STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

IN RE: W. ALBERT MARTIN AND HELENE C. MARTIN
FRESHWATER WETLANDS APPLICATION NO. 87-0440F

D E C I S I O N A N D O R D E R

This matter is before the Hearing Officer on the application of W. Albert Martin and Helene C. Martin to alter a freshwater wetland. The location of the alteration is 777 Smithfield Road, North Providence, Rhode Island, and, more particularly, Assessor's Plat 21, Lots 907 and 908. An administrative hearing concerning the encaptioned application was held on Monday, June 11, 1990, at the Town Hall, Council Chambers, North Providence, Rhode Island. The hearing was conducted pursuant to the Administrative Procedures Act (R.I.G.L. Section 42-35 et. seq.) and the Administrative Rules of Practice and Procedure of the Department of Environmental Management. Licht & Semonoff, by Sean O. Coffey, represented the applicants. Katherine Robinson Hall represented the Department of Environmental Management. No requests to intervene were received. Prior to the commencement of the hearing, the parties met to discuss the marking of documents, possible stipulations and expert testimony. (The Hearing Officer ordered a pre-hearing conference for this purpose but was unable to attend such due to a death in her family). As a result of such order and discussions, the following documents were entered by agreement of the parties:

Joint 1	Notice of Violation, File Complaint No. 1997 dated October 1, 1986;
Joint 2	Consent Agreement entered into between W. Albert Martin and Department;
Joint 3	Formal application form to Alter a Freshwater Wetland received by the Department on June 12, 1987;
Joint 4	Evaluation of Application for Permission to Alter Freshwater Wetlands by Daniel M. Kowal dated May 24, 1989;
Joint 5	Site Plan submitted by Applicants;
Joint 6	Official notice regarding public notice and comment dates dated April 28, 1989;
Joint 7	Denial of Application - correspondence to the Applicants dated July 12, 1989;
Joint 8	Correspondence requesting an adjudicatory hearing on the denial dated July 24, 1989;
Joint 9	Notice of Administrative Hearing and Pre-hearing Conference dated May 14, 1990;
Joint 10	Curriculm Vitae of Dean H. Albro;
Joint 11	Resume of Harold K. Ellis;
Joint 12	Resume of Daniel M. Kowal;
Joint 13	Resume of Henry A. Sardelli;
Joint 14	Aerial photograph dated April 11, 1975;
Joint 14A	Aerial photograph;
Joint 15	Aerial photograph dated March 10, 1980;
Joint 16	Photographs A - F.

Two additional exhibits were admitted at the hearing, viz.:

DEM A	Data sheet for violations;

DEM B Drawing rendered by Henry Sardelli pertaining to 2:1 sloping/stability.

Pursuant to Section 11.02 of the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act ("Act") adopted June, 1981 ("Regulations"), the applicant bore the burden of proof that the subject proposal is not inconsistent with the Freshwater Wetlands Act and the Regulations adopted thereunder.

The applicant called two witnesses, to wit, the applicant, W. Albert Martin, and George Damiano. Mr. Damiano is a registered professional engineer in the State of Rhode Island and his professional experience is such as to qualify for testimony as an expert witness. However, the testimony of Mr. Damiano was not in the form of expert testimony, that is, not stated as professional opinions. Accordingly, such was given no weight in this decision.

The Department presented four (4) witnesses, to wit, Daniel M. Kowal, Dean H. Albro, Harold K. Ellis, and Henry J. Sardelli. Each was duly qualified as an expert witness based upon education, professional experience, etc.

In August, 1980, the applicants purchased the subject property which borders the Wenscott Reservoir. The reservoir is a freshwater pond. At the time of the purchase, the property was improved with a residence. The land to the rear of the dwelling was then terraced from the dwelling in an easterly direction toward the reservoir by construction of two (2) parallel

landscape timber retaining walls with two connecting walls. At the time of the purchase, the applicants were unaware of any violations of either the Act or the Regulations as no such notice was recorded in the Land Evidence Records nor found in the Department's internal files. The applicants checked both sources.

As of 1986, the landscape timbers which comprise the retaining walls had deteriorated. The timbers were, in part, rotted and splintered. Despite the applicants' contrary assertion, there is no evidence that the walls were in a state of "imminent collapse." To support this assertion, expert testimony was required. There was no such expert testimony. However, it is clear from evidentiary photographs of the retaining walls that such were rotted and splintered. The walls were unsightly. The applicants' home and yard-area are lovely and well-maintained. The view of the reservoir is beautiful. The unsightly retaining walls were likely a great source of consternation to the applicants in view of the obvious care and attention given to the aesthetic preservation of the home.

In 1986, the applicants engaged a contractor to reconstruct the timber walls with a concrete facing. Construction involved installation of a concrete footing at the base of the walls and the addition of concrete blocks and a stone veneer along the existing timbers. The existing walls were extended by some 13" to 14" as a result of the construction.

Prior to commencing this referenced construction, the applicants did not apply to the Department to obtain a permit for same. As a result, on October 1, 1986, the Department issued a notice of violation addressed exclusively to W. Albert Martin despite the joint ownership of the subject parcel by Helene C. Martin. This notice, essentially, was a cease and desist order of the then in progress construction, as well as, a restoration order. The applicant, W. Albert Martin, was ordered to restore the property to its May 9, 1974, condition. (This, obviously, was a time prior to the ownership of the applicants).

Mr. Martin requested a hearing pertaining to the notice of violation. There is no evidence in the record to show that, prior to this hearing, Mr. Martin raised the issue that said notice issued exclusively to Mr. Martin, as opposed to Mr. and Mrs. Martin. Further, there is no evidence in the record to show that, prior to this hearing, Mr. Martin raised the issue that the original timber walls were constructed by his predecessor in title (the "responsible-party" issue). Such arguments were proper for a hearing on the notice of violation but are improper hereunder. Other than to the extent of my ruling herein on the notice of violation and consent agreement, these arguments are moot as Mr. Martin waived his right to be heard on such by executing the consent agreement.

In general, the consent agreement allowed an after-the-fact application for issuance of a permit relating to the construction

on the retaining walls. However, pending review and decision on the application, the in-progress construction was to cease.

On July 12, 1989, the Department issued a denial letter to the applicant citing the following grounds therefore:

I. The proposed alterations will cause an undesirable destruction of freshwater wetlands as described by Section 5.03(b)(c)7 of the Rules and Regulations governing the Enforcement of the Rhode Island Freshwater Wetlands Act;

II. The proposed project will result in the loss, encroachment and permanent alteration of wetland wildlife habitat (0.24 acres) associated with the subject wetland area;

III. The project proposal will reduce the value of a "valuable" wetland recreational environment and will reduce and negatively impact the aesthetic and natural character of the undeveloped wetland and buffer zone.

The applicants requested a hearing on the denial and, accordingly, the matter is before the Hearing Officer.

As indicated, the applicants bear the burden of proof by a preponderance of the evidence that the proposed alteration is consistent with the purpose of the Act, complies with the Rules and Regulations, and is protective of the environment and the health, welfare, and general well-being of the populace. The Department submits, and I sustain, that the applicants wholly failed to meet their burden on every count, and that the Department's denial was proper as a matter of law.

At the conclusion of the applicants' case, the Department moved for a directed verdict which now, upon further reflection,

I should have granted. At the time, I did not do so as I felt that I would be required to consider the credibility of the testimony of Mr. Martin. A directed verdict must be denied when the trier of fact considers credibility. However, upon a careful review of the transcript, there simply is no evidence submitted by the applicants pertaining to the statutory/regulatory grounds for the denial. Any issues of credibility solely involved the testimony about the notice of violation and consent agreement and how such, allegedly, pertain to this hearing. This hearing was occasioned by an appeal of a denial of a formal application and that matter is solely before me for decision. However, my ruling stands, in fairness to the parties. As a result, I decide this matter based upon all of the documentary and testimonial evidence which was presented.

The existing and proposed alterations will result in the permanent loss of approximately one-quarter acre of state jurisdictional wetlands. The applicants' site plan outlines the total area of impact associated with the project.

On behalf of the Department, Daniel Kowal testified rather extensively as to the direct loss of wildlife habitat resulting from the present and proposed alterations. Mr. Kowal carefully explained that this physical loss displaced birds, mammals, reptiles and other wetland species which previously inhabited the area subject of the proposed alteration.

The applicants' planting scheme provides little compensation in terms of the loss of wildife habitat.

An additional loss of wildlife habitat is occasioned by human encroachment. Human activity detrimentally affects the wildlife utilizing the reservoir and adjacent shores for food, safety, shelter, nesting, breeding, or mating.

Further, the clearing and removal of wetland vegetation allows for the introduction of nuisance species which displace those species which thrive in this type of wetland area. Displacement involves nesting, breeding, and living in the subject wetlands.

In response to cross-examination questions, Mr. Kowal again opined that the applicants' planting scheme does not compensate for loss of wildlife habitat caused by the subject alteration. Further, the walls create physical barriers for non-flying species.

Further, Mr. Kowal testified that the subject wetlands is "valuable" due to the overall quality of the natural wetlands area and the wetlands' ability to support recreation by the general public. The subject alterations will greatly reduce the value of the recreational environment. The direct physical loss of the wetland area would and did reduce the aesthetic and open space values attributable to the subject wetlands. The alterations result in the loss of such activities as bird-

watching, education, and nature study due to the lack of available wildlife habitat and associated decline in the variety of wildlife. In addition, the increased human disturbances contribute to the loss of the natural character and reduction of the wetlands' ability to support recreational activities. Further, the reservoir supports such other recreational activities as canoeing, ice-skating, fishing, etc.

I am greatly troubled by the issues raised throughout the hearing pertaining to the notice of violation and the consent agreement. I am not at all troubled in the sense of responding to such issues. Rather, I struggle with good faith in proferring such. Credibility was an issue. As Mr. Martin testified, I internally reacted with a certain degree of indignity thereto. His testimony appeared to me to be carefully rehearsed and his responses cautiously and consciously phrased. For example, when questioned whether or not the notice of violation was the notice of violation, Mr. Martin replied, "that appears to be the Notice of Violation that issued" (transcript page 21; emphasis provided). When questioned whether or not the consent agreement was the consent agreement, Mr. Martin replied "that appears to be a true copy of that agreement" (transcript page 24; emphasis provided). These answers were objectionable as nonresponsive but, moreover, these documents were full, joint exhibits. It was this type of cat and mouse testimony that led me to conclude that

these issues and testimony were engineered to seek relief from the denial and restoration orders when there was no other evidence available to the applicants to attack the grounds for the denial, subject, however, to my feeling that such issues were proper if raised at a hearing on the notice of violation. It is very easy to see why Mr. Martin would be extremely unhappy with the denial and restoration order. As indicated, he has a beautiful backyard and a well-defined concept of the retaining walls, access areas, etc. He, quite obviously, has spent great sums to accomplish such. He could not be expected to relish the thought of complying with the Department's order. However, there simply is no excuse, particularly when Mr. Martin is an officer of the court, to bring forth testimony which (in my opinion) is subject to challenge as without credit. It is a relief to me not to have to decide this matter based upon credibility.

In my opinion, the applicants must comply with the denial/restoration orders. The notice of violation and the consent agreement are no longer separate documents standing apart from the formal application. The content of such is not under consideration herein, in terms of a formal hearing thereon. The notice of violation and the consent agreement were incorporated by reference into the application and such documentation, that is, the terms of such documentation, became an integral part of the application.

I specifically reject any testimony by Mr. Martin that he did not understand the terms of the consent agreement. The document is clear and unambiguous. Further, Mr. Martin personally negotiated the terms thereof and prior to executing same, required certain changes to the original draft of the consent agreement.

Let me review the pertinent terms of the application, to support my assertion that the notice of violation and consent agreement were incorporated by reference into the application.

Q. Brief description and purpose of project.

A. Post-alteration permit.

Q. Any previous application for this site? If yes, provide application number.

A. No.

Q. Any previous complaint or violation for this site? If yes, provide complaint number.

A. Complaint number 1997.

Q. Has this application been submitted in response to a Consent Agreement?

A. Yes.

There is an affirmation on the application, viz.:

> "I hereby certify under the penalty of law that I have personally examined and am familiar with the information submitted herein and based on my inquiry of those individuals immediately responsible for obtaining the information, I believe the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information under the authority of the General Laws of 1956." (emphasis provided).

W. Albert Martin and Helene C. Martin signed the application. Thus, rhetorically I submit:

How is it now that Mr. Martin claims not to be the party responsible for the violation particularly after waiving a right to a hearing on this issue?

How is it now that Mr. Martin claims not to have understood the terms and conditions of the consent agreement particularly when he negotiated the terms thereof?

How is it now that the argument is posed that Mrs. Martin was not cited in the violation notice, again, particularly after waiving a right to a hearing on this issue?

There is a question of whether or not the applicant caused "filling" at the subject site. The applicant testified that no new fill was brought to the site, in the sense of fill material. The Department's witness, Harold Ellis, stated that to members of the Department, "fill" is a generic term and is not limited to "fill material." Fill is implied necessarily by use of the terms grading and wall construction. I really do not see the import of this issue in terms of the overall findings of the Department in support of its denial. However, I will agree with the applicant that he did not bring in new fill material and I will agree with the Department that fill is a generic term included in grading and wall construction. I might also indicate that Mr. Martin testified that he was familiar with the notice that was published

for public comment and familiar that such contained the word "filling." He was not heard to complain thereof until this hearing. However, I would not consider the mere discrepancy over the meaning of the word "filling" to be controlling hereunder.

An issue of great concern to the Hearing Officer, in terms of the order hereunder for restoration, is the question of stability. I am persuaded by the testimony and opinion of Henry A. Sardelli that if the restoration is competently performed stability will be maintained.

F I N D I N G S O F F A C T

After review of all the documentary and testimonial evidence of record, I make the following findings of fact:

1. A prehearing conference was held on May 29, 1990.

2. A public hearing was held on June 11, 1990.

3. The hearing was conducted at a site convenient to the site of the proposed project to wit, Town Hall, North Providence, Rhode Island.

4. The hearing was conducted in accordance with the provisions of the "Administrative Procedures Act" (Chapter 42-35 of the General Laws of Rhode Island) and the "Freshwater Wetlands Act" (Rhode Island General Laws section 2-1-18 et. seq.).

5. The applicants seek approval to alter a Fresh Water Wetlands on a parcel of land located at 777 Smithfield Road, North Providence, Rhode Island, Assessor's Plat 21, Lots 907 and 908.

6. The alteration is described as follows: vegetative clearing, filling, excavating, grading, and soil

disturbance of approximately 10,500 square feet (0.24 acres) of 50 foot perimeter wetland; construction of four (4) walls paralleling the edge of the Wenscott Reservoir, ranging in length from 20 feet to 145 feet and all within 5 - 45 feet of said reservoir; construction of three (3) walls perpendicular to the edge of the Wenscott Reservoir ranging in length from ten feet to fifty feet all within 10 - 20 feet of said reservoir and construction of a 17 foot brick walk with planters on each side within 50 feet of the Wenscott Reservoir all of which have been accomplished. I find this to be so, particularly, I find that the activities, in part, did constitute "filling" although the applicant did not bring in any new fill material. In addition to the above work, new proposed alterations consist of constructing a 7 x 17 foot brick walk and 10 x 10 foot landing with stairs, constructing a 5 foot addition to an existing wall, and constructing concrete caps for two existing walls within 50 feet of the Wenscott Reservoir. I so find.

7. The applicants were cited with a notice of violation on October 1, 1986.

8. The applicants and the Department entered into a Consent Agreement received by the Department on January 27, 1987.

9. The formal application was filed on June 12, 1987.

10. The site plan subject to the hearing was received by the Department on February 9, 1989.

11. The Department did not receive any public comments during the public comment period.

12. The Department denied the application on July 12, 1989.

13. The applicants filed a timely request for an adjudicatory hearing on July 24, 1989.

14. The proposed and existing alterations will cause undesirable destruction of the subject freshwater wetland complex.

15. The proposed and existing alterations will result in loss, encroachment and permanent alteration of the wetland wildlife habitat associated with the subject wetland complex.

16. The proposed alterations and existing alterations will reduce the value of a valuable wetland recreational environment.

17. The proposed and existing alterations will reduce and negatively impact the aesthetic and natural character of the undeveloped wetland and buffer zone.

18. The proposed project will thwart the policies expressed in R.I.G.L. 2-1-19 and said proposal is inconsistent with the functions enumerated in R.I.G.L. Section 2-1-18.

C O N C L U S I O N S O F L A W

Based upon all the documentary and testimonial evidence of record, I conclude the following as a matter of law:

1. The public hearing was held in an appropriate place at a location convenient as possible to the site of the proposed project.

2. The hearing was held in accordance with the Rhode Island Administrative Rules for Practice and Procedure for the Department of Environmental Management and the Department's Rules and Regulations Governing the Enforcement of the Freshwater Wetland Act.

3. The proposed alteration is inconsistent with the public interest and public policy as stated in Sections 2-1-18 and 2-1-19 of the Rhode Island General Laws and Section 1:00 of the Rules and Regulations of the Department.

4. The alteration to the wetlands proposed by the applicants will cause an undesirable disturbance of a freshwater wetland which should be protected by the director.

5. The proposed alteration will cause an unnecessary and undesirable destruction of freshwater wetlands.

6. The proposed alteration will cause an undesirable destruction of freshwater wetlands in that said project proposes significant alterations which will result in the reduction of the value of a "valuable" wetlands which provides a valuable recreational environment.

7. The applicants have failed to sustain their burden of proof that the application will not cause random, unnecessary and/or undesirable destruction of fresh water wetlands.

Therefore, it is ORDERED:

1. Application No. 87-0440F to alter a freshwater wetlands be and hereby is denied.

2. The applicants are ordered to comply with the restoration provisions in the denial letter dated July 12, 1989.

I hereby recommend the foregoing Decision and Order to the Director for issuance as a Final Order.

DATED:

PATRICIA A. SULLIVAN, IN MY CAPACITY AS HEARING OFFICER

The within Decision and Order is hereby adopted as a Final Decision and Order.

DATED:

MICHAEL ANNARUMMO
ACTING DIRECTOR OF THE DEPARTMENT OF ENVRIONMENTAL MANAGEMENT