

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

In the Matter

- of -

the Application for a Wild, Scenic and
Recreational Rivers System Permit pursuant
to Title 27 of Article 15 of the
Environmental Conservation Law and Part 666
of Title 6 of the Official Compilation of
Codes, Rules and Regulations of the State of
New York ("6 NYCRR"),

- by -

KATHLEEN WILSON,

Applicant.

DEC File No. 1-4734-01908/00001

DECISION OF THE ACTING COMMISSIONER

November 3, 2010

DECISION OF THE ACTING COMMISSIONER

Kathleen Wilson ("applicant") proposes to subdivide a 1.1 acre parcel that is located at 819 Meadow Road, Smithtown, Suffolk County, New York (the "property"), into two lots of approximately equal size. The existing single family dwelling with septic system, driveway and detached garage on the property would be situated on one of the lots, while on the other lot, applicant is proposing to construct a single family dwelling with septic system and driveway.

Because the property is located within the Nissequogue Recreational Rivers Area, it is subject to the requirements of the Wild, Scenic and Recreational Rivers System Act ("Act") (title 27 of article 15 of the ECL) and the accompanying regulations (6 NYCRR part 666). As set forth in the regulations, each private dwelling in a recreational river area must be on a lot of at least 2 acres in size (see 6 NYCRR 666.13[C][2][b], note [iii]) Accordingly, applicant has applied to the New York State Department of Environmental Conservation ("Department" or "DEC") for a Wild, Scenic and Recreational Rivers System permit and an area variance from the two acre minimum lot size requirement.

Department staff determined that applicant's proposed project failed to satisfy the standards for permit issuance and that applicant did not qualify for a variance from the two acre minimum lot size requirement (see Hearing Exh 4 [Notice of Permit Denial]). In response to the denial, applicant requested a hearing. Following referral to the Office of Hearings and Mediation Services, the matter was assigned to Administrative Law Judge ("ALJ") Helene G. Goldberger. An adjudicatory hearing conducted pursuant to 6 NYCRR part 624 was held on July 13, 2010.

ALJ Goldberger has prepared the attached hearing report in which she determines that the application and variance fail to meet the applicable legal standards and, accordingly, recommends that Department staff's determination to deny the permit and variance application be upheld. I adopt the ALJ's hearing report as my decision in this matter, subject to my comments below.

Applicant's residential property is a preexisting nonconforming lot (see Hearing Transcript, at 12). Applicant purchased the property in 1997 (see Hearing Transcript, at 74),

subsequent to the adoption of the Act and its implementing regulations.

No dispute exists between applicant and Department staff that the proposed project does not meet the regulatory requirement that each private dwelling in a recreational river area must be on a lot of at least two acres. Accordingly, the hearing addressed whether the project met the standards that would allow for an area variance from the "at least two acre" requirement. In making a determination, the Department considers the benefit to an applicant if a variance were granted, weighed against the adverse impacts upon river resources (see 6 NYCRR 666.9[a][2]) and other enumerated standards (see 6 NYCRR 666.9[a][2][i]-[v]; see Hearing Report, at 7-8).

In this proceeding, applicant has the burden of proof to demonstrate that her proposal will be in compliance with all applicable laws and regulations that the Department administers (see 6 NYCRR 624.9[b][1]). Applicant has failed to meet that burden.

The express purpose of the Act is to manage, protect, and enhance the control of land use and development in the wild, scenic and recreational river areas (see ECL 15-2709[1]). The Act expressly states that "[i]mprovident development" will deprive "present and future" generations of the benefit and enjoyment of unique and valuable river resources (see ECL 15-2701[2]; see also ECL 1-0101 [3][c][policy of the department to promote patterns of development "which minimize adverse impact on the environment"])). In order to fulfill this purpose with respect to recreational river corridors, the Department has established lot size dimensions of at least two acres to preclude overdevelopment and the impairment of natural resources in the recreational river corridor. The protections that have been established are not restricted to the river's shoreline, but extend to all properties within the designated river corridor. As set forth in the July 1985 Draft Environmental Impact Statement for Statewide Wild, Scenic and Recreational Rivers System ("Rivers System DEIS"), the Nissequogue Recreational River represents "an important open space within a developed area," and is the only river on the north shore of Long Island (see Rivers System DEIS, at 62).

If applicant's project were approved, the resulting two lots would each be approximately 73% less in acreage than the regulations require. This reduced sizing represents a

substantial deviation from the regulatory standard. By subdividing the property and constructing a residence on one of the subdivided lots, the existing condition and appearance of the property would be materially affected and further density would be added to the recreational river corridor.

Department staff acknowledges that, in some respects, the incremental effects on the river corridor of applicant's proposal to subdivide the property and construct an additional dwelling would not be large (see Hearing Report, at 6 [Findings of Fact 7-10]). However, Department staff has demonstrated that, by increasing density with the construction of a new single family dwelling, certain adverse environmental impacts will result (see, e.g., Hearing Transcript, at 97, 102-103, 104). Those impacts, together with the substantial deviation from the two-acre requirement, warrant the denial of applicant's permit application and variance request.

Department staff also contends that approval of the proposal would establish a negative precedent that would allow for future property subdivision within the corridor, and result, cumulatively, in adverse environmental impacts. Although no evidence exists in the record that additional lot subdivisions are currently planned in this vicinity, Department staff has raised a valid concern and the precedential impact of approving this subdivision must be considered. As the record demonstrates, lots exist in the vicinity of applicant's property that could be similarly subdivided if a precedent were established here (see, e.g., Hearing Transcript, at 88, 94; Hearing Exhibit 15).

Successive approvals of a similar nature would erode the "at least" two acre regulatory standard which is the standard established for the protection, management and enhancement of the river corridor.¹ An approval of similar projects could result in cumulative impacts that would impair the natural

¹ Applicant notes that in 2003 the Department allowed for the subdivision of a nearby property (Kass Estates subdivision), even though the property was less than two acres in size. No evidence was offered that would explain the basis for that subdivision approval, or the extent to which other factors applied (including the potential benefits of any mitigation measures). On the record before me, I decline to consider that subdivision proposal which was approved some seven years ago, to be controlling. Whatever may have been the basis for that subdivision approval, I conclude that approval of applicant's subdivision request would erode the "at least two acre" size requirement in this area, in contravention of the Act's policies and purposes.

resources of the river corridor.² Prior Commissioner decisions have similarly rejected permit and variance applications that would create a precedent for similar applications that could cumulatively lead to further loss of a natural resource (see, e.g., Matter of Porcelli, Decision of the Commissioner, October 22, 2004, at 1 [determining that application to construct a single family home in the freshwater wetland "would create a precedent for similar applications that would lead to the further loss of wetland acreage"]; Matter of Abrams, Decision of the Commissioner, January 10, 1986, at 1 [granting of variance under the Tidal Wetlands Act for construction of single family home would create "highly undesirable precedent in the vicinity"]).

I recognize the benefit to applicant if the variance were granted as it would allow her to construct a more modern home on one of the subdivided lots. However, this benefit does not outweigh the adverse impacts upon the river corridor that would result from allowing the proposal, which represents a substantial departure from the acreage requirement established by the regulations, to proceed.

Although applicant represented that she could not afford to build or purchase a house outside of the river corridor, no competent financial evidence was presented to support that position.³ Moreover, applicant's situation is self-created, in that she purchased the property subsequent to the adoption of the Act and its implementing regulations. Lack of knowledge of the restrictions would not be a sufficient defense (see, e.g.,

² Department staff reference ECL 3-0301(1)(b) as the basis to consider cumulative impacts, and I concur that this section provides authority for the Department to consider cumulative impacts in permit decision making. I also read the language of the Act as independently requiring that cumulative impacts be considered in the application and variance review process (see, e.g., ECL 15-2709[1][directs that regulations under the Act be promulgated to manage, protect and enhance wild, scenic and recreational river areas, and "primary emphasis" to be given to ecological, recreational, aesthetic, botanical, scenic, geological, fish and wildlife, historical, cultural, archeological and scientific features of the area]).

³ The Hearing Report suggests that applicant may have benefited from the recreational river corridor restrictions by paying less for the property when she bought it (see Hearing Report, at 13). Based on my review of the record, I am not able to conclude that when applicant purchased the property, the restrictions in the Act on the usage of the property were recognized or considered in the price of the property. Indeed, the property's location within a protected river corridor might result in a higher price for that property than for comparable properties outside the river corridor. The Act's development restrictions, in preserving and protecting natural conditions, could make the properties in the corridor more attractive.

Tharp v Zoning Board of Appeals, 138 AD2d 906, 907[3d Dept 1988][where prospective purchaser of property does not have actual knowledge of applicable provisions of ordinance, "he is bound by them and by the facts and circumstances concerning the use of the property which he may learn by exercising reasonable diligence"]; Matter of Monroe Beach, Inc. v Zoning Board of Appeals of City of Long Beach, 71 AD23d 1150, 1151 [2d Dept 2010][finding that alleged difficulty was self-created where applicable zoning regulations in effect when petitioner purchased the property]).

On this record, the Department's purpose in protecting the Nissequogue recreational river corridor from negative environmental impacts from the proposed development outweighs applicant's goal of subdividing the property and constructing a new residence on one of the subdivided lots. Accordingly, applicant's application for a Wild, Scenic and Recreational Rivers System permit, and a variance from the applicable two acre standard, is denied.

FOR THE NEW YORK STATE DEPARTMENT
OF ENVIRONMENTAL CONSERVATION

/s/

By: _____
Peter M. Iwanowicz
Acting Commissioner

Dated: November 3, 2010
Albany, New York

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DEC #1-4734-01908/00001

- by -

/s/

Helene G. Goldberger
Administrative Law Judge

September 20, 2010

PROCEEDINGS

Background and Brief Project Description

Kathleen Wilson, the applicant, proposes to subdivide a 1.1 acre parcel that is located entirely within the Nissequogue Recreational Rivers Area and construct a single family dwelling with septic system and driveway. The parcel, which contains the applicant's current home (a historic home built in 1890 known as Hill House), is located at 819 Meadow Road, Smithtown, Suffolk County, New York (SCTM # 0800-72-2-11). If the subdivision is approved, lot 1 will be approximately 23,968 square feet and will contain the existing single family dwelling with septic system, driveway, and detached garage. Lot 2 will be approximately the same size and is proposed to contain a new single family dwelling with septic system and driveway. The proposal requires an area variance from the two acre minimum lot size requirement established under the regulations governing the State's Wild, Scenic and Recreational Rivers System. *See*, subdivision 666.13(C)(2)(b), note (iii) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR).

To go forward with her project, Ms. Wilson seeks a Wild, Scenic and Recreational Rivers System permit and area variance pursuant to Environmental Conservation Law (ECL) Article 15, Title 27 and Part 666 of 6 NYCRR.

In March 2003, Ms. Wilson made her application for a permit from the New York State Department of Environmental Conservation (DEC or Department). By notice of determination of non-significance dated February 9, 2007, staff determined that the project is an unlisted action that would not have significant adverse environmental impacts, pursuant to the State Environmental Quality Review Act (SEQRA). On that same date, staff determined that the application was complete. By letter of September 24, 2009, Department staff concluded that the project failed to satisfy standards for permit issuance and would not qualify for a variance under 6 NYCRR 666.9(a)(2). In response to this denial, on September 30, 2009, pursuant to 6 NYCRR 621.10(a)(1), the applicant requested a hearing. The matter was docketed for a calendar call on January 20, 2010 in the Department's Region 1 office before Administrative Law Judge (ALJ) Richard R. Wissler. Based upon this appearance, the matter was scheduled for a hearing on July 13-14, 2010. Chief ALJ James T. McClymonds issued a notice of hearing dated May 4, 2010 and assigned the hearing to me.

The notice of hearing was published in the *Environmental Notice Bulletin* on June 16, 2010 and in the *Smithtown Messenger* on May 20, 2010. As announced in the notice, the hearing went forward on July 13, 2010 at the American Legion, Sherwood Brothers Post #1152, 95 Lake Avenue, St. James, New York.

DEC staff appeared by Jennifer Ukeritis, an assistant regional attorney at DEC's Region 1 headquarters in Stony Brook.

Ms. Wilson appeared by Vincent J. Trimarco, Esq., at 1038 West Jericho Turnpike, Smithtown, New York.

Legislative Hearing

The hearing notice allowed for written and oral comments on the permit application. No written comments were provided before or at the hearing, and other than representatives of the applicant and the staff, no one appeared at the hearing to offer comments.

POSITIONS OF THE PARTIES

Applicant

At the legislative hearing, Vincent Trimarco, Esq., the applicant's counsel, stated that the proposed subdivision exceeds the Town of Smithtown's zoning requirements and also meets the Suffolk County Health Department's requirements. He acknowledged that it did not meet the Department's regulations that were promulgated "after these lots were set up along Meadow Road." Transcript page (TR) 7. Mr. Trimarco stated that railroad tracks separate the parcels from the Nissequogue River. *Id.* He also stated that approximately 1,000 feet to the north of the railroad tracks is Route 25A – a main thoroughfare. *Id.* He also described Meadow Road as a main road – a well traveled connection - between Smithtown and Kings Park. TR 7-8. Mr. Trimarco characterized the area as “. . . not a pristine area buried in the woods . . .” TR 8. He mentioned that there are residential homes all along Meadow Road. *Id.*

With respect to the subject parcel, Mr. Trimarco emphasized that it was 760 feet from the water and that one could not see the property from the river. *Id.* He stated that 10-12 trains go by each day and that these trains were powered by diesel. *Id.* Mr. Trimarco argued that the line for the river corridor should have been on the other side of the train tracks because the railroad was a big divider. TR 9. He commented that there were plenty of woods for the wildlife and that one house would not make a difference with respect to noise and traffic. TR 9-10.

Mr. Trimarco maintained that the sanitary system was permissible under County Health Department requirements. TR 10. He explained that it was 34 feet to groundwater and that the sanitary system would be placed 10-12 feet deep leaving plenty of room between the system and groundwater. TR 10-11.

Mr. Trimarco concluded by stating that the applicant has no other alternative because she and her husband cannot afford to purchase another property outside the river corridor. TR 11. He added that it was clear that the 1890 house that was currently on the property was built to the side of the property to make room for construction of another home. *Id.*

DEC Staff

Jennifer Ukeritis, Assistant Regional Attorney, started her presentation by describing the subject parcel as a preexisting nonconforming 1.1 acre lot at 819 Meadow Road in Smithtown. TR 12. She reiterated that the Department's regulations required 2 acres to obtain a permit under the Wild, Scenic and Recreational Rivers Act (Act) program and therefore, the applicant's proposal constituted a significant area variance. *Id.* Ms. Ukeritis stated that there already was a house on the property that was within the Nissequogue recreational river corridor. *Id.* She

described the features of the surrounding area – the railroad to the north and Meadow Road to the south as the dividing lines for the recreational river corridor from the scenic area. TR 13. Assistant Regional Attorney Ukeritis stressed that the project did not meet the regulatory standards for a variance and that granting the variance would result in a variety of negative impacts. TR 13-15. She summarized these impacts as: change to character of the area, increase in traffic, increase in noise and light pollution, and decrease in aesthetic character. *Id.* She identified properties to the south and to the north that consist of parklands. *Id.* Ms. Ukeritis argued that increased housing density was adverse to the Act's mandate. TR 14.

Ms. Ukeritis stated that the Department staff would show in the hearing that the standards for the area variance have not been met by the applicant. TR 15.

Issues Conference

The hearing notice provided an opportunity for persons and organizations to make written filings for party status, and to propose issues for adjudication concerning the permit application. No filings were received by the deadline set nor were any received subsequently. As a result, the only conference participants were the applicant and the Department staff.

The issues conference was held immediately following the legislative session on July 13, 2010. At the start of the issues conference, the parties and the ALJ reviewed the exhibits that constituted the application as well as documents that the parties wished to include as part of their respective cases. Attached to this report is the exhibit chart.

Because there was no disagreement regarding the project's nonconformance with the permitting standards contained in 6 NYCRR 666.13(C)(2)(b), note (iii), the issues summarized by the ALJ and agreed to by the parties were the variance standards contained in paragraph 666.9(a)(2) and contained in the staff's notice of permit denial. Hearing Exhibit (Ex.) 4. Specifically, those consisted of:

- 666.9(a)(2)(i) - character of the river corridor – the extent to which a change would be produced and result in a detriment to nearby properties by granting an area variance;
- 666.9(a)(2)(ii) – whether the benefit sought by the applicant can be achieved by some method other than an area variance;
- 666.9(a)(2)(iii) – whether the requested variance is substantial – 1.45 acre variance (73%);
- 666.9(a)(2)(iv) – whether the variance will have an adverse effect or impact on the physical or environmental conditions in the river corridor. Staff maintained that the increased nutrient loads from fertilizer and sanitary runoff, pesticides from lawn care, and oils and other harmful pollutants from vehicles would negatively affect corridor; and
- 666.9(a)(2)(v) – whether the difficulty was self-created.

After this identification of issues, the parties accompanied me to the property for a site visit. This visit gave me an opportunity to view the existing house, the area proposed for development, the railroad tracks, the location of the State and Town parks, the road that abuts the property as well as the major roads that are nearby, the other houses on the road including the

property on the corner of Meadow Road and Route 25 that was the subject of a DEC permit (Kass Estates), the location of the river, the public access to the river, and the general area.

After the site visit, we returned to the hearing location to commence the adjudicatory hearing.

Adjudicatory Hearing

The parties agreed that since they made statements as part of the legislative hearing, those statements would constitute their opening statements in the adjudicatory hearing. The applicant offered two witnesses: Janet F. Haeberle of Suffolk Paralegal Services, Inc. and Detlev Lindenberg, the applicant's husband. The Department staff presented one witness: Robert Marsh, Region 1 manager of DEC's Bureau of Habitat, who works at DEC's Region 1 headquarters in Stony Brook. (Mr. Marsh's resume was received as Ex. 14.)

The parties agreed to the admission of the exhibits that were reviewed during the issues conference – Exs. 1a to 21a-k.

The hearing concluded on July 13, 2010. At the conclusion of the hearing, the parties' counsel agreed to submit written closing memoranda by August 20, 2010 and I received them electronically on that date per our agreement. Counsel also agreed to make a determination with respect to the preference for filing replies after review of the closing briefs. On August 26, 2010, the parties informed me that they did not intend to submit replies. Therefore, the record was closed on August 20, 2010, pursuant to 6 NYCRR 624.8(a)(5).

On August 9, 2010, I sent to the parties' counsel a list of proposed transcript corrections and requested that they provide any objections, or additional corrections, with their written closings. In his letter of August 11, 2010, Mr. Trimarco noted his concurrence with my corrections. In its letter transmitting its closing brief, staff presented three additional corrections which have now been adopted along with those previously made.

FINDINGS OF FACT

1. Kathleen Wilson lives at 819 Meadow Road in Smithtown, a parcel of 1.1 acres upon which her current home, garage, and driveway are located. Ms. Wilson seeks to divide this parcel into two lots and construct a single family dwelling with septic system and driveway upon the western section of the property. Ex. 3.

2. In 1997, Ms. Wilson acquired the property which was advertised as a possible subdivision. TR 74-75. The site is on the north side of Meadow Road, in the Nissequogue River Recreation River Corridor and approximately 650-670 feet from the Nissequogue River. *See*, ECL 15-2714(3)(ee); TR 89. The Nissequogue River is not visible from the property. TR 42, 108. After Ms. Wilson made application to the Town of Smithtown to subdivide the property, the Town referred her to the Department to address river corridor restrictions of which she was previously unaware. TR 75.

3. Meadow Road is a developed residential road that is also a busy corridor for school buses and trucks hauling garbage to the transfer stations. TR 52, 58, 88, 110 The land that the applicant wishes to subdivide and construct a home upon is currently densely vegetated. Ex. 16a. Directly west of this parcel is the Long Island Power Authority (LIPA) egress of about one-half acre. Ex. 21b. North of the property are the tracks for the Long Island Railroad. TR 88. North of the railroad tracks is town property comprised of 23 acres of open space including wetlands. *Id.* North of the park is Route 25A, a very busy road otherwise known as North Country Road. Ex. 21. South of the applicant's property is Meadow Road as described above. *Id.* South of Meadow Road is a state park known as Caleb Smith State Park (300 acres) and directly adjacent to the park is a BOCES facility. Ex. 17, TR 55, 105. To the east of the applicant's property are a few houses along Meadow Road including the subdivision identified as Kass Estates (Exs. 21 d and e) on the corner of Route 25 (Jericho Turnpike) and Meadow Road. The Nissequogue River is southeast of the Wilson property, flows under Route 25 and bends north in this area. TR 89; Ex. 21. There are also a town park and a county park to the east of the property. Ex. 21. There is a canoe access on the southeast intersection of Routes 25 and 25A in the county park - Paul Given Park. In addition, there are several commercially developed properties southeast of the subject property. Exs. 21, 21f-k; TR 72-74.

4. There is no dispute between the parties with respect to the fact that the proposed project is in the recreational river corridor and does not meet the requirement contained in 6 NYCRR 666.13(C)(2)(b), note (iii) that each private dwelling in a recreational river area must be on a lot of at least 2 acres. Therefore, the dispute to be adjudicated is whether or not the proposal meets the variance requirements in 6 NYCRR 666.9(a)(2).

5. On March 9, 2005, the Town of Smithtown issued its notice of coastal consistency regarding the Wilson proposal. Ex. 12. The Town determined that the project was consistent with the fish and wildlife policies of the local water revitalization program because it was not near any significant fish and wildlife habitat. *Id.* In addition, the Town determined that due to the location and proximity of the railroad, the property was separated from wetlands and surface waters. *Id.* The Town suggested a buffer of 30 feet along the rear property lines of the two lots "to mitigate any potential impacts to the surrounding environment." Ex. 12, Memorandum from Frank DeRubeis, Planning Director to Patrick R. Vecchio, Supervisor and Members of the Town Board dated February 24, 2005 regarding Coastal Consistency Review #04-10 – Kathleen Wilson, p. 2. The Town concluded that because the site was 760 feet from the Nissequogue River and screened by the railroad and vegetation from the river, the visual impacts would be minimal.¹ Ex. 12, p. 2. With respect to water quality, the Town determined that the applicant must revise the project to ensure that all runoff would be contained on-site and required the submission of a new drainage plan to the Planning Department. Ex. 12, p. 3.

6. On Meadow Road, there is only one other parcel that is not developed and that is the LIPA property directly west of the property at issue. TR 52. Lot sizes within 500 feet of the property range from .21 acres to .76 acres. Ex. 5. There are larger lots in the vicinity of the proposed project. TR 94. The homes are visible from Meadow Road and the addition of one other home will not be out of character with the existing characteristics of the area. Exs. 16b-d;

¹ Note that the Town and the Department staff have come to different conclusions regarding the distance between the applicant's parcel and the Nissequogue River.

TR 52. There are also a number of commercial properties on Jericho Turnpike (Route 25) in the area between the Town Park and the railroad tracks as well as in the area where Meadow Road and Route 25 meet. Exs. 21f, g, h, i, j, k. Some of these properties border the river – including a canvas shop, a bicycle shop, and a body shop. TR 72-73.

7. The construction of the home will increase the existence of impervious surfaces; however, the applicant is required by the Town's coastal determination to capture all runoff on-site. Ex. 12.

8. There will be loss of wildlife habitat but this would appear to be slight given the small amount of acreage that would be affected. TR 104-105. The surrounding parks, particularly the Caleb Smith State Park, would be more significant resources for wildlife habitat. TR 104-105, 115.

9. The increase in traffic coming from an additional one family home is not substantial. Meadow Road is already a busy thoroughfare for cars, school buses, and trucks hauling garbage to the various town solid waste facilities. Similarly, the additional noise and light pollution would not be significant. TR 104, 114.

10. With respect to sanitary effluent, the County Health Department is requiring the applicant to install additional cesspools to capture the discharges and to upgrade the existing sanitary system that serves the current home on the eastern part of the property. TR 56-57.

11. The applicant represents that she and her husband are inclined to have a small lawn with native plantings and use little or no fertilizers, pesticides, and herbicides on their garden. TR 64-65, 80. There is virtually no way to ensure that future owners of the property would adhere to these same practices. TR 93. Thus, it is possible that the addition of this home would add to nutrient loads from fertilizer, pesticides, oils and other harmful pollutants from vehicles. The drywells required by the Town of Smithtown will assist in capturing some of these pollutants. Ex. 12; TR 53, 65-66. At this time, however, these drywells do not appear on the plans submitted to the Department staff. TR 70-71.

12. The applicant's area variance is substantial – 73% from the 2 acre requirement. The average size of the lots in the area (within 500 feet) is .52 acres. TR 43. The applicant's lot size will be .55 acres. TR 44, 95.

13. The applicant could buy another property outside the river corridor to construct a home or an existing home but contends that she cannot afford to do so. The applicant purchased the Meadow Road property seven years after the Commissioner's Order and Decision (1990) finalized the boundary of the recreational river corridor. TR 74, 102.

14. There are approximately 16 lots on Meadow Road that could physically be subdivided in a manner similar to the proposal by Ms. Wilson, resulting in a doubling of the number of homes that exist in this corridor. TR 94, 99.

DISCUSSION

Legislative and Regulatory Framework

In 1973, the Legislature enacted the Wild, Scenic & Recreational Rivers System, Title 27 of Article 15 of the ECL, which recognizes “that many rivers of the state, with their immediate environs, possess outstanding natural, scenic, historic, ecological and recreational values.” L. 1973, c. 400, section 39. In order to protect these resources, the Legislature directed the Adirondack Park Agency and the Department to implement a Wild, Scenic and Recreational Rivers System that would designate the rivers and corridors subject to protection as well as the regulatory provisions that would restrict development. ECL 15-2707, 15-2709. The agencies responsible for implementation of this law are directed to place “primary emphasis . . . to protect. . . ecological, recreational, aesthetic, botanical, scenic, geological, fish and wildlife, historical, cultural, archeological and scientific features of the area.” ECL 15-2709(1).

As indicated above, the boundary for the recreational river corridor of the Nissequogue River was finalized in 1990. ECL 15-2709(2)(c) states that “[i]n recreational river areas, the lands may be developed for the full range of agricultural uses, forest management pursuant to forest management standards . . . , stream improvement structures for fishery management purposes, and may include small communities as well as dispersed or clustered residential developments and public recreational areas.” Thus, residential development is not necessarily adverse to the goals of the rivers system. However, the regulations promulgated to implement these protections require that the proposed land use is consistent with the purpose of the rivers system; that the resources are protected and the development will not have an adverse environmental impact; that no reasonable alternative exists for modifying the project or locating it outside of the corridor; and that actions taken by State agencies are protective of the resources of the designated rivers. 6 NYCRR 666.8(f).

The use guidelines set forth in subdivision 666.13(C)(2)(b), note (iii), provide that a permit is required for a residential structure located more than 250 feet from the recreational river or tributary bank and that any private dwelling must be on a lot of at least two acres. *See Matter of DeCillis*, Decision of the Commissioner, at 4, 2007 N.Y. Env. Lexis 52 (August 28, 2007), *confirmed on judicial review*, 69 AD3d 851 (2d Dep’t), *lv denied*, 14 NY3d 709 (2010). Section 666.9 of 6 NYCRR provides for variances from these restrictions. Ms. Wilson has applied for such a variance but the regulations provide that it can only be granted if the area requirements “would cause practical difficulty for the applicant. In making its determination, the department will consider the benefit to the applicant if the variance is granted, as weighed against the adverse impacts upon river resources. The department will also consider:

- (i) whether and to what extent a change will be produced in the character of the river corridor or a detriment to nearby properties will be created by the granting of the area variance;
- (ii) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance;
- (iii) whether the requested area variance is substantial;
- (iv) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the river corridor; and

- (v) whether the alleged practical difficulty was self-created, which consideration will be relevant to the decision of the department, but will not necessarily preclude the granting of the area variance.”

Subparagraph 666.9(a)(2)(i)-(v).

The regulations also provide that the applicant may provide financial evidence of hardship caused by the strict application of the rules. If the applicant is able to prove significant economic injury, the burden will be on the Department to establish that strict application of the regulations “is reasonably related to the purpose and policy of the act and this Part.” 6 NYCRR 666.9(a)(2).

Summary of Permit Denial Rationale

DEC Region 1 Deputy Permit Administrator Mark Carrara states in the Department staff’s notice of permit denial dated September 24, 2009, that the subject lot fails to meet either the permitting or area variance standards in Part 666. Pursuant to 6 NYCRR 666.9(a)(2)(i), he maintained that granting the area variance “will increase housing density and associated environmental impacts, including, but not limited to, increased runoff due to increased impervious surfaces, the loss of wildlife habitat, increase in sanitary effluent reaching groundwater, increase traffic, noise and light pollution leading to a decrease in the aesthetic qualities of the area. These impacts will occur immediately adjacent to large undeveloped parcels owned by New York State and the Town of Smithtown. Allowing this variance would produce a change in the character of the river corridor by increasing housing density and disregarding the Act’s mandate to preserve and restore the natural scenic and recreational qualities of the river area. (NYS ECL 15-2707[2][c][2]).” He also concluded that the application did not meet the other standards set forth in 6 NYCRR 666.9(a)(2)(ii)-(v).

The applicant notes in her closing memorandum that Mr. Marsh agreed in his testimony that the addition of this one home would likely not have major impacts with respect to light pollution and wildlife habitat. TR 103-104. However, Mr. Marsh did testify that the potential for this one home to set a pattern of increased development that would qualitatively affect the corridor was an important consideration. TR 94, 112. With respect to groundwater pollution and surface runoff, Mr. Marsh explained how the increase of these impacts that would be caused by this project and the resulting greater density are not in keeping with the protections endorsed by the Act. TR 96-97.

Regarding whether the applicant can achieve the benefit she seeks through an alternative method pursuant to 6 NYCRR 666.9(a)(2)(ii), the applicant has a home on the subject property. The proposed subdivision and additional home appear to be of financial benefit to the applicant and her husband, but not a necessity. The home currently on the property is historic and hence, if it was the applicant’s desire to live in a modern home, she could build one outside of the corridor. The applicant contends that she cannot afford to do so; however, there was no evidence provided of this constraint. In addition, one would assume that if the applicant sold the current home and property, it would be possible to buy or build a home elsewhere.

Concerning 6 NYCRR 666.9(a)(2)(iii), the Department staff's conclusions with respect to how substantial the requested area variance is – 73% - were not contested. As noted by Mr. Carrara in his notice of permit denial, the current lot at 1.1 acres is already 45% less than the 2 acre requirement. Ex. 4. What the respondent does strongly contest is the application of this restriction in light of the smaller lot sizes of the nearby homes. Wilson Closing Br., pp. 7-9. However, for most of these homes, the lots were determined prior to the enactment of the Act.

As discussed in *DeCillis*, in evaluating a variance application for residential development in the recreational river corridor on a parcel that did not conform to the 2 acre requirement, the staff had considered the nature of the development within 500 feet of the project.² TR 121. This was done to determine if the proposal was consistent with the character of the community. Through her consultant, Ms. Wilson produced this information to Department staff and this has revealed that excepting the parks, the average lot size within 500 feet is .52 acres in contrast to the applicant's proposal of .55 acres. Ex. 5. With the exception of the Kass property, there was no evidence presented that these lots resulted from subdivisions that the Department approved. While the Wilson subdivision might not stand out as different from many of the neighboring properties in size, it results in incrementally adding to the density of the area. Moreover, the attendant impacts are not consistent with the objectives of the recreational river corridor land use restrictions.

With respect to 6 NYCRR 666.9(a)(2)(v) regarding self-created difficulties, the applicant has created this situation by purchasing the home and property after the river corridor boundary had already been promulgated. TR 125. While the applicant's husband testified that he and his wife had no knowledge of the restrictions, constructive notice had been given. *See e.g. Zaccaro v. Cahill*, 100 NY2d 978 (2003) (because agency had adhered to statutory requirements, court found that DEC had provided adequate notice of wetland designation despite fact that landowner did not receive notice due to faulty tax assessment rolls.) As with any real property transaction, it is necessary to do extensive research to establish what restrictions if any are relevant. *See e.g. McGlasson Realty Inc. v. Town of Patterson Board of Appeals*, 234 AD2d 462 (2d Dep't 1996) (cited by staff in its closing brief at p. 13). The applicant's failure to do so should not result in a diminishment of the corridor's protections.

As for the application of 6 NYCRR 666.9(a)(2)(iv) - considerations of adverse physical or environmental impacts on the river corridor - Mr. Marsh testified candidly about the impacts of the proposed development. He admitted that the incremental effects of this one home would not be large. TR 93-94, 97-99, 102-105, 120. However, he explained that the purposes of the recreational river corridor is to not only protect the river but to minimize negative impacts of overdevelopment on the entire corridor that results in loss of wildlife habitat and the increase of pollution – water, air, noise and light. TR 109. At this time, the Meadow Road area is developed but there remains vegetation and mature trees that line the road – making the vicinity appear less densely populated. Exs. 16a-d. While the respondent stresses the developed nature of Meadow Road in her closing brief, these arguments do not address the large expanses of

² In *DeCillis*, *supra*, Commissioner Grannis did not rely upon the 500 foot analysis stating that there was insufficient information in the record on why this distance was chosen and because there were many other factors to consider in the overall analysis beyond the immediate neighborhood. He also indicated that it was improper to apply standards uniformly to all projects without making them part of law or regulation.

parkland. In fact, in the applicant's closing memorandum, the parklands are only mentioned as another example of a developed use in the descriptions of the area. *See*, Wilson Closing Brief, pp. 1-2.

Holistic, Cumulative Analysis

Mr. Marsh stressed in his testimony that while the Wilson proposal might not cause large negative environmental impacts by itself, it would lead to "exacerbating the problem." TR 97. The addition of this one home would lead to more pollution in the groundwater and more run-off, more traffic, more light, more noise. But fundamentally, the greater impact would be the magnification of these environmental problems as it set a precedent for the creation of potentially 16 more houses on Meadow Road. TR 104.

The applicant disputes this analysis by stating that the Kass subdivision was approved and therefore the precedent has already been set. Wilson Closing Br., p. 11. In addition, the applicant argues that the statute and regulations do not provide for the holistic and cumulative effects analysis that staff has put forth. *Id.* at 11-12. With respect to the Kass subdivision, I provide my determinations below. As for the staff's application of holistic and cumulative principles, I disagree with Ms. Wilson's conclusion. The very nature of the designation of the recreational corridor implicates a balancing of uses that can only be described as holistic. That is, the statute requires that the Department allow for certain kinds of development but limit these in the interests of ensuring that the natural scenic and recreational qualities be preserved and restored. ECL 15-2707(3)(c)(2), 15-2709(2)(c). The Department cannot undo the development decisions that were made prior to the Act. In this instance that means that the houses that sit on lots smaller than the acreage determined necessary to preserve and enhance the recreational river corridor remain as do the businesses that were established in this vicinity prior to the Act. However, the Department has been directed to find the ways to guide future development in a manner that is most compatible with the designation of this corridor. The Act certainly calls for a holistic approach in this effort by cataloging a host of values to protect: "ecological, recreational, aesthetic, botanical, scenic, geological, fish and wildlife, historical, cultural, archeological and scientific features of the area." ECL 15-2709(1). As stated by Mr. Marsh in his testimony, the granting of an area variance in this application doesn't assist in preservation and restoration of the scenic and recreational qualities of the Nissequogue River recreational river corridor. TR 103.

As for the staff's concern regarding cumulative impacts, while each application must be reviewed on its own merits, part of that analysis must also be the precedential effects, especially in a case where they can be readily identified. The construction and use of any individual house may have some negative effect on the environment yet still conform to regulatory requirements that allow for its construction. But in this case, Mr. Marsh has elucidated how the Wilson proposal not only will add incremental negative effects to the environment, it will also set up a development regime that will potentially allow for the addition of many more homes. With this additional density, all of the environmental impacts that were addressed by staff in its denial and in Mr. Marsh's testimony will be magnified. TR 92-94. While the regulations do not specifically call for this cumulative impact analysis, they do ask for a very broad analysis of "adverse effect or impact on the physical or environmental conditions in the river corridor." 6

NYCRR 666.9(a)(2)(iv). Moreover, as noted by staff in its closing memorandum (pp. 4,6), the Department must consider the cumulative effects on the environment of any permit applications before it. ECL 3-0301(1)(b). Therefore, staff's inclusion of cumulative impacts in its analysis falls within both the Department's statutory and regulatory mandates. *But cf. Matter of Mary Palmeri*, 2007 N.Y. Env. Lexis 17 (March 27, 2007).

The applicant criticizes the staff's view of the Meadow Road area by pointing out the number of residential homes, the commercial development, the busy roads including Meadow Road, and the proximate Routes 25 and 25a, as well as the railroad which is an active corridor for diesel trains. The applicant's counsel in his opening remarks states that the area is far from pristine. However, despite the developed nature of Long Island, the Legislature has not excluded it from the protections of the Act. And in areas where there is greater density and fewer areas of open space, the protections can be more critical given this scarcity and the need to achieve adequate protections for the great number of people who will enjoy them. *See*, staff's closing brief at p. 5. In my issues ruling in *Matter of American Marine Rail, LLC*, 2001 N.Y. Env. Lexis 13 (August 25, 2000), regarding areas of scarce natural resources, I made a similar finding that these areas can be of much greater importance.

Kass Estates Subdivision

During the hearing, the applicant pointed out that in May 2003, the Department had allowed a subdivision on Meadow Road, similar to the applicant's and close to the Wilson property.³ Exs. 21d and e. Under questioning by Mr. Trimarco, Mr. Marsh explained that he was new to the Department during the review of that project. TR 106. While he stated he was involved in the Kass permit review process, he testified that he was not a decision maker. TR 100, 107. He explained that he was not aware of all the factors that may have played a part in the granting of the Kass permit application and also intimated that it is possible that this application would not be granted today by staff. TR 100, 113.

As the Court of Appeals held in *Matter of Charles A. Field Delivery Serv.*, 66 NY2d 516 (1985), an administrative agency must not come to a different decision when presented with essentially the same facts as those that were present in a prior decision. That is, unless it presents a reason for the departure. In addition, the court said, "[administrative agencies are] free, like courts to correct a prior erroneous interpretation of the law by modifying or overruling a past decision." Thus, as stated by the Appellate Division, First Department *In Matter of Stahl York Avenue Co. LLC v. City of New York*, __ AD 3d __ (2010), NYLJ, July 8, 2010, p. 26, "... even where there has been a reversal of a prior administrative decision, it will be upheld if the proffered reasons for the reversal or modification find rational support." This is an appropriate holding akin to the long established holding that estoppel does not generally apply to the government in its efforts to enforce its laws. *Wedinger v. Goldberger*, 71 NY2d 428 (1988). In important endeavors, such as the protection of our vanishing environmental resources, the mistakes of a staff member or even the erroneous decisions of an agency should not be borne by the public that relies upon the appropriate application of the environmental laws by the

³ I note that in *Matter of William Haley*, 2010 N.Y. Env. Lexis 22 (February 22, 2010), a wetland permit proceeding, the Commissioner determined that it was appropriate to consider evidence regarding permits that were issued to an adjacent property owner.

governmental agency. Therefore, the Commissioner should reject the applicant's argument that the Kass subdivision has established a precedent that should apply to this application. Wilson Closing Br., p. 11.

Accordingly, while I cannot speculate as to why the Kass permit was issued by Region 1 and the parties did not provide any definitive answers in that respect, it is clear that the Wilson application no matter how similar does not meet the variance standards and should not be issued. While the financial benefit of granting the permit to Ms. Wilson would undoubtedly be significant, it does not outweigh the negative environmental impacts. There may not be a noticeable change to the character of the immediate area through permit issuance, but as Mr. Marsh testified, the cumulative effects triggered by granting this permit would be very significant. Mr. Marsh testified that potentially 16 more homes would be added to this vicinity based upon the other larger lots that could be subdivided and developed. Ex. 21. Certainly, the addition of 17 homes with the attendant driveways, septic systems, cars, and lawns would diminish the present "green" appearance of the corridor. TR 94. In addition, the amount of pollutants, light, and noise would have a detrimental effect on the river corridor through impacts to water quality, aesthetic characteristics, and loss of wildlife habitat.⁴

Moreover, even if the Commissioner were to disagree with the cumulative impact analysis that staff has advanced and which I have adopted, it is appropriate for staff and the Commissioner to determine that despite the prior development and permitting of the Kass subdivision, based upon the facts of this matter and the applicable regulations, a "tipping point" has been reached and no further development of this nature should occur in this location.

Alternatives, Substantiality, Self-Created Difficulties

As noted above, the applicant could build or purchase a house outside of the river corridor. Through her husband's testimony, Ms. Wilson represented that she could not afford to do so; however, there was no evidence presented to support that conclusory statement. Particularly when the applicant has an existing home on these premises, there was no reason established why that home could not be sold and a new one purchased and built if the aim was to own a more modern residence.

The applicant's area variance is certainly substantial at 73%. See staff's closing brief, p. 11. As noted in *DeCillis*, the applicant's argument that many other parcels are of similar size is not persuasive because the subdivision proposed by the Wilsons is not a pre-existing one. ALJ's Hearing Report, at 18; 2007 N.Y. Env. Lexis 52, *47-48 (8/28/07).

And, the applicant's difficulties resulting from the recreational river corridor restrictions are self-created because the boundaries were in effect prior to the purchase of the property. *Id.* at *46 citing *Matter of Joachim*, ALJ's Hearing Report, at 18, 20; 2007 N.Y. Env. Lexis 34, *54

⁴ In *DeCillis*, ALJ Villa dismissed the staff's testimony regarding future development triggered by the permitting of the *DeCillis* application as speculative. I do not find Mr. Marsh's testimony on this topic speculative at all. As Ms. Wilson has ventured to do – substantially increase property values through subdivision of her property despite the existence of a home – so would other landowners similarly situated. And, the precedential effects of such permitting are demonstrated by the applicant's reliance on the Kass Estates subdivision permit.

(5/31/07). Presumably, the applicant benefited from those restrictions by paying less for the land and home. But in any case, the applicant's desires to benefit financially at this time cannot outweigh the law's protection of the resources. *Id.*

Practical Difficulty and Competent Financial Evidence

As Judge Villa held in *DeCillis*, 6 NYCRR 666.9(2) provides that an applicant must also show that the area requirements would cause "practical difficulty." ALJ Villa cited to *Matter of Sasso*, 86 NY2d 374, 381 (1995) (citing *Matter of Sena*, 45 NY2d 105, 108 [1978]) in which the Court of Appeals reiterated its historic view of "practical difficulty" to be that the government must evaluate "whether the strict application of the ordinance . . . will serve a valid public purpose which outweighs the injury to the property owner."⁵ As in *DeCillis*, the Department's purpose in protecting the Nissequogue recreational river corridor from negative environmental impacts resulting from unnecessary development outweighs the Wilson applicant's goal of subdivision and a second home.

Pursuant to 6 NYCRR 666.9(a)(2), Ms. Wilson did not present "competent financial evidence" that would demonstrate that the "strict application of the . . . [regulations would] result in significant economic injury."

CONCLUSION

In addition to the discussion above, as noted by staff in its closing memorandum (pp. 7-8, 12), the respondent failed to present any expert evidence that would contravene the findings of staff's expert, Mr. Marsh, with respect to the impacts of this proposed project. Accordingly, based upon this and all the above stated factors, the staff's determination to deny this permit and the variance application should be upheld.

The Wilson permit application and waiver request do not meet the standards set forth in Part 666 for a recreational river corridor permit or variance and should be denied.

⁵ In *Sasso*, the Court was asked to review the determination of a town zoning board with respect to a boat house application that was opposed by neighbors. The "practical difficulties" test was part of former Town Law § 267-b(3). The Court held in *Sasso* that this test was no longer applicable because the Legislature had adopted a new law (L 1991, Ch 692) that replaced the "practical difficulties" standard with a five part test. DEC has incorporated that same five part test into the rivers system area variance requirements in subparagraphs 666.9(a)(2)(i)-(v). However, DEC uses a variance review process that not only maintains the "practical difficulties" test with the addition of the five part evaluation but also includes a "competent financial evidence" provision discussed above.