior to September 1, 1975 (emphasis added). The filed maps considered in the declaratory ruling were the Partition Map of 1878 and the maps filed in 1911 and 1913.

With regard to exemption from the freshwater wetlands permit requirements for regulated activities on privately-owned lots, the declaratory ruling stated that a land use, improvement or development for which a valid building permit was secured prior to September 1, 1975 (the effective date of the Freshwater Wetlands Act) is "grandfathered." The declaratory ruling cited 6 NYCRR 663.3(o) concerning requests from the public to the DEC regional permit administrator for decisions about such exemptions. This regulation states that the burden of showing the exemption from the permit requirements rests on the person seeking to benefit from the exemption. The declaratory ruling goes on to say that if certain lots in the Village of Saltaire have been improved pursuant to validly-issued building permits, this does not "grandfather" all future regulated activities on these lots (DEC Declaratory Ruling 24-16, at 13 and 14).

The Village of Saltaire challenged the declaratory ruling in a proceeding under article 78 of the Civil Practice Law and Rules (CPLR). Supreme Court, Suffolk County dismissed the proceeding based upon untimeliness, but also stated that the Court would have granted the Department's motion to dismiss on substantive grounds even if the CPLR article 78 proceeding was timely (*Village of Saltaire v Zagata*, Sup Ct, Suffolk County, July 7, 1999, Cannavo, J., Index No. 1995-26039). Among other things, the Court stated, "While the DEC does not seek to restrict a privately owned parcel from development if a Village building permit was issued prior to the effective date of the Article [ECL article 24], it can restrict any further development of parcels located within the boundaries of a Freshwater Wetlands (BE-19) district" (*id.* at 4). The decision to dismiss the petition was affirmed, without reaching any other contentions (*Village of Saltaire v Zagata*, 280 AD2d 547, 720 NYS2d 200 [2d Dept. 2001]).

In the present hearing, the Applicants argued their present project is exempt from the freshwater wetlands permit requirements notwithstanding the declaratory ruling. The Applicants argued that the Village Trustees of the Village of Saltaire had authority to approve subdivision plats (contrary to a conclusion reached in the declaratory ruling), that the declaratory ruling had not considered the 1918 map, and that the Applicants must have had a building permit for the work they did prior to 1975. Therefore, according to the Applicants, their current project is exempt and does not require a freshwater wetlands permit.

Village Law 7-728 sets forth the procedures to be followed by a village planning board in reviewing subdivisions and approving plats. Village Law 7-728(1) states that a village board of trustees may authorize the planning board to approve plats. DEC Declaratory Ruling 24-16 states that, based on the petition for a declaratory ruling and the Saltaire Village Code, no governmental body in the Village was authorized to approve plats prior to September 1, 1975 (Declaratory Ruling, at 8 - 9). The declaratory ruling stated there was no indication, in the record on which the ruling was based, that the Village of Saltaire Board of Trustees was authorized to approve subdivision plats under Village Law 7-728.

No party to the hearing asserted or showed that the Village of Saltaire has ever had a planning board, and the Applicants' brief states that "the Village of Saltaire has not seen fit to create a planning board as authorized by statute..." (Brief, at 8). The Applicants argued, however, that in the absence of a village planning board, the Village of Saltaire Board of Trustees retains the authority to approve subdivision plats. In support of this, the Applicants cited Real Property Law 335(2), which refers to approval of subdivision maps by the board of trustees of a village not having a planning board, and the decision in *Matter of Russell Oaks, Inc. v Planning Board of the Incorporated Village of Russell Gardens* (28 AD2d 569, 280 NYS2d 436 [2d Dept 1967], *affd* 21 NY2d 784, 288 NYS2d 477 [1968]). Of the maps in, or mentioned in, the present hearing record, the only one adopted by the Village Board of Trustees is the 1918 tax map.

Although the Commissioner would have the authority to revisit the declaratory ruling, this is not necessary since the Applicants did not show that the Board of Trustees of the Village of Saltaire ever approved a subdivision plat as contemplated in Village Law 7-728. There is no evidence of a resolution by the Village Board of Trustees approving a subdivision plat, or of any subdivision plat certified by a village clerk of the Village of

Saltaire. The 1918 map is a tax map, not a subdivision plat. As with the three maps discussed at pages 9 and 10 of the declaratory ruling, the tax map has a different purpose than a subdivision plat (see, 24 Op. State Compt. 851 [1968]). Any similarity between the 1918 map and the 1911 or 1913 maps does not affect the identity of the 1918 map.

In their closing brief, the Applicants requested that official notice be taken "that transfers of property and Saltaire and Islip property taxes have been imposed on the basis of the plat descriptions for many decades prior to the 1975 grandfathered effective date of the freshwater wetlands statute." As noted above, this is not a fact of which official notice can be taken. The request that official notice be taken of the quoted statement was made in a reply brief, precluding an opportunity for response by the other party. On September 7, 2004, Commissioner Erin M. Crotty directed that the record be reopened pursuant to 6 NYCRR 621.15(b) for further consideration of the quoted statement. This direction was stated in a letter to the parties from James T. McClymonds, Chief Administrative Law Judge. The Commissioner gave the Applicants the opportunity to elaborate on the statement and to submit any relevant documents for the record. The Commissioner also noted that no building permits for work on the building were in the record, and allowed such permits to be submitted as part of the re-opened record.

In the hearing record as it existed before being reopened, the reference to "the plat descriptions" was vague in view of the Village of Saltaire documents in evidence or discussed in the testimony. The Village Clerk, who was called as a witness by the Applicants, testified about two maps that are referred to in the Village zoning code. He stated that, in comparison with the 1918 tax map that is in evidence as Exhibit 17, these are "the same maps, very similar." The two other maps, however, were not offered into evidence by the Applicants despite an objection to a question being asked about the other maps when they were not in evidence, and related objections to questions about interpreting or characterizing the map references in the Village code, which objections were sustained (10/28/03 Transcript (Tr.) at 100 - 106). No map or other document labeled as a plat or plat description was in evidence.

The documents submitted by the Applicants for the reopened record included certified copies of the maps referred to in the zoning code (maps dated 1911 and 1913). The certification accompanying the copies states that the dimensions and configurations identified on these maps are, to the best of the knowledge and belief of the Village Clerk, "identical in all

respects to those on the Tax Map of the Village of Saltaire which was approved by the Board of Trustees of the Village of Saltaire on July 12, 1918." The Applicants also submitted an affidavit by the Village Clerk, stating among other things that the zoning map of the Village is essentially a replication of the 1911 and 1913 maps, and that the "1918 plat approved by the Board of Trustees of the Village of Saltaire after its incorporation in 1917 is identical in all respects to the above referenced maps of 1911 and 1913." The affidavit also discussed, and provided examples of, documents in which the block and lot system from the 1911 and 1913 maps was used to identify property in Saltaire for purposes of real estate taxes, certificates of occupancy, deeds of property transfer and land surveys.

Despite use of the terms "plat" and "plat descriptions" in the Applicants' supplemental documents, the record still does not contain evidence of any subdivision plat having been approved by the Village of Saltaire. No plat dated 1918 was submitted for the reopened record. The only map dated 1918 that is in the record is the 1918 tax map. Although the Applicants submitted evidence demonstrating that the block and lot system used in the 1911, 1913 and 1918 maps was used in describing property for purposes of property transfers and property taxes, they have not shown that any of these maps were plat descriptions in the sense of subdivision plats. The project is not exempt under ECL 24-1305(a).

In the Village of Saltaire, a building permit is necessary before constructing, enlarging, altering or removing a building. No building permits for any work on the Applicants' house are in the hearing record. The Applicants argued that an answer in the testimony of Mr. Posillico should be interpreted as meaning that building permits must have been issued for the work. The question and answer are as follows:

"Q. Prior to 1975, when the Fresh Water Wetlands Act was enacted, prior to 1975 under the Village code was the Watts proposed building in compliance with the building requirements?

A. Yes." (10/28/04 Tr. 107; see Applicants' brief at 17).

This question followed questions about compliance with the Village zoning code. With regard to evaluating whether building permits were issued for the earlier work, this answer can be given little, if any, weight because the context of the questions immediately preceding this one suggests that the answer had to do with whether the project complies with the zoning requirements

such as lot coverage, not with the procedural step of getting building permits. Mr. Posillico was not asked whether the Village had issued building permits for any of the work already done on the house. Counsel for DEC Staff asked Mr. Posillico whether the Village had issued a permit for the proposal that is the subject of this hearing, and the answer was "no." In response to the next question, of why a permit was not issued, Mr. Posillico replied, "I don't have an application before me." (10/28/03 Tr. 108).

The Applicants offered a drawing prepared by Mr. Watts as evidence of prior work on the house. This exhibit (marked as Ex. 47 for identification) was not received in evidence for reasons stated at pages 14 through 17 of the October 29, 2003 transcript. Later that day, counsel for DEC Staff asked Mr. Watts if he had obtained building permits for the house expansions occurring from 1963 through the present. Mr. Watts stated he believed he had permits for all of them, but he had not checked the file. In response to further questions, Mr. Watts stated that he did not have any such permits with him, that he thought the Applicants had asked the Village Clerk to find them, and that he assumed the Village records include a permit for construction of the second story of the house (10/29/03 Tr. 92 - 94). When Mr. Petschek, the Applicants' architect, testified in February of 2004, DEC Staff asked him whether he had determined if building permits were issued for any aspects of the existing structure, and Mr. Petschek replied, "No, it wasn't necessary." Mr. Petschek testified that he had looked at the village records to see if there were any plans on file, and that he believed there were a set of blueprints but he did not look to see if those had been "signed off." Mr. Petschek later said the blueprints might have been provided to him by the Applicants. He had not determined whether any building permits were issued for any of the existing decking (2/26/04 Tr. 17 - 22). The inference that the Applicants argue should be drawn from Mr. Posillico's answer quoted above cannot be made.

When the Commissioner reopened the record, she allowed the Applicants to submit any building permits obtained prior to 1975 for work on the Applicants' residence, provided such permits were appropriately authenticated. The Applicants provided copies of correspondence concerning pre-1975 construction work, which did not include building permits. In an affidavit describing work done on the house, they stated that, based upon the common practice in Saltaire as allowed under the building code, it is likely the contractors who did the pre-1975 work would have obtained the building permits. Both contractors are now deceased.

The Applicants also submitted an affidavit by the Village Clerk, who stated that the Applicant's house file does not contain documents prior to 1975. The Village Clerk attributed this to inconsistencies in the Village's record keeping or loss of records from floods or other events.

Even if construction of the existing house was authorized by building permits, this would not make the current proposal exempt from the freshwater wetlands permit requirements under ECL 24-1305(c). As stated in Declaratory Ruling 24-16, "Furthermore, if certain lots in the Village have been improved pursuant to validly-issued building permits, this does not "grandfather" all future regulated activities on those lots. This determination is limited to the scope of the development authorized by the building permit which was secured prior to September 1, 1975" (Declaratory Ruling at 13 - 14).

Under 6 NYCRR 663.3(o), the burden of proof to demonstrate an exemption based on an approval by a local government is on the person seeking the exemption, and that the person should provide supporting documentation. The Applicants did not meet this burden of proof.

The Applicants also argued that ECL 24-1305(c) does not only relate to building permits but also refers to use of property, and that if one has a residential use, that use is permitted to continue (10/29/03 Tr. 10-11). The reference in ECL 24-1305(c) to "actual commencement of the use, improvement or development of the land," however, applies in those local governments that do not require building permits. The Village of Saltaire requires building permits, so this latter portion of ECL 24-1305(c) does not apply. Further, it is undisputed that the Applicants' residential use of the property may continue.

For the reasons stated above, the proposed project is not exempt from the freshwater wetlands permit requirements under ECL 24-1305(c).

#### Activities under 6 NYCRR 663.4

The second issue identified for adjudication is which activities under 6 NYCRR 663.4 apply to the project, and consequently, what levels of compatibility with freshwater wetlands apply when considering the standards for issuance of freshwater wetlands permit. Section 663.4 contains a numbered list of activities (listed as "items") and the corresponding procedural requirements and levels of compatibility with

wetlands. The parties differ in their interpretation of which activities describe the work proposed by the Applicants.

DEC Staff argues that the project should be evaluated as items 23 (clear-cutting vegetation other than trees, except as part of an agricultural activity), 25 (grading), 38 (introducing or storing any substance, including any chemical, petrochemical, solid waste, nuclear waste, toxic material, sewage effluent or other pollutant, except as described in items 39, 40, and 41),<sup>1</sup> and 42 (constructing a residence or related structures or facilities).

The Applicants argue that the project should be evaluated as item 14 only (expanding or substantially modifying existing functional structures or facilities, except for activities covered by item 13, 19 or 30).

The application documents and other information in the record support evaluating the project under items 23 and 14, but not 25, 38 or 42.

Mr. Marsh testified that it is common construction practice to clear the work area entirely of vegetation before beginning to build. The area under the new structures would remain unvegetated due to shading. Although Dr. Abrams testified that the term clear-cutting refers to trees, there are two separate clear-cutting items in the list of regulated activities, one of which is clear-cutting timber (not applicable here) and the other by its own terms relates to vegetation other than trees. Item 24 (cutting but not elimination or destruction of vegetation) does not apply here since the vegetation will be eliminated in the area under the new structures.

With regard to whether the project is under item 14 or item 42, the "existing structures and facilities" to which items 10 through 14 apply include buildings, and are not limited to things such as bridges, highways, and bulkheads, contrary to the argument presented by DEC Staff. Item 10 specifically includes buildings in describing the scope of "existing functional structures," and there is no reason to conclude that buildings are not within the meaning of that term where it is used in items 13 and 14. The structure proposed by the applicants is an addition on an existing house. Although there may be a gray area between the projects covered by item 14 and those covered by item

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<sup>1</sup> Items 39, 40 and 41 have to do with pesticides. The pollutant involved in this case is sewage effluent.

42, the present project is more like an addition than a "guest cottage" (the description used by Mr. Marsh).

The testimony proved that the project would not involve grading, notwithstanding the label "approximate limits of clearing and grading" on the drawing of the project. The site is also essentially flat and it is hard to picture how grading would be involved.

DEC Staff argued that additional septic effluent would be introduced into the wetland due to the addition of two bedrooms. The Applicants argued that the project would not lead to an increased number of persons using the house. The number of bathrooms would remain the same if the project is built since a bathroom in the existing house would be removed and one would be added in the addition. No additional or enlarged septic tanks are proposed, and the Applicants' environmental consultant testified that the existing septic system would be adequate if the addition is built on the house. The Applicants' family could also increase their use of the house (and septic system) simply by visiting more often or longer even if the addition is not built. There was no testimony concerning any relationship DEC uses between either the number of bedrooms or the number of bathrooms and the estimated sanitary discharges from houses, either year-round houses or seasonal houses. There are enough unknown and unpredictable factors in the present situation that the project should not be evaluated under item 38.

#### Standards for permit issuance

Section 663.5 of 6 NYCRR contains the standards for issuance of freshwater wetlands permits. Applying these standards involves determining whether a proposed activity is compatible with a wetland and its functions and benefits. If the activity does not meet all three tests of compatibility or is identified in subdivision 663.4(d) as "X" (incompatible), the need for the proposed activity must be weighed against the benefits lost.

In the present case, the project would involve expanding an existing functional structure, which is included among item 14 of section 663.4. A permit is required for this activity, and it is usually incompatible with a wetland and its functions and benefits (abbreviated as P(N)). The project would also involve clear-cutting vegetation other than trees, and is not part of an agricultural activity, item 23 of section 663.4. A permit is required for this activity, and it is incompatible with a wetland and its functions and benefits (abbreviated as P(X)).

The Applicants argued that item 13 (restoring, reconstructing, expanding or modifying existing functional structures or facilities which involves a temporary disturbance of less than 50 square meters (approximately 540 square feet) of ground surface), listed in section 663.4 as P(C) (permit required, usually compatible), should be used as a guideline to decide that the project is compatible with the wetland (Applicants' reply brief, at 22). Although disturbance at the site is around the upper limit of the size of disturbances described in item 13, the disturbance of the wetland by the proposed project would be permanent, not temporary. Even though the area under the house would remain wetland, the vegetation and its related functions would be eliminated.

Clearing the vegetation would be necessary in order to expand the structure, and expansion of the structure would prevent the vegetation from growing back in the area that would be shaded and occupied by the house addition and the new decking. The project as a whole is incompatible with the wetland and its functions and benefits, and is subject to the weighing standards in 6 NYCRR 663.5(e) (2).

The weighing standards as set forth in section 663.5(e) (2) differ depending on what class of wetland is affected. The wetland in the present case is a Class II wetland. For Class II wetlands, the proposed activity must be compatible with the public health and welfare, be the only practicable alternative that could accomplish the applicant's objectives and have no practicable alternative on a site that is not a freshwater wetland or adjacent area. The proposed activity must minimize degradation to, or loss of, any part of the wetland or its adjacent area and must minimize any adverse impacts on the functions and benefits that the wetland provides. A permit shall be issued only if it is determined that the proposed activity satisfies a "pressing" economic or social need that "clearly outweighs" the loss of or detriment to the benefit(s) of the Class II wetland (6 NYCRR 663.5(e) (2)).

Section 663.5(f) (5) defines certain terms used in the weighing standard. The term "[p]ressing should suggest that for the need to outweigh the loss of or detriment to a benefit of a Class II wetland, it must be urgent and intense, though it does not have to be necessary or unavoidable" (6 NYCRR Section 663.5(f) (5) (ii)). The term "clearly outweighs" "means that the need for the proposed activity must outweigh the loss of or detriment to the benefits in a way that is beyond serious debate, although there does not have to be a large or significant margin

between the need and the loss" (6 NYCRR Section 663.5(f) (5) (iii)).

The impacts on the wetland and its values are not large, but there are adverse impacts due to loss of habitat. In addition, eliminating vegetation in the project area will reduce nutrient uptake and transpiration on the site. While these effects are also small, they are not negligible in an area where septic systems are sitting in the groundwater and where the houses and roadways are on pilings over a wetland.

DEC Staff argued that a "pressing economic or social need" should be interpreted to mean a need by the public as a whole, not by an individual applicant, and that economic and social need may include facilities such as sewer systems, schools, and fire and police protection (DEC Staff brief, at 30). The citation offered by DEC Staff in support of this position actually lists such facilities in describing the economic or social burden imposed on the public as a result of development, that must be taken into account in considering the economic and social need for a project (6 NYCRR 663.5(f) (3)).

In the present case, the Applicants did not assert or show any economic need for the project. Their stated purpose in expanding the house is to end the "collegiate style of living," with people sleeping on sofa beds in the upstairs living room and the enclosed front porch, that occurs during the week each summer that the Applicants' entire family is at the house, and to make the house more comfortable (Applicants' brief, p.3). Even if the "social need" for a project can be that of an individual, rather than of the public, this is not a "pressing" need that "clearly outweighs" the loss of wetland functions that would occur due to the project.

The project does not have any practicable alternatives on a site that is not a freshwater wetland or adjacent area because the Applicants' entire site is within the wetland. With regard to other alternatives, however, Mr. Watts testified that he had not substantially considered converting the upstairs living room into bedrooms (10/29/03 Tr. 141- 142). Although it was not discussed in the hearing record, an additional question would be whether this room could be divided temporarily during the one week per year that the entire family is at the house. The room is already used as a sleeping area by the Applicants at times.

## CONCLUSIONS

1. Environmental Conservation Law 24-1305 does not exempt the proposed project from the requirement for a freshwater wetlands permit.

2. The activities under 6 NYCRR 663.4 that apply to the project are clear-cutting vegetation other than trees that is not part of an agricultural activity (item 23) and expanding or substantially modifying an existing functional structure (item 14). Both activities require a freshwater wetlands permit when, as here, they would take place within a regulated freshwater wetland. Item 23 is incompatible with a freshwater wetland and its functions and benefits. Item 14 is usually incompatible with a wetland and its functions and benefits, although in some cases a proposed action may be insignificant enough to be compatible. In the present case, expanding and substantially modifying the house and deck is integrally related to clear-cutting and permanently eliminating approximately 545 square feet of wetland vegetation, and is incompatible with preservation, protection and conservation of the wetland and its benefits.

3. The weighing standards in 6 NYCRR 663.5(e)(2) apply to this project. The project does not satisfy a pressing economic or social need that clearly outweighs the loss of or detriment to the benefits of the wetland. The project does not meet the standards for permit issuance.

4. With regard to the tidal wetlands permit application, no issues were in dispute concerning the standards for issuance of a tidal wetlands permit, and this permit could be issued with standard conditions. Notwithstanding this conclusion, a tidal wetlands permit should not be issued because the project also requires a freshwater wetlands permit and does not meet the standards for issuance of a freshwater wetlands permit.

## RECOMMENDATION

I recommend that the freshwater wetlands permit application be denied.