

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter of the Application of

BRIAN ZAZULKA

for a freshwater wetlands permit
pursuant to article 24 (Freshwater Wetlands) of the
New York Environmental Conservation Law and
part 663 (Freshwater Wetlands Permit Requirements)
of title 6 of the Official Compilation of the
Codes, Rules and Regulations of the State of New York
to construct a two-family dwelling
in Freshwater Wetland AR-16,
Richmond County Tax Block 6784, Lot 70,
Staten Island, New York.

DEC No. 2-6405-00425/00001

DECISION OF THE COMMISSIONER

December 27, 2004

DECISION OF THE COMMISSIONER

Brian Zazulka ("applicant") has applied for a freshwater wetland permit to construct a two-family dwelling on Richmond County Tax Block 6784, Lot 70, Staten Island, New York. The attached hearing report of Administrative Law Judge ("ALJ") Kevin Casutto is hereby adopted as my decision in this matter subject to my comments below.

The New York State Legislature, in adopting the Freshwater Wetlands Act ("Act"), declared it to be the public policy of the State of New York to preserve, protect and conserve freshwater wetlands and the benefits derived from them, to prevent their despoliation and destruction, and to regulate the use and development of freshwater wetlands to secure their natural benefits (see Environmental Conservation Law § 24-0103). The regulations of the Department of Environmental Conservation (the "Department") contain the standards to implement the policies and provisions of the Act (see parts 662-665 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR")).

An applicant for a freshwater wetlands permit bears the burden of showing that the proposed activity complies with the Act and the implementing regulations (see 6 NYCRR 663.5(a); see also 6 NYCRR 624.9(b)(1)). In this matter, applicant proposes to construct a two-family dwelling on an unimproved lot that is located entirely within Freshwater Wetland AR-16. The lot contains no non-wetland acreage and no wetland adjacent area. The State has classified Freshwater Wetland AR-16 as a Class II wetland. According to the Department's regulations, Class II wetlands provide important wetland benefits "the loss of which is acceptable only in very limited circumstances" (6 NYCRR 663.5(e)).

The freshwater wetland regulations establish three levels of compatibility with a wetland and its functions and benefits based on the activity. An activity designated as "C" is "usually compatible" with a wetland and its functions and benefits, an activity designated as "N" is "usually incompatible" and an activity designated as "X" is "incompatible" (see 6 NYCRR 663.4(d)). Where a permit is required, a "P" is added to the designation. The construction of a residence in a freshwater wetland is designated as "P(X)," an activity which requires a permit but which is incompatible with a wetland and its functions and benefits (see 6 NYCRR 663.4(d)(item 42)).

For an activity that is designated as "P(C)" or "P(N)," three regulatory compatibility tests must be satisfied. If all three compatibility tests are met, a permit may be issued for the activity (see 6 NYCRR 663.5(e)(1)). If the activity fails one or more of the compatibility tests, then specific weighing standards are applied.

An activity that is designated as "P(X)," by definition, is incompatible with a wetland and its functions and benefits. Where an activity is listed as "P(X)," a permit may be issued only if the activity meets each of the applicable weighing standards (see 6 NYCRR 663.5(e)(2) (specifying weighing standards by wetland classification)).

In this proceeding, applicant proposes a "P(X)" activity in a Class II wetland. For a Class II wetland, a "P(X)" activity must meet the following weighing standards: (1) the proposed activity must be compatible with the public health and welfare, be the only practicable alternative that could accomplish the applicant's objectives and have no practicable alternative on a site that is not a freshwater wetland or adjacent area; (2) it 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; and (3) it must satisfy a pressing economic or social need that clearly outweighs the loss of or detriment to the benefit(s) of the Class II wetland.

As set forth in the ALJ's hearing report, applicant failed to show that the construction of the two-family dwelling would satisfy the applicable weighing standards for a Class II wetland.

Moreover, applicant purchased the lot from the City of New York at auction in 1999, where the notice advertising the auction stated that the property may be located within an area designated as a freshwater wetland (see Finding of Fact #6, Hearing Report, at 8). Pursuant to that notice, applicant knew or should have known, prior to his acquisition of the lot, that it might be within a freshwater wetland.

In light of the foregoing and upon consideration of the entire record, the application for a freshwater wetlands permit is denied.

For the New York State Department
of Environmental Conservation

_____/s/_____
By: Erin M. Crotty, Commissioner

Albany, New York
December 27, 2004

Summary

The Applicant, Brian Zazulka, has applied to the New York State Department of Environmental Conservation for a Freshwater Wetlands permit to construct a two-family residence at a Staten Island site located entirely in a mapped Class II freshwater wetland. The proposed activity is classified as incompatible with a wetland and its functions and benefits. See 6 NYCRR 663.4(d), Item (42). Therefore, the proposed residential construction presumptively will have a negative and harmful impact on the wetland and its benefits. See Article 19 of the Environmental Conservation Law and 6 NYCRR part 663. Prior to purchase, the Applicant knew or should have known that the site may be a state-regulated wetland; the property was advertised as such.

The Administrative Law Judge (ALJ) concludes that the Applicant has failed to meet his burden of demonstrating compliance with the regulatory compatibility tests or weighing standards found in Environmental Conservation Law Article 24 and regulations issued pursuant thereto. A preponderance of the evidence shows that the removal of the vegetation and replacement of the existing soil and hydrology with impervious structures and the presence and intrusive activities of human daily life will destroy the wetlands at the site and, therefore, would not be compatible with the preservation, protection or conservation of the wetland. The project would result in the loss of existing vegetation and replacement of existing soil and hydrology on more than half of the site to structures and impervious surfaces, and most of the rest of the site to lawn and other domestic uses. As such, the project would result in much more than insubstantial degradation or loss of any part of the wetland at the site.

The Applicant failed to show that this project is the only practicable project alternative that could accomplish the Applicant's objectives and that no practicable alternatives exist on a site that is not a freshwater wetland or adjacent area. The proposed project fails to minimize degradation to or loss of any part of the wetland or to minimize adverse impacts on the functions and benefits that the wetlands at the site provide. The Applicant failed to demonstrate that the proposed activity satisfies any pressing economic or social need that clearly outweighs the loss or detriment to the benefits of the Class II wetlands at the site, or any economic or social need. Lastly, the Applicant's possible inability to construct the proposed residence on this site is not a financial hardship, because when he purchased the property in 1999, it had long ago been mapped as wetland (*i.e.*, since 1987).

In conclusion, the ALJ recommends that Department Staff's tentative determination to deny this freshwater wetlands permit application be adopted by the Commissioner as the Department's final agency decision in this matter.

Proceedings

Brian Zazulka applied to the New York State Department of Environmental Conservation (the "Department" or "NYSDEC") 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") for a freshwater wetlands permit to construct a two-story, two-family dwelling within NYSDEC regulated Class II Freshwater Wetland AR-16¹ ("Bloeser's Pond"), at his real property located on Sherwood Avenue between Sharrott and South Goff Avenues, Staten Island, New York (Richmond County Tax Block 6784, Lot 70).

Department Staff deemed the permit application complete on December 19, 2003. Staff determined that the proposed residential construction is a Type II action pursuant to the State Environmental Quality Review Act ("SEQRA") (ECL Article 8, 6 NYCRR Part 617), and, thus, does not require preparation of an environmental impact statement. See 6 NYCRR 617.5(c)(9).

The Legislative Hearing

On July 13, 2004 at 7:00 p.m., a legislative hearing was held before ALJ Kevin J. Casutto, at Barnard Hall, 137 Barnard Avenue, Staten Island, New York. At the legislative hearing, no members of the public offered comments on the permit application. One written comment was filed, in opposition to the proposed project, by the Protectors of Pine Oak Woods, a local environmental citizens group.

The Issues Conference

An issues conference was held at Barnard Hall on July 14, 2004 at 10:00 a.m. The deadline for receipt of petitions for party status was July 7, 2004. No petitions for party status were received. Therefore, Applicant and Staff were the only parties to this proceeding.

¹ Official notice was taken of Freshwater Wetlands Map AR-16.

As presented by the Department Staff during the issues conference, the issues on which the Applicant and Staff disagreed were summarized in Staff's denial letter dated April 12, 2004, which cites non-compliance with the compatibility and weighing permitting standards of 6 NYCRR 663.5.

The Applicant sought clarification that the scope of the hearing would allow evidence to show that Staff's permit denial was arbitrary. The ALJ advised the Applicant that the Applicant bears the burden of proof to show that the project will comply with all statutory and regulatory requirements (see 6 NYCRR 624.9[b]), and that the standard of proof is "preponderance of the evidence". See 6 NYCRR 624.9(c). The Applicant sought clarification that the scope of the hearing could include evidence that others similarly situated in close proximity to the site have received Departmental freshwater wetlands permits in the past. The ALJ did not preclude such evidentiary showing, but cautioned the Applicant that during the evidentiary hearing, the ALJ may limit the scope of such showing.

The Adjudicatory Hearing

The issues relied upon by Staff to deny the permit were the subject of an adjudicatory hearing held at Barnard Hall, immediately following the issues conference on July 14, 2004. Following the July 15, 2004 adjudicatory hearing session, from approximately 5:45 p.m. to 6:30 p.m., a site visit was conducted with the ALJ and the parties' representatives.

Also, following the adjudicatory hearing, by agreement of the parties, additional filings were allowed in order to complete the record. By letter dated July 20, 2004, the Applicant provided meteorological data regarding the days of rainfall that preceded the July 15, 2004 site visit. DEC Staff filed an affidavit of DEC Staff Biologist Joseph J. Pane, dated August 25, 2004 and the Applicant filed a responsive affidavit of September 2, 2004. These three documents have been assigned Exhibit numbers 34, 35 and 36, respectively, and by agreement of the parties, are part of the evidentiary record in this proceeding.

A complete stenographic record of the proceedings was received by August 2, 2004. The ALJ received the parties' closing briefs by October 8, 2004. The hearing record closed on October 8, 2004, with receipt of the parties' closing briefs.

The Applicant was represented by the law firm of Menicucci-Villa Associates, 2040 Victory Boulevard, Staten Island, New York 10314, Richard Rosenzweig, Esq., of counsel. Three witnesses

were presented by the Applicant: Stephen P. Kunz, Senior Ecologist, Schmid & Co.; Robert A. Caneco, Registered Architect; and Brian Zazulka, the Applicant.

Department Staff appeared by Gail M. Hintz, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation Region 2. Staff presented one witness, Joseph J. Pane, NYSDEC Principal Fish and Wildlife Biologist.

The Applicant purchased the site at a New York City public auction in or about December 21, 1999 for the sum of \$75,000.00. The City advertised the property for auction with a note that, "this property may be located within an area designated as a Freshwater Wetland and as such development of the property must comply with all requirements applicable to such areas including, but not limited to, those set forth in the New York State Freshwater Wetlands Permit Requirements". City of New York, Notice Of Public Auction, Exhibit 10.

The site is entirely within the boundaries of mapped Freshwater Wetland AR-16, and consequently is subject to regulation under the Department's freshwater wetlands program. The site is bordered on the south by Sherwood Avenue and on the north by Tax Block 6784, Lot 28, upon which a building is located in the adjacent area of the wetland. The easterly border of the site is lot 67, which is in the adjacent area of the wetland and contains a residential structure (and a swimming pool in the back yard). To the west, the site is bordered by lot 73, which is one of five unimproved lots west of the site, along Sherwood Avenue. North and northwest of the site along Vail Place are approximately seven residential structures all within the adjacent area of the wetland, except for lot 26, northwest of the site, which is within the mapped wetland. (Attached is a copy of Exhibit 8, a tax map with approximate wetland boundaries overlain.)

Applicant's Position

The Applicant seeks to construct a two-story, two-family residence and appurtenances at the site. The Applicant would occupy one unit of the two-story, two-family dwelling and his mother would occupy the other unit. The Applicant currently resides with his mother on the same street at 61 Sherwood Avenue, in a single family residence where the Applicant was raised and has lived continuously, except for a period of two years.

The Applicant contends that the permit application meets the standards for issuance of a freshwater wetlands permit and,

consequently, that Staff's permit denial letter is arbitrary, capricious and unreasonable². In addition, the Applicant contends that other property owners similarly situated in or adjacent to Freshwater Wetland AR-16 have been treated differently, in that the Department has issued freshwater wetlands permits to those other applicants. The Applicant asserts that a single family residence (approximately 14 ft. x 20 ft.) with septic sewer tank existed on the site until the early 1980's, when the residence was demolished and the foundation removed. The septic sewer tank remains onsite.

Lastly, the Applicant asserts that although the site is within mapped Freshwater Wetland AR-16, the portion of the mapped wetland containing the site is not connected to the primary mapped wetland area, and is not functioning as a wetland.

The construction proposal for the site contains the following design measures intended to minimize adverse project impacts:

1. Buffer area in rear of the lot.
2. Installation of a berm.
3. Use of dry wells (and buffer area), intended to preserve water balance.
4. A split-rail fence, intended to protect the buffer area.
5. Zoning at the site would allow two two-family residences on the lot, but Applicant seeks to construct only one two-family residence.
6. The project would create construction jobs in the community.
7. The project would afford separate residences for his mother and himself.

² To the extent the Applicant suggests that the CPLR Article 78 "arbitrary and capricious" standard applies in 6 NYCRR part 624 proceedings, he is in error. Under part 624, where the department has denied a permit application, it is the Applicant's burden to establish "by a preponderance of the evidence" that the application meets all statutory and regulatory standards. See 6 NYCRR 624.9(c).

8. The project would provide the Applicant's mother with greater economic viability, as she would be able to sell her current real property, which she owns outright.

The Applicant concludes that Department Staff erred in rendering its tentative determination to deny the permit, and that the Commissioner should grant the permit in this instance.

Staff's Position

On April 12, 2004, Staff issued its tentative determination to deny the current permit application based upon the following factors:

1. The construction activities proposed by the Applicant are regulated by 6 NYCRR 663.4(d), Item (42), constructing a residence or related structures, listed as "P(X)", permit required - activity incompatible with wetland functions and benefits.

2. The standards for permit issuance, 6 NYCRR 663.5(e), require that activities listed as P(X) be determined compatible with and weighed according to wetland class against the wetland benefits lost. Freshwater Wetland AR-16 is a Class II wetland totaling 14 acres. It was designated a Class II wetland on September 1, 1987, because of its wildlife habitat, flood and storm water control and open space benefits.

3. Pursuant to 6 NYCRR 663.5(e)(2), three tests are used to weigh need for the project against the wetland benefits lost.

4. The project proposal fails both the compatibility test and weighing test required by 6 NYCRR 663.5. Specifically, the proposal fails because (i) it does not satisfy a "compelling" (*sic*)³ economic or social need that clearly outweighs the loss of or detriment to the benefits of the Class II wetland, (ii)

³ The "compelling economic or social need" standard applies to Class I wetlands; apparently Staff mistakenly cited the wrong standard. For Class II wetlands, the standard is "pressing economic or social need". See 6 NYCRR 663.5(e)(2), [chart column "Class II Wetlands"; compare chart column "Class I Wetlands"].

it is not the only practicable alternative and has no practicable alternative on a site that is not freshwater wetland, (iii) it does not minimize degradation to or loss of any part of the wetland and its adjacent area, and (iv) it does not minimize the adverse impacts on the functions and benefits that the wetland provides, including those functions and benefits identified in 6 NYCRR 663.5(f)(3) and (4).

Staff concludes that the proposed project therefore should be denied.

Findings of Fact

Introduction

1. Brian Zazulka (the "Applicant") owns unimproved real property known as Richmond County Tax Block 6784, Lot 70, located on Sherwood Avenue, between Sharrott and South Goff Avenues, Staten Island, County of Richmond, State of New York (the "site"). The site is approximately 50 feet wide and 165 feet deep, located on Sherwood Avenue. To the east of the site is South Goff Avenue, to the west is Sharrott Avenue, and to the north of the rear of the site is Vail Place. Exhibits 7 and 8.

2. More specifically, the site is bordered on the south by Sherwood Avenue, and on the north by Lot 28 (upon which a building is located in the adjacent area of the wetland) and further north, by Vail Place. The easterly border of the site is lot 67 (a/k/a 41 Sherwood Avenue, which is in the adjacent area of the wetland and contains a residential structure with a swimming pool in the back yard). To the west, the site is bordered by lot 73, which is one of five unimproved lots west of the site, along Sherwood Avenue. North and northwest of the site along Vail Place are approximately seven residential structures all within the adjacent area of the wetland, except for lot 26, northwest of the site, which is within the mapped wetland. (Attached is a copy of Exhibit 8, a tax map with approximate wetland boundaries overlain.)

3. Richmond County Tax Block 6784 contains 28 lots, portions of which are within mapped Freshwater Wetland AR-16. Lot 70, the site, is entirely within mapped Freshwater Wetland AR-16 (Bloeser's Pond) on the New York State Freshwater Wetlands map promulgated pursuant to ECL Article 24 and 6 NYCRR Part 663. Exhibit 7. (Attached is a copy of Exhibit 7, the City's tax map showing Tax Block 6784 and Lots.)

4. The City of New York's zoning for the site allows for the construction of two multi-family dwellings.

5. The Applicant purchased the site from the City of New York at a public auction in 1999.

6. The auction notice advertising a December 21, 1998 auction of Parcel No. 115, Block 6784, Lot 70, north side of Sherwood Avenue, west of South Goff Avenue, Staten Island (the site), specifically stated: "NOTE: Bidders should be aware that, in addition to any other matters affecting title to or use of this parcel, the Division of Real Estate Services has been advised that this property may be located within an area designated as a Freshwater Wetland and as such development of the property must comply with all requirements applicable to such areas, including, but not limited to, those set forth in the New York State Freshwater Wetlands Permit Requirements Regulations (6 NYCRR Part 633 [sic] of the Environmental Conservation Law)." Exhibit 10, Public Auction Notice.

7. The Applicant proposes to construct a two-story, two-family dwelling and appurtenances at the site. The Applicant would occupy one unit and his mother would occupy the other unit. He currently resides with his mother on the same street (61 Sherwood), in a single family residence where the Applicant was raised and has lived continuously (except for a period of two years).

8. In or about Spring, 2001, the Applicant had a contract to sell the property, as shown by another permit application filed with the Department by the prospective purchasers of the site. However, the sale was never completed.

9. Wetland AR-16 is a Class II wetland, approximately 14 acres, and extends from Woodvale Avenue to Sharrott Avenue. Bloeser's Pond, northeast of the site, is the primary feature of Wetland AR-16. Freshwater Wetlands Map AR-16; see also Exhibits 16 and 26.

10. The term "Bloeser's Pond" wetland is a common name for the area. The name refers to several lobes of wetlands at and near Bloeser's Pond. The wetland system includes more than one wetland feature, including Bloeser's Pond itself and more than one creek system that drain to connected locations, all of which function as a unit.

11. One lobe of Wetland AR-16 discharges from the vicinity of Woodvale Avenue into Tax Block 6785, then onto the

site, then discharges into a City storm sewer located west of the site, at Sharrott Avenue.

12. The project site is an unimproved lot. Previously, in or about 1923 and possibly earlier, a single family wooden bungalow (residence), approximately 14 feet x 20 feet existed on the site together with a septic system. In or about 1985, prior to the Applicant's acquisition of the site, this residential structure was demolished. See Exhibit 25. The septic system cover remains on-site.

13. The Zazulka permit application was filed on October 24, 2000; Staff's tentative denial of the permit application was issued on April 12, 2004.

14. DEC Staff Biologist Pane inspected the site on five occasions: December 21, 1999 (prior to DEC's receipt of the Zazulka permit application), on or about April 10, 2001, on or about December 26, 2001, July 31, 2003 and June 7, 2004 (after DEC Staff's tentative denial).

15. In addition, DEC Staff Biologist Pane was generally familiar with Wetland AR-16, and more particularly, the area of Wetland AR-16 including the site. He participated in, and supervised DEC Staff who prepared the drafts for, the Richmond County Freshwater Wetland Map that was the subject of public hearings in 1986 and was finalized and adopted as the official Richmond County Freshwater Wetland Map in 1987.

16. On December 21, 1999, DEC Staff Biologist Pane inspected Lot 67,⁴ adjacent to the site. In order to evaluate Lot 67, Biologist Pane inspected adjacent Lot 70 (the site) because the presence of wetlands on Lot 70 would influence the permit application for Lot 67.

17. On December 21, 1999, the site showed evidence of standing water and changes in topography that one would expect with water coming through the site during a storm event. These features included, in addition to standing water, leaf litter and signs of erosion including mature trees with exposed roots (at the rear of the site). DEC Staff Biologist Pane determined that the entire site was a functioning freshwater wetland within mapped freshwater wetland AR-16.

⁴ The street address of Lot 67 is 41 Sherwood Avenue.

18. On or about April 10, 2001, a second permit application for the site was filed by Michael Caracappa, a then-potential purchaser of the site. This permit application was subsequently withdrawn.

19. Also, on or about April 10, 2001, while conducting an inspection of a parcel adjoining the site, DEC Staff Biologist Pane discovered that the front portion of Lot 70, the site, had been clear cut.

20. Consequently, the Applicant was charged with violations at the site, including clearing a freshwater wetland without a permit and placing fill in a freshwater wetland without a permit. Review of Applicant's permit application was suspended, pending resolution of the alleged violations.

21. In aid of settling these alleged violations, on or about December 26, 2001⁵, DEC Staff Biologist Pane conducted another inspection of the site to determine the number of trees cut down during the clear cutting activity and to develop a remediation/ restoration plan. He used a tree survey of the site prepared by the Applicant's surveyor (prior to the site disturbance) to identify felled trees which had been previously identified on the survey as intact. At least six and possibly as many as eleven trees with diameters varying from six inches to forty eight inches were felled in the clear cutting activity. Exhibit 22 (Tree Survey).

22. The alleged violations were resolved by an Order on Consent (July 7, 2002, DEC File No. R2-20010618-105) in which the Applicant admitted the violations. In violation of the ECL, in or about May 2001, the Applicant, Brian Zazulka, caused the felling of certain trees at the site, and left debris from the fallen trees at the site. This activity constituted clear-cutting of trees at the site (and "filling" the site with debris).

23. The Order on Consent required the Applicant to pay a civil penalty of \$6,000.00 (\$3,000.00 immediately payable, \$3,000.00 suspended) and to implement a remediation plan requiring, in part, the removal of debris from the site, planting

⁵ A discrepancy exists in the record as to the date of the inspection. Testimony at T. 380 indicates December 20, 2001 and testimony at T. 391 and Exhibit 22 indicate December 26, 2001. This discrepancy is not material, as it is uncontroverted that an inspection occurred on or about December 26, 2001.

of nine trees and re-seeding all disturbed areas, consistent with the specifications of Order on Consent Schedule A. Exhibit 6, Order on Consent.

24. At least one of the felled trees on the site was a mature Pin Oak, a freshwater wetland indicator species.

25. Upon the Applicant's commencement of the site restoration, DEC Staff resumed the permit application review.

26. On July 31, 2003, DEC Staff Biologist Pane inspected the site to determine the status of the Applicant's restoration efforts, as required by the Order on Consent. At that time, the Applicant had commenced some restoration work, including removal of the felled trees, debris collection and land grading. Exhibit 21.

27. Following implementation of the remediation plan, the disturbed area was returning to a wetland area. By June 2004, Jewel weed, several types of sedges and maple saplings were present in the front (southerly) portion of the site. In the rear of the site were grasses, old tree stumps and remnants. Further to the rear, a "floodplain" related to the stream or drainage ditch that crosses the site (and adjacent properties) is present.

28. The ditch was created by property owners approximately thirty years ago to provide a flowpath for septic system overflows and rainwater runoff. The ditch crosses the rear of the site and adjacent properties. The ditch is approximately a foot wide and approximately eight inches deep.

29. On July 7, 2004, DEC Staff Biologist Pane inspected the site again, in anticipation of the adjudicatory permit hearing in this matter. He confirmed his earlier-formed opinion that the site continued to be functioning freshwater wetlands. He observed that the cleared area of the site was a disturbed wetland area re-establishing itself.

The Compatibility Tests

30. The proposed activities are incompatible with the first two of the three compatibility tests, as discussed in the following paragraphs. The impacts of this project would be both short-term, from construction, and long-term, from the structures, impermeable surfaces and daily life activities and the loss of drainage values.

31. Wetland AR-16 was determined to be a Class II freshwater wetland at the time the mapping was done, and continues to exhibit the characteristics of a Class II wetland. Granting a permit for this project would result in direct loss of regulated Class II wetlands, and would have a continual adverse impact extending beyond the site into the future. This would include increased pressure to continue development beyond the initial construction, loss of wetlands and wetlands habitat, creation of impervious surfaces that quickly shed water resulting in more turbulent ditch/stream flow, erosion, sedimentation and higher water levels in surrounding areas including nearby wetlands.

32. Wetland AR-16, including the site, provides habitat for many bird species. The Final Freshwater Wetland Classification for Wetland AR-16 (issued in August 1987), identifies more than thirty bird species within the Wetland AR-16 system.

33. More specifically, the site contains the following wetland vegetative indicator species: Sweetgum, Red Maple, Silver Maple, Purple Loose Strife, Jewel Weed, Mug Worts, Reed, Weeds, Large Stump, Reed Canary Grass, Rushes, Wetland Grasses, Smart Weed, Sedges (several types), Pin Oak and herbaceous tree cover.

34. The site contains the following hydrological conditions and wetland benefits: a ditch or stream at the rear of the site, standing water, evidence of flooding and standing water at the rear of the site (outside the ditch), including water-stained leaves; wetland benefits include flood protection, stormwater recharge, wildlife habitat and open space benefits.

35. Construction of the project will result in the removal of vegetation and all soil functions from the entire area where the footprint of the house and impermeable surfaces will be located. In addition, wetland vegetation will be removed from those areas of the site that will serve as yard. The destruction of these wetland areas will adversely impact the wetland benefits of flood protection, stormwater recharge and wildlife habitat.

36. Construction of the project will result in the introduction of human activity at the site where none exists now, thereby adversely impacting the wetland benefit of wildlife habitat.

37. The Applicant presented no evidence that he considered any other alternative sites, or why another non-

wetland Staten Island location would not suffice as a project site.

The Weighing Standards

Only Practical Alternative (Weighing Standard [1])

38. The Applicant failed to show that no other site is physically or economically feasible. Instead, the Applicant offered evidence only that this site is the sole location available in this block of Sherwood Avenue that would serve the Applicant's purpose. He presented no evidence that he considered any other alternative sites, either vacant or developed. See 6 NYCRR 663.5(e)(2) (weighing standard [1]); see also 6 NYCRR 663.5(f)(2) (definition of "only practicable alternative").

39. Instead, according to the Applicant, he simply heard that the site was available (via a City of New York public auction) and he successfully pursued acquisition of the site through the auction process. He made no effort to look for other possible sites, either vacant or developed.

Pressing Economic or Social Need (Weighing Standard [3])

40. The Applicant provided no evidence to show that the denial of this project will have a broader economic or other hardship on the society at large. The Applicant demonstrated no unique value to locating the proposed residential structure on this particular site, other than that it is on the block of Sherwood Avenue where he grew up and now lives. 6 NYCRR 663.5(e)(2) (weighing standard [3]), see also 6 NYCRR 663.5(f)(3) (economic and social need).

Discussion

The Applicant bears the burden to demonstrate compliance with each of the standards for permit issuance set forth in the applicable regulatory sections, by a preponderance of the evidence. See 6 NYCRR 624.9(b) and (c); see also, 6 NYCRR 663.5(a). Under the Freshwater Wetlands Act, ECL Article 24, the Applicant bears the burden of demonstrating that the proposed activity will be in compliance with the policy and provisions of that Act. See ECL 24-0703(4). In addition, pursuant to ECL §1-0101, the Department's mandate is to promote patterns of development which minimize adverse impacts on the environment. Lastly, pursuant to ECL §3-0301(1)(b), the Commissioner must consider the cumulative impacts of a proposed project.

In ECL Article 24, the Legislature declared that it is, "the public policy of the state to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom, to prevent the despoliation and destruction of freshwater wetlands, and to regulate use and development of such wetlands to secure the natural benefits of freshwater wetlands, consistent with the general welfare and beneficial economic, social and agricultural development of the state." The Applicant bears the burden of showing that a proposed activity will comply with the policies and provisions of ECL Article 24 and 6 NYCRR part 663. See 6 NYCRR 663.5(a); see also 6 NYCRR 624.9(b)(1).

Pursuant to 6 NYCRR 663.5(d)(1), the Department must apply the three-part test of compatibility set forth in 6 NYCRR 663.5(e)(1). The three compatibility tests require that the activity (i) would be compatible with preservation, protection and conservation of the wetland and its benefits, (ii) would result in no more than insubstantial degradation to, or loss of, any part of the wetland, and (iii) would be compatible with the public health and welfare. Incompatibility with any of the three tests requires application of the weighing standards, discussed below. Failure to satisfy any of the weighing standards requires denial of the project. See 6 NYCRR 663.5(e).

Because the proposed activity is listed as P(X), presumptively incompatible, the Applicant must demonstrate compliance with each of the three weighing standards of 6 NYCRR 663.5(e)(2). 6 NYCRR 663.5(e)(2). The three Class II wetland weighing standards of 6 NYCRR 663.5(e)(2) require that (1) the proposed activity must be compatible with the public health and welfare, be the only practicable alternative that could accomplish the Applicant's objectives and have no practicable alternative on a site that is not a freshwater wetland or adjacent area; (2) that 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 functions and benefits that the wetland provides; and (3) that the loss of Class II wetlands is acceptable only in very limited circumstances; the proposed activity must satisfy a pressing economic or social need that clearly outweighs the loss of, or detriment to, the benefits of the wetland. See 6 NYCRR 663.5(e)(2).

The Site Visit

Following the July 15, 2004 adjudicatory hearing session a site visit was conducted from approximately 5:45 p.m., to 6:30 p.m., with the ALJ and the parties' representatives. The

site is approximately 50 feet wide and 165 feet deep, located on Sherwood Avenue. The property adjacent to the site immediately to the east is 41 Sherwood Avenue (Tax Block 6784, Lot 67), which has been elevated with approximately 18 to 24 inches of fill. A recently installed in-ground swimming pool was observed in the rear of that lot. Features observed at the Applicant's site (Lot 70) during the site visit include a wet area, approximately 20 feet by 8 feet, located in the front portion of the lot.⁶ Located in the rear of the site is a Pin Oak tree with a bird nest of approximately three feet diameter. Near the trunk of the Pin Oak were Smilax vines, a wetland indicator. Other wetland indicator species were observed on the site, including Japanese Knotwood, and, in the "front-third" of the lot (the area that was cleared and filled, and is the subject of the Order on Consent [Exhibit 6]), sedges and rushes. Lastly, on the east side-property line, approximately 100 feet back from Sherwood Avenue on the site, is the cover of the septic leach field remaining from the previously-existing dwelling.

The Site and the Wetland Boundary

The Applicant contends that DEC Staff never visited the site to evaluate site features and conditions. However, the record shows that DEC Staff Biologist Joseph Pane inspected the wetland boundary of the property adjacent to the Applicant's site in December 1999 (while evaluating the adjacent property), and on four subsequent occasions, and that he is familiar with the AR-16 wetland generally. See Findings of Fact, *supra*. Therefore, the Applicant's contention that DEC Staff Biologist Pane had no specific knowledge of the site is simply incorrect and must be rejected.⁷

⁶ Heavy rains occurred during July 13 through 15, 2004 in the vicinity of the site. The Applicant provided meteorological data from the Brunswick, NJ weather station (approximately 11 miles southwest of the site), which reported a total of 4.92 inches of precipitation for the three days preceding the July 15, 2004 site inspection, as follows: July 12, 3.53 inches; July 13, 0.30 inches; July 14, 1.09 inches; July 15, 0.00 inches (Exhibit 34). Even discounting this site visit observation of a wet area at the site (which was not a basis for any finding of fact), the record independently supports finding that the site has wet areas, based upon DEC Biologist Pane's site visits.

⁷ Staff did not base its tentative denial of the permit application upon the Department's Record of Compliance Policy or the Applicant's suitability to hold a permit in view of the

The Applicant's expert witness, Ecologist Kunz, offered opinion testimony that only the rear half of the site is within the wetland boundary, and further, that only the rear half of the site is functioning freshwater wetlands. However, Ecologist Kunz only observed the site after it had been cleared by the Applicant (or at the direction of the Applicant) in the Spring of 2000. Even so, Ecologist Kunz admitted that many freshwater wetland indicator plant species are present on the site. He also acknowledged the existence of conditions onsite and benefits provided by the site that are described in the freshwater wetlands regulations as wetland conditions and wetland benefits. Moreover, the entire site is part of a regulated, mapped Class II freshwater wetland. See Freshwater Wetlands Map AR-16; see Exhibit 16; see also, Exhibit 26. As described in the findings, *supra*, the portion of wetland AR-16 in Tax Block 6784, including the entire area of the site, is a functioning wetland unit.

The Direction of Water Flow Through the Site

The Applicant contends that no hydrological connection exists between Bloeser's Pond and the site. This is significant, in the Applicant's view, because mapped freshwater Wetland AR-16 is named the "Bloeser's Pond" wetland. Yet, DEC Staff explained that the term "Bloeser's Pond" wetland is merely the common name for the area. The name refers to several lobes of wetlands located at and near Bloeser's Pond, not necessarily indicating a direct connection to Bloeser's Pond. The wetland system includes more than one wetland feature, including Bloeser's Pond itself and more than one creek system that drain to connected locations, all of which function as a unit. One lobe of Wetland AR-16 discharges into the site from the vicinity of Tax Block 6785, then discharges westerly across the site, into a storm sewer located at Sharrott Avenue.

The Applicant offered into evidence a drainage assessment of the Bloeser's Pond area, prepared by "Michael Nagy, P.E." The two documents, Exhibits 27 and 28, were admitted into evidence. These documents concern a wetlands permit application for the property at 35 Vail Avenue, in Tax Block 6784. Lot 35 is northeast of the Applicant's site, adjacent to Lot 33 on Vail Avenue. Lot 33 shares its easterly property line with Lot 35, and the corner of its rear westerly border with the Applicant's site. See Exhibit 8, attached.

enforcement case and resulting Order on Consent. Nor were Record of Compliance factors considered in evaluating the permit application in this Report.

Exhibit 27 is a two-page letter dated October 31, 1998 from Michael Nagy, P.E., to Raymond J. Cortish, NYSDEC. Exhibit 28 is identified in the letter as a portion of the 1912 topographical map of the area. Drawings on the map depict Tax Block 6784, and the lots therein, as well as the adjacent four streets. In cross examining DEC Staff Biologist Pane, the Applicant sought to use these exhibits to elicit a statement from the witness of Mr. Nagy's purported expert opinion regarding the direction of water flow through Block 6784, and by implication, direction of flow through the Applicant's site. Staff objected on best evidence grounds. Objection to the Applicant's attempt to introduce hearsay expert opinion (via Exhibit 27, the Nagy letter) without producing the expert was sustained. If the Applicant wishes to offer an expert's testimony, the expert witness must be produced for testimony and available for cross-examination. See Prince, Richardson on Evidence, § 7-301 et seq. (Expert Witness), generally, and § 7-303 (a) (Availability of Expert Witness) Farrell (11th ed. 1995).

In any event, this opinion would merely bolster the opinion already placed in the record by the Applicant's expert, Ecologist Kunz, that the direction of flow is across the site to the west along a depression in the rear of the lot (and adjacent lots) that has been variously described as a "ditch" (purportedly man-made, decades ago) or a "stream". Moreover, hearsay and best evidence rules aside, DEC Staff does not dispute that the direction of flow is across the site to the west, terminating at the municipal sewer on Sharrott Avenue. Nonetheless, DEC Staff maintains that Lot 70 does provide substantial benefit to the wetlands in and around Bloeser's Pond itself, as one component of the AR-16 freshwater wetland unit.

Applicant's Failure to Request Remapping of the Site

A landowner may challenge the wetland designation either at the time of mapping or at a later date, in the event the existing wetland map designation fails to accurately reflect the conditions on the ground. See ECL §24-0301(6) and 6 NYCRR 664.7. The Zazulka site is entirely within Freshwater Wetland AR-16, as depicted on the official Wetlands Map. Exhibit 16; see, also, Exhibit 26. DEC Staff Biologist Pane confirmed the site's wetland boundary in the field in December 1999, when evaluating the adjacent property.

The record shows that the Applicant made no remapping application to modify the wetland designation of this site.⁸ See ECL §24-0301(6) and 6 NYCRR 664.7 (Map readjustment, map amendment). However, during the permit hearing the Applicant contended that the wetland map designation does not accurately reflect the actual conditions at the site. A freshwater wetlands remapping hearing and a freshwater wetlands permit application hearing are separate and distinct proceedings.⁹ In Applicant's view, there was no need to have the wetland boundary formally corrected because the proposed construction site is in the same area of the property occupied by a prior structure until in or about 1985. As discussed below, this view is erroneous and must be rejected.

In sum, throughout the application process (prior to hearing), the Applicant did not dispute the location of the wetland boundary itself. The Applicant never requested remapping of the site wetland boundary.

The Prior Structure on the Site

In the early 1920's, a bungalow, constructed on a foundation of wood posts, was erected on the site. This structure, predating the Freshwater Wetlands Act by several decades, remained on the site until in or about 1985. Exhibits 24 and 25. The City of New York had acquired the property at some time prior to 1985, and had the bungalow demolished and its foundation removed.

Approximately 14 years later, in or about 1999, the Applicant purchased the property from the City at public auction. Upon acquiring the property, the Applicant filed an application

⁸ Nor did the Applicant dispute the wetland boundary in Spring 2000, when presented with notice of violations for the site, resulting in the July 9, 2002 Order on Consent (Exhibit 6).

⁹ Pursuant to 6 NYCRR 664.7(a)(2)(i), "[o]nce the announcement of a proposed [map] amendment has been made, no activity subject to regulation pursuant to the [freshwater wetlands] act shall be initiated within the area that is the subject of the proposal until the commissioner has either amended the map or denied the amendment. However, no activity which has already been initiated at the time of the announcement, within an area that is proposed as an addition to the map, will be subject to such regulation."

with the Department for a freshwater wetlands permit. On these facts, the Applicant contends that the property "had already been developed and disturbed, and the proposed building's impact on the 'wetlands', if any, would be no greater than what previously existed." Applicant's Brief at 2. But, this permit application is not for reconstruction of an existing structure on the site. Instead, the application is for new construction on a site that has been vacant for approximately 14 years.

The Applicant's contention ignores the accretion of wetland species that has occurred during the intervening 14 years. Through the 14-year process of ecological succession, the once disturbed wetland site has been reclaimed as freshwater wetlands, to the point where the Staff wetlands expert, on viewing the site in December 1999, was initially not aware that any structure had existed there in the past. To authorize the project based upon a structure that existed on the site some 14 years ago, and well before the Applicant's ownership of the site, would require ignoring the recent site conditions (*i.e.*, prior to the clear cutting) and the current site conditions. Such a course of action would destroy the existing freshwater wetlands on the site, thereby eliminating the wetland values contributed by this site. In light of the foregoing, the Applicant's argument must be rejected.

Other Nearby Sites for Which Wetlands Permits Were Issued

In the course of the hearing, the Applicant offered a series of documents relating to other sites in Staten Island for which the Department has issued freshwater wetland permits in the past. Exhibit 11 (Tax Block 6784, Lot 67), Exhibit 13 (Tax Block 6784, Lot 26), Exhibit 19 (Tax Block 6775, Lot 241) and Exhibit 33 (Tax Block 6784, Lot 3). The Applicant's contention, at hearing, was that these cases are not any different than the Applicant's, and because permits were granted in these other instances, the current permit application should be granted. Staff objected to this evidentiary offer, arguing that this may be an appropriate issue for appellate review, but not appropriate during the administrative hearing. While cautioning the Applicant that freshwater wetland permit determinations are case by case decisions, the ALJ overruled Staff's objections and allowed the Applicant to make a limited record on this issue.

In its closing brief, Staff renewed its objection to the admission into evidence of documents related to four other sites, arguing that each permit must be judged separately. Although I decline to grant Staff's renewed objection, evidence of these four other nearby sites was of little value in this proceeding.

The determination whether to grant this permit necessarily focuses on whether this Applicant has demonstrated compliance with the statutory and regulatory requirements of ECL article 24 and 6 NYCRR part 663, which is the proper subject of this Hearing Report.

Staff states that the Applicant's entire site is regulated freshwater wetland, with no adjacent area at all. Therefore, Staff asserts, the Applicant's comparison of these four sites to the Applicant's site is misplaced. Three of the four other sites identified by the Applicant contained enough adjacent area for proposed structures to be constructed in the adjacent areas. Exhibits 11, 13 and 33. For one of these properties, the Exhibit 13 permit issued May 26, 1987, DEC Staff conducted a site evaluation and re-evaluated the location of the wetland boundary. As a result, the site had sufficient adjacent area in which to locate the proposed residence, and the permit was issued.

The Exhibit 11 permit (issued April 25, 2000) was for reconstruction of an existing residence. The wetland boundary was located at the rear of the lot. Consequently, the front of the lot was adjacent area. The Exhibit 11 permit preserved all of the existing wetlands and provided for additional buffer plantings.

Regarding the Exhibit 19 permit issued April 5, 1990, that property contained a portion of mapped freshwater wetlands that was separated from the main body of the wetland by a road and residences. See Exhibit 26, Tax Block 6775, Lot 241. DEC Staff conducted a site evaluation of this portion of the mapped freshwater wetlands and determined that it did not function well, or at the same level or extent, as the remainder of the wetland system. Consequently, Staff determined that a permit could be issued for that project even though it would occur in the mapped wetland.

One of the sites (the Exhibit 33 permit, issued August 28, 2000) did allow limited intrusion into the wetland, although the residence was proposed to be built in the adjacent area. Forty square feet of wetland would have been lost to creation of a side yard for the residence. As a result, although the permit was issued, that applicant, in mitigation of the lost wetlands, was required to create an additional 282 square feet of freshwater wetlands from existing adjacent area at the site and to execute a restrictive covenant to preserve all of the wetlands on the site. The Exhibit 33 property contained sufficient adjacent area to allow for the necessary substantial mitigation.

These four permits, rather than supporting the Applicant's position, show that the Department's freshwater wetlands permitting decisions necessarily are case by case, site specific determinations. These permits show that DEC Staff have, where appropriate, responded to unique site specific conditions to work with a permit applicant.

Here, however, the record shows that the Applicant's site is entirely within mapped, functioning wetlands. Unlike the Exhibit 19 property, the wetlands comprising the Applicant's site are functioning well, at the same level or extent, as the remainder of the wetland system. Unlike the Exhibit 33 property, the Applicant's project will not intrude slightly into the wetland, but will be wholly within the mapped wetland. Moreover, the site contains no adjacent area in which to offer a mitigation project that would create an additional new wetland area to compensate for wetlands destroyed by the project proposal; nor has the Applicant offered any such mitigation project. In two of these other projects, the applicants requested that Staff conduct a site evaluation. By comparison, the Applicant here never requested a site evaluation or remapping.

In short, the Applicant proposed to show that four other freshwater wetland permit cases in the vicinity of the site are not any different than the Applicant's, and because permits were granted in these other instances, the current permit application should be granted. Instead, the Applicant has analogized that an aspect or feature of each of these projects is similar to the Applicant's project, and, if these similar features are taken together, they comprise a property similar to the site. This argument is neither what the Applicant initially proposed to show, nor is it persuasive.

Conclusions of Law

1. ECL §24-0107(1) defines a freshwater wetland as lands and waters of the state shown on the freshwater wetlands map (as further elaborated upon in the statute). *See also*, 6 NYCRR 663.2(p). The Applicant's site is entirely within mapped freshwater wetland AR-16, and therefore is subject to regulation under the Department's Freshwater Wetlands program.

2. In the State of New York, freshwater wetlands are afforded substantial protection. *See* ECL §24-0103. In the statement of findings of the Freshwater Wetlands Act, the New York State Legislature has articulated the value of the state's freshwater wetland resources. *See* ECL §24-0105.

3. The proposed activities are properly classified as P(X) under the freshwater wetlands regulatory program. 6 NYCRR 663.4(d), Item (42). The designation "(X)" indicates the activity is incompatible with a wetland and its functions and benefits. 6 NYCRR 663.4(d). The proposed activities presumptively have negative and harmful impacts on the wetland and its benefits. See ECL Article 24 and 6 NYCRR part 663.

4. Applicant failed to satisfy the first compatibility test because the destruction of vegetation at the site and replacement of the existing soil and hydrology with impervious structures, as well as the presence and intrusive activities of human daily life, will destroy the wetlands at the site. Therefore, the proposed activities would not be compatible with the preservation, protection or conservation of the wetland. See 6 NYCRR 663.5(e)(2), (weighing standard [1]).

5. The Applicant failed to show that this project is the only practicable project alternative that could accomplish the Applicant's objectives and that no practicable alternatives exist on a site that is not a freshwater wetland or adjacent area. See 6 NYCRR 663.5(e)(2) (weighing standard [1]); see also 6 NYCRR 663.5(f)(2) (definition of "only practicable alternative").

6. Applicant failed to satisfy the second compatibility test because the proposed activities would result in the loss of existing vegetation and replacement of existing soil and hydrology in more than half of the site to structures and impervious surfaces, and most of the rest of the site to lawn and other domestic uses. As such, the project would result in much more than insubstantial degradation or loss of any part of the wetland at the site. See 6 NYCRR 663.5(e)(2), (weighing standard [2]).

7. The proposed activity would destroy substantial portions of the wetlands at the site and degrade the remaining wetlands at the site. Therefore, the proposed project fails to minimize degradation to or loss of any part of the wetland or to minimize adverse impacts on the functions and benefits that the wetlands at the site provide. See 6 NYCRR 663.5(e)(2), (weighing standard [2]).

8. When the economic and social need for the proposed activity is considered, the economic and social burden that would be imposed on the public is examined. See 6 NYCRR 663.5(f)(3) (economic and social need). The Applicant failed to demonstrate that the proposed activity satisfies any pressing economic or

social need that clearly outweighs the loss or detriment to the benefits of the Class II wetlands at the site. See 6 NYCRR 663.5(e)(2), (weighing standard [3]).

9. Denial of the permit application to construct a residence on this site may be a personal financial hardship for the Applicant. Nevertheless, any such personal financial hardship the Applicant may suffer is his own creation. Prior to purchase the Applicant knew or should have known that the site may be a state regulated wetland; the auction notice advertised it as such. Exhibit 10 (Notice of Public Auction).

10. In fact, the Applicant's possible inability to construct the proposed residence on this site is not a financial hardship, because when he purchased the property in 1999, it had long ago been mapped as wetland (i.e., in 1987). Therefore, the Applicant knew, or should have known, that the property is regulated as wetlands. *Matter of Gazza v. N.Y.S. Department of Environmental Conservation*, 89 NY2d 603, 679 NE2d 1035, 657 NYS2d 555 (1997).

11. The Applicant's argument, both during the hearing and in his closing brief, that Staff's tentative decision to deny this permit application was arbitrary and capricious is erroneous and misplaced. As stated at the outset of the hearing, the Applicant bears the burden of showing that the application is in compliance with all regulatory requirements, by a preponderance of the evidence. 6 NYCRR 624.9(b)(1); see also 6 NYCRR 663.5(a). Applicant has failed to carry his burden. Moreover, the other permit cases the Applicant relies for the argument that Staff acted inconsistently in denying the permit application are factually distinguishable and inapposite.

Recommendation

After a review of the entire record, and based upon the foregoing findings of fact and conclusions of law, it is recommended that the Commissioner should deny the application of Brian Zazulka for a freshwater wetlands permit. Department Staff's tentative determination to deny this application for a freshwater wetlands permit should be adopted by the Commissioner as the Department's final determination in this matter.