

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Division of Groundwater and
Freshwater Wetlands

IN RE: APPLICATION OF ALICE I. WHEELER FOR A PERMIT TO ALTER A
FRESHWATER WETLAND: APPLICATION NO. 87-0704F

DECISION AND ORDER

AUTHORITY:

This matter is before the Administrative Hearing Officer pursuant to the Freshwater Wetlands Act (Chapter 2-1 and specifically section 2-1-22 of the Rhode Island General Laws, 1956, as amended), the Administrative Procedures Act (Chapter 42-35 of the Rhode Island General Laws and specifically section 42-35-9), and the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act, June, 1981 ("Wetlands^v Regulations"), and the Administrative Rules of Practice and Procedure for the Department of Environmental Management promulgated by the Department of Environmental Management ("DEM").

DECISION:

The applicant, Alice I. Wheeler, has sought approval for a permit to alter freshwater wetlands. Specifically, the applicant seeks approval to build a single-family residence with associated driveway, septic system, well and grading within 200 feet of Frenchtown Brook. The location of the proposed work is north of Bates Trail and west of Carr's Pond Road at their intersection in the Town of East Greenwich on Assessor's Plat 15G, Lot 180.

RECORD:

Pursuant to a Consent Hearing Order entered by the Hearing Officer on June 21, 1989 and by mutual agreement of the parties this was a Hearing on the Record and was conducted according to Rule 13.00(b) of the Department's Administrative Rules of Practice and Procedure.

The following documents were submitted by the Applicant in support of her case:

1. Initial Memorandum, On Behalf Of Respondent, Alice I. Wheeler, Douglas J. Rose, Esq., August 4, 1989
2. Preliminary Determination Application, August 4, 1987
3. Letter of October 16, 1987 from Dean Albro to Louis Wheeler
4. Formal Application To Alter A Wetland, October 17, 1987
5. Letter of March 7, 1988 from Philip M. Kaczorowski to Brian Tefft
6. Undated "Site Plan Detail"

7. Certified Letter of August 18, 1988 from Stephen G. Morin to Alice I. Wheeler
8. Wetland Wildlife/Recreation Evaluation, (with attachments), Brian C. Tefft, August 2, 1988
9. Wetlands Inspection Report, Brian Tefft, August 2, 1988
10. Letter of June 16, 1988 from Irwin W. Anderson to Dean A. Albro
11. Letter of August 30, 1989 from Douglas J. Rose, Esq. to Sandra Calvert, Esq.
12. Letter of September 29, 1989 from Douglas J. Rose, Esq. to Malcolm Grant

The following documents were submitted by the Division of Groundwater and Freshwater Wetlands in support of its case:

1. The Department of Environmental Management's Memorandum In Support of the Denial of Freshwater Wetlands Application #87-0704F, Sandra J. Calvert, August 7, 1989
2. Site Plan To Accompany Wetlands Application No. 87-0704F, Scott F. Moorehead, P.E. Rev. 3/88,
3. Ibid; Applicant's (8)
4. Ibid; Applicant's (9)
5. Ibid; Applicant's (4)
6. Ibid; Applicant's (7)
7. Letter of August 25, 1988 from Scott F. Moorehead, P.E. to Stephen G. Morin
8. Department's Memorandum In Reply To Respondent's Initial Memorandum, Sandra J. Calvert, Esq., August 29, 1989

9. Department's Memorandum In Response To Applicant's Allegations Of Error In The Department's Assessment Of The Subject Wetland, (with attachments), Sandra J. Calvert, October 25, 1989

Pursuant to the aforementioned Consent Hearing Order, this Decision and Order is based solely and entirely on the various documents identified above. No testimony or affidavits by witnesses for either party were submitted.

FINDINGS-OF-FACT:

1. The construction of a residence together with associated driveway, septic system, well and grading is proposed to occur within 200 feet of a flowing water body having a width in excess of ten feet which pursuant to R.I.G.L. 2-1-20 is a form of freshwater wetland more particularly known as a "riverbank" and which by virtue of such designation is subject to regulation pursuant to the Freshwater Wetlands Act.

The Applicant in her Initial Memorandum (Applicant's #1) argued that for various reasons set forth in Section IV.A of that Memorandum no part of the Applicant's project lies in the wetland buffer zone and that most of it lies outside of the biological wetland. Applicant does, however, concede that Frenchtown Brook as it crosses her property is more than ten feet wide with the consequence that land within 200 feet of the water's edge" could be considered a riverbank "(p.8). This width of flowage is attributed to

"a rather unnatural avulsion of water" caused by a narrow (30 inch) culvert under Carr's Pond Road immediately downstream from Applicant's property (p.5).

In his letter of September 29, 1989 (Applicant's #12), however, Mr. Rose advised the Hearing Officer on behalf of the Applicant that "the arguments in Section IV(A) should be considered waived" because his calculations had been "infected" by an error in the scale employed in Respondent's Site Plan.

The Hearing Officer, therefore, finds that the Division's assertion of jurisdiction under R.I.G.L. 2-1-20 stands unrebutted and is further substantiated by Applicant's Site Plan (DEM #2) which shows a so-called "200' riverbank setback" drawn by Applicant's engineer to the south of Applicant's property and, in fact, on the opposite side of Bates Trail.

2. The proposed construction will result in the "alteration" of a freshwater wetland as that term is defined under Rule 2.02 of the Department's Freshwater Wetlands Regulations.

Applicant's Initial Memorandum (Applicant's #1) at various points refers to "grading and filling" (p.4), "cut and fill" (p.8), "excavation" (p.9), and "earth work" (p.9), all associated with the Applicant's proposal. Since as previously noted, the Applicant subsequently waived her argument that the proposal lies outside the legal riverbank wetland and since the regulatory definition of "alteration" specifically includes among an inclusive list of activities

"excavation", "filling", and "grading" in/of a wetland, the record supports no other Finding on this point.

3. The proposed alteration will not reduce the volume or net flood holding capacity of a flood plain, or create a detrimental obstruction of a floodway contrary to the requirements of Freshwater Wetlands Rules 5.03(c)(1) or 7.03.

Such reduction and/or obstruction is not alleged by the Division in opposing issuance of this permit nor does the record contain any evidence which would suggest that either is likely to result.

4. The proposed alterations will not reduce the ability of the wetland to moderate flood damage nor adversely affect its water retention capacity, drainage or runoff characteristics contrary to the requirements of Freshwater Wetlands Rules 5.03(c)(2), 1.03(a) or 7.02, respectively.

Again, such impacts are neither alleged to be nor shown to be likely on the basis of the record before me.

5. The proposed alterations will not reduce the ability of the wetland to recharge any groundwater aquifer or existing or potential public drinking water supply, nor will they reduce groundwater levels contrary to the requirements of Freshwater Wetlands Rules 5.03(c)(3) or 1.03(b).

Neither alleged nor shown to be likely.

6. The proposed alterations will not degrade water quality standards contrary to Freshwater Wetlands Rule 5.03(c)(4).

An objector's claim that this proposal would degrade water quality (Applicant's #10) was apparently not found to be substantive by the Division which did not allege that such degradation would occur.

7. The proposed alteration will not reduce the ability of a tributary to a public water supply to remove pollutants from surface waters contrary to Freshwater Wetlands Rule 5.03(c)(5).

Neither alleged nor shown to be likely.

8. The proposed alterations will not degrade the natural character of a "unique" wetland contrary to Freshwater Wetlands Rules 5.03(c)(6) and 7.06(a).

The Division's Biologist in his Wildlife/Recreation Evaluation (Division's #3) specifically found that the wetland in question is not "unique" as the term is defined under rule 7.06(a).

9. The proposed alterations will not cause sedimentation of a wetland due to inappropriate erosion and/or sedimentation control measures contrary to Freshwater Wetlands Rule 7.04.

Neither alleged nor shown to be likely.

10. The riverbank wetland proposed to be altered per Finding of Fact #2, above, provides "valuable wildlife habitat" and is consequently a "valuable" wetland per Freshwater Wetlands Rule 7.06(b).

The Applicant has alleged that the Division's biologist erred in performing the Wetland/Environmental Evaluation required by Rule 7.06 by assigning incorrect numerical

values to various parameters identified in the Golet evaluation system with the result that he calculated a higher total numerical value than he should have, 64.0 as opposed to 58.5 (Applicant's #1, p.12).

The Applicant also argues that the biologist's evaluation is flawed by his failure to find any actual evidence of the various mammals, birds, and aquatic species he concludes the wetland in question is capable of supporting (Applicant's #1, pp.5-6).

The Division argued persuasively in its Memorandum In Response To Applicant's Allegations Of Error In The Department's Assessment Of The Subject Wetland (Division's #9) that the biologist's application of the modified (revised) Golet System required to be employed by Rule 7.06, as opposed to the unmodified version used by the Applicant and the biologist's related arithmetic calculations were performed correctly with the consequence that the scoring of the wetland as "valuable" was substantiated. It likewise argued persuasively that the presence of various species can be reasonably inferred from environmental indicators short of actual field observation (Division's #8,D). With regards to this latter argument, the Hearing Officer concludes that requiring actual observation would render Rule 7.06 effectively inoperable since it is patently obvious that seasonal climatic changes, day-to-day weather conditions, time of day and innumerable other environmental and/or temporal variables

and pure chance all to varying degrees effect the actual presence or at least observation of at any given time in any given place of resident plant and animal species.

11. The riverbank wetland proposed to be altered is not capable in any meaningful sense of supporting recreation by the general public and its characterization as a "valuable recreational environment" is consequently not supportable. The protection affected "valuable recreational environments" under Rules 5.03(c)(7) and 7.06(b) are, therefore, not germane to this application.

The Applicant argues that the subject wetland is not a "valuable recreational environment" as defined by Rule 7.06(b) for the simple reason that they do not allow members of the general public to pursue any of the activities identified in the regulation on their property which is furthermore entirely surrounded by other private property (Applicant's #1, p.14).

The Division conversely argues that the proposed site provides "vital" recreational use both presently and potentially (Division's #1, p.4) and is capable of supporting a "wide range" of active and passive recreational opportunities which would be lost if the application were granted (Division's #1, pp.8-9). In its Reply Memorandum (Division's #8) the Division goes on to argue that the Freshwater Wetlands Regulations do not require as suggested by the Applicant actual or present public recreational access, but merely the possibility of

such access (Division's #8,D).

The Hearing Officer finds the Applicant's argument that there can be no public recreational value to privately held wetlands simply because they are private to be unpersuasive since it would effectively limit the protection provided "valuable recreational environments" by Rule 7.06 to wetlands already owned by units of government. The language of the regulation, particularly when read in the context of the Freshwater Wetlands Act itself, suggests rather clearly that this was neither the Legislature's nor the regulator's intent.

However, I find the Division's position on this point as it relates to this specific application equally untenable. In its Memorandum (Division's #1) the Division identifies the site in its entirety as consisting of 3.0 acres (p.2) with "the extent of the alteration [being] 10,800 square feet of State regulated freshwater wetland." (p.3). I find no disagreement on the Division's part with the Applicant's representation that the site is private, that she neither allows nor intends to allow public recreational use, or that the site is surrounded by other privately held land.

While as stated previously, I do not find that the intent of Rule 7.06(b) was to limit recreationally valuable wetlands to those already held by the public, neither do I find an intent to assign [public] recreational value to all wetlands under any and all circumstances. Likewise, while

I agree as argued by the Division that actual and present recreational access or opportunity is not required for there to exist the "capability" of supporting public recreational use, there nevertheless is implicit in the regulatory requirement some reasonable standard of probability or at least possibility.

Applying such a standard of reasonableness to this specific application I find a privately held site which is too small and too isolated relative to other publicly held land to show any reasonable probability of ever being accessible to or placed under any significant pressure to be made accessible to the public and which, moreover, is so isolated relative to urban concentrations and/or generally traveled highways that its significance even as a passive aesthetic resource for passersby is questionable.

11. The proposed alteration will reduce the value of a "valuable" wetland in contravention of Freshwater Wetlands Rule 5.03(c)(7) by destroying, displacing and/or encroaching upon "valuable wildlife habitat" as both terms are defined under Rule 7.06(b).

Per his Finding #1, the Hearing Officer has concluded that the proposed alteration in its entirety lies within a legal "riverbank" wetland and per Finding #2, that it is consequently an alteration of that wetland. This wetland, moreover, provides "valuable wildlife habitat" and is, therefore, a "valuable" wetland by regulation (Finding #9).

In his Wetland Wildlife/Recreation Evaluation (Division's #3), the Division's biologist on the basis of his field visit and application of the revised Golet wetlands rating system observes that "the wetland is expected to provide valuable wildlife habitat and is enhanced by its streamside association, its variety of adjacent wetland cover type and undeveloped upland ecotone." (p.4). He further notes the necessity to preserve an undisturbed "buffer zone" along the wetlands edge to eliminate habitat encroachment and/or loss (p.6) and concludes that the proposed alteration will result in "permanent loss" of 10,800 square feet of regulated wetland and buffer setback. (p.7).

The Applicant introduces no expert testimony in her Memorandum (Applicant's #1) to support her representation that the proposed site is a "non-valuable" wetland" (pp.4,12) or that her alteration of that wetland is "insignificant" (p.10). Her arguments in this regard rely entirely on efforts to discredit the Division biologist's field observations and calculations. As noted in Finding #9, the Hearing Officer finds these arguments and efforts unpersuasive with the consequence that the biologist's Evaluation Report (Division's #3) and its conclusions stand un rebutted.

The Hearing Officer further finds upon close review of the plans submitted with this application (Division's #2)

that there exist in close proximity to the proposed site several other encroachments on or alterations of the regulated wetland including another residence, a narrow culvert and two streets that all to varying degrees and in differing ways may reasonably be expected to be adversely effecting wetlands habitat and inhabitants. Any increment of additional habitat stress as would be associated with the Applicant's proposal must, therefore, be viewed with extreme concern.

CONCLUSIONS OF LAW:

After consideration of the documentary evidence of record, I make the following Conclusions of Law:

1. Pursuant to a Consent Hearing Order entered by the Hearing Officer on June 21, 1989 this proceeding was by mutual agreement of the parties a Hearing on the Record per Rule 13.00(b) of the Department's Administrative Rules of Practice and Procedure.
2. References in the Applicant's Memorandum (Applicant's #1) to the Division's or D.E.M.'s "burden of proof" (pp.10 and 16) reflect an erroneous interpretation of law and regulation. Pursuant to Rule 11.02 of the Rules and Regulations Governing The Enforcement Of The Freshwater Wetlands Act the Applicant bore the burden of proof that the subject proposal is not inconsistent with the Freshwater Wetlands Act and the regulations adopted thereunder.
3. Approval of this Application will cause random, unnecessary and/or undesirable destruction of a freshwater wetland by reducing the value of a "valuable" wetland in contravention of Freshwater Wetlands Rule 5.03(c)(7).

4. Approval of this Application, would, therefore, be inconsistent with the public interest and public policy as stated in Sections 2-1-18 and 2-1-19 of the Freshwater Wetlands Act and Section 1.00 of The Rules and Regulations Governing The Enforcement Of The Freshwater Wetlands Act.
5. Approval of this Application to alter a freshwater wetland would not be in the best public interest, so as to satisfy R.I.G.L. §2-1-24(a).

ORDERED

Approval of Application No. 87-0704F, by Alice I. Wheeler for a Permit To Alter Freshwater Wetlands shall be **DENIED**.

10-30-89

Date

Malcolm J. Grant

Malcolm J. Grant, in his capacity
as Administrative Hearing Officer

10-31-89

Date

Robert L. Bendick, Jr.

Robert L. Bendick, Jr., Director
Department of Environmental
Management

CERTIFICATION

I hereby certify that on March 31 1989 a true and accurate copy of the within has been sent first class mail, postage prepaid, to Douglas J. Rose, Esq., 20 Washington Place, Providence, R.I. 02903 and by Inter-Office mail to Sandra J. Calvert, Esq., Division of Groundwater and Freshwater Wetlands, 291 Promenade Street, Providence, R.I. 02908.

Maureen Stone

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