

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

IN RE: Harold Large, III
Freshwater Wetlands Application No. 89-0140F

DECISION AND ORDER

This matter came before the Administrative Adjudication Hearing Officer as an appeal from the Department of Environmental Management's denial to alter an intermittent stream and its associated one hundred feet riverbank wetland located in a residential neighborhood on the south side of Rawson Road, Cumberland, Rhode Island.

Harold Large, III, owner of the property proposes to build a 1,625 square feet single family home, well and septic system upland from the stream and a three hundred feet gravel driveway leading from Rawson Road to his home. Part of the house and well will be situated in the jurisdictional wetland. Five concrete box culverts totalling three hundred and twenty square feet will be installed in the channel to allow for the driveway crossing. Riprap and a ten feet wide retaining wall will be built to stabilize the shoreline.

Francis Gaschen represented Mr. Large and Gerald DeCelles appeared on behalf of the Division of Groundwater & Freshwater Wetlands.

An adjudicatory hearing concerning this application was held on September 4, 1987 at the Cumberland Town Hall, 45 Broad St, Cumberland, Rhode Island. The hearing was held in accordance with the Administrative Procedures Act, (Chapter 42-35 of the General Laws of Rhode Island as amended), the Rhode Island Freshwater Wetlands Act (R.I.G.L. §2-1-18, et. seq.) and the Rules and Regulations Governing Freshwater Wetlands ("Regulations") promulgated pursuant thereto, and the Administrative

Rules of Practice and Procedure adopted by the Rhode Island Department of Environmental Management.

A site visit was conducted by all parties on the same day. No members of the public spoke at the hearing and no comment letters were received.

The prehearing conference was held on August 24, 1990 at One Capitol Hill, Providence, Rhode Island. No motions to intervene or comment letters were presented.

Prior to the hearing both parties agreed to qualify Paul Shea, President of Independent Environmental Consultants, Inc., Carl Ruggieri, Senior Natural Resource Specialist at DEM and Dean Albro, Deputy Chief, Division of Groundwater and Freshwater Wetlands as experts in biology and Robert Smith, President and principal engineer for Waterman Engineering as an expert in engineering.

The parties agreed to enter the following eleven joint exhibits and nine stipulations of fact:

JOINT EXHIBITS

- JT1. Formal application form to alter wetland 89-0140F dated 5/20/89.
- JT2. Site plan.
- JT3. Official notice regarding public notice dated 2/21/90.
- JT4. DEM Evaluation and Assessment report dated 4/26/89.
- JT5. Letter dated June 5, 1990 to Harold Large from Brian C. Tefft denying the application.
- JT6. Letter dated June 14, 1990 from Francis A. Gaschen, Esq. to Brian C. Tefft appealing the denial and requesting a hearing.
- JT7. Curriculum Vitae of Dean H. Albro.
- JT8. Curriculum Vitae of Carl A. Ruggieri.

- JT9. Curriculum Vitae of Paul J. Shea.
- JT10. Curriculum Vitae of L. Robert Smith.
- JT11. Four (4) photographs of the subject property. (labelled A-D).

STIPULATIONS

1. The applicant has filed all necessary documents and paid all necessary fees to be properly before the Hearing Officer in the above-entitled matter.
2. The site is owned by applicant and is located at the south side of Rawson Road, A.P. 23, Lot 30, utility pole number 2, Town of Cumberland, Rhode Island.
3. The applicant proposes the construction of one single family house, a well, an ISDS system, and a driveway leading to Rawson Road, over a concrete box culvert in the channel of an existing intermittent stream.
4. The formal application was filed on May 12, 1989.
5. The site plan subject to this hearing is entitled, Wetland Alteration Plan, dated February 1989 Waterman Engineering Co.
6. The application was sent to public notice on February 21, 1990; the forty-five (45) day public notice period expired April 7, 1990.
7. The Department denied this application on June 5, 1990 in a letter to applicant by Brian C. Tefft.
8. Applicant filed a timely request for hearing.
9. The wetlands proposed to be altered and subject to the Department's jurisdiction are that area of land within one hundred (100) feet of a flowing body of water less than ten (10) feet wide and intermittent stream for the purpose of driveway installation and construction.

Applicant presented two exhibits at the hearing which were admitted as full over DEM's objection. They are: Applicant's # 1, a technical deficiency letter from DEM biologist Susan Cabeceiras and Applicant's # 2 a letter to Mr. Large from the Army Corp of Engineers. DEM proffered no further exhibits.

The following issues were submitted to the hearing officer for decision:

1. Whether the proposed alterations will cause unnecessary and/or undesirable destruction of freshwater wetlands as described by Section 5.03 (c) (7) of the Rules and Regulations Governing the Enforcement of the Rhode Island Fresh Water Wetlands Act.
2. Whether the proposed project will result in loss, encroachment and permanent alteration of Wetland-wildlife habitat (11,884 square feet) associated with the subject wetlands area and cause undesirable reduction of the wildlife habitat values provided by this wetland.
3. Whether the proposed project will reduce the value of a "valuable" wetland-recreational environment (Section 7.06(b) and will reduce and negatively impact the aesthetic and natural character of the undeveloped wetland and adjacent areas which serve as a buffer zone.
4. Whether there is an available alternative to the proposed crossing which would not require an alteration of the subject wetlands area.
5. Whether the existing traveled gravel roadway located along the easterly side of the subject property, which, if incorporated into a project redesign, would result in substantially reduced impacts to the subject wetland.
6. Whether proposed alterations are inconsistent with the best public interest and public policy stated in Sections 2-1-18 and 2-1-19 of the Rhode Island Freshwater Wetlands Act and Section 1.00 of the Rules and Regulations Governing the Enforcement of the Act.

Pursuant to Section 11.02 of the Rules and Regulations governing the enforcement of Freshwater Wetlands Act the applicant bears the burden of proof by preponderance of the evidence that the subject proposal is not inconsistent with Act and the adopted Regulations.

HEARING SUMMARY

The Department of Environmental Management (DEM) has characterized this site as a valuable wildlife and recreational area and has suggested there is an alternative access to the property. Applicant agrees the proposed alteration will affect a statutorily defined freshwater wetland, but contends the site has no significance as a wetland and further proposes to prove that no viable alternative access to the property exists. In support of this position applicant presented Paul Shea and Robert Smith.

Mr. Shea holds a Bachelor of Arts in environmental planning from Northeast University and a Masters Degree in Environmental Studies from Brown University. Since 1986 he has been president of his own environmental consulting firm, Independent Environmental Consultants, Inc. He has previously worked as a principal planner, environmental planner and cartographer. The parties stipulated to his curriculum vitae and he was qualified during the hearing as a biologist and environmentalist.

Mr. Shea has visited the site on five or six separate occasions. He recalls specifically being on the property in November 1988, January 1989, May 1989, July 1989 and winter of 1990. He testified that he never saw more than a trickle of water in the channel (transcript page 43 and 54).

Applicant's biologist pointed out that he visited the site when the groundwater elevations were at the highest and the stream continued to hold very little water.

Testimony revealed that this area is not a flood area. It is classified on Federal emergency maps as an area of minimal flooding (transcript page 66). The only water into the channel results from Lonesome Pine and Fieldside Drive Developments, two forty house subdivisions which are located West of Abbott Run Road. These areas discharge stormflow into holding ponds that in turn overflow and discharge into this channel. This discharge is the only source of water into the intermittent stream (transcript page 14).

Mr. Shea stated that during his various site visits he never saw any fish or animal life in the stream. In the channel area he observed cobblestone rocks but no hydrophytic vegetation (transcript page 57). This type of vegetation normally exists in an area with a high watertable such as a freshwater wetland. Mr. Shea concluded no biological wetland existed on either side of the stream bank.

Both sides of the one hundred foot riverbank wetland are wooded areas. Applicant's biologist testified that due to the large amount of human activity and homes in this suburban neighborhood actual wildlife species on the site would be very limited.

To counter Mr. Shea's assertions The Department of Environmental Management called Carl Ruggieri and Dean Albro. Mr. Albro is the Deputy Director of the Department's Freshwater Wetlands Division. He discussed DEM's general policies and decision making practices. His conclusions and opinions paralleled those of Mr. Ruggieri. Both witnesses were stipulated by counsel to be experts in wildlife biology.

Mr. Ruggieri has a Bachelor of Arts in Natural Resources from the University of Rhode Island. He has worked for the Freshwater Wetlands Division for the past 2 years and is currently employed as a Senior Natural Resources Specialist.

On April 26, 1990 Mr. Ruggieri conducted an ecological field study and evaluation of the area (JT 5). This was his only visit to the site. He stated on direct examination that DEM regulations require that any land within one hundred feet of a less than ten feet intermittent stream is under the department's jurisdiction and classified as a wetland.

Further testimony by Mr. Ruggieri revealed that at times this designation can be taken to the extreme. He agreed with Mr. Shea's assertion that regardless of the type of land within the one hundred feet of the riverbank, even if the area was an asphalt parking lot, the Department would classify that area as a wetland (transcript page 129, 130).

Mr. Ruggieri's testimony on his site visit that he saw wooded vegetation within the one hundred feet riverbank wetland but not much vegetation, if any, in the water course paralleled Mr. Shea's observations (transcript page 97). No witness testified seeing any plants or animals indigenous to a freshwater wetland.

Mr. Ruggieri did observe passerine birds in the upland area as well as duck and racoon tracks in the channel. He believes the proposed culverts will not interfere with animal use of the stream and it is his opinion that the culverts do not have a detrimental effect on the wetland (transcript page 100). The biologist contends the real effect on the

wetland will be from alterations in the upland area caused by the portions of the house construction and driveway within the one hundred feet riverbank area. However, he offered no reasons or conclusions for this assertion.

Mr. Ruggieri classified this site as a valuable recreational wetland and wildlife habitat. Section 7.06 of the Rules and Regulations governing Freshwater Wetlands defines a valuable recreational environment as "a relatively natural and undeveloped area which, in its natural state, is capable of supporting recreation by the general public". The term "capable" is undefined in the regulations and is therefore left to subjective interpretation. Although agencies are empowered to interpret their own regulations Mr. Ruggieri's testimony clearly indicated that the department has broadly defined this term to mean any land regardless of its location or ownership which might at some point in time be utilized for recreational purposes by the general public. The hearing officer agrees in theory any land has recreational potential, but activities associated with public use of a recreational wetland such as hiking, education, trapping, birdwatching, research and photography are not practical or reasonable uses of this property. The site in question is situated off a suburban secondary road, which has homes on both sides and it is sheltered from the road by a dirt driveway. In the lowland area a two family home sits to the right of the driveway, a large barn which is in the jurisdictional wetland, exists to the left and a horse corral is located to the west of the upland parcel. The watercourse can not be

seen from the road and the upland areas can not be reached without walking across the privately owned stone culverts.

I find the area is not a valuable recreational wetland and this project will have no effect on the wetland recreational environment.

The Department's biologist was concerned that the proposed house and driveway would affect wildlife living in the area. He believes introduction of domestic animals, noise and lights would cause a loss of wildlife on the site (transcript 199). The hearing officer rejects this hypothesis. Passerine birds in the upland area and racoon and duck tracks in the channel were the only wildlife sighted. Mr. Ruggieri has already concluded that the culverts in the channel will not affect wildlife. This is a completely suburban area already surrounded by homes, cars, children, and domestic animals. I cannot find that the building of applicant's home will add a significant disturbance to any wildlife.

It should also be noted that Mr. Ruggieri when assessing the surrounding habitat ratio section of the Project Assessment Sheet (JT4) found the cumulative loss of wetland to be minor.

The aesthetic and natural character of this wetland is limited. As already stated, a suburban area surrounds the parcel and the site has restricted access. Mr. Ruggieri found the gorge and intermittent stream to have great aesthetic value. The old adage "beauty is in the eyes of the beholder" appears to be applicable to this site. The hearing officer respects the biologist's assessment but does not agree this particular

trench and trickle of water hold any great appeal.

The Department in reviewing Mr. Large's application identified several alternatives to the proposed crossing which they believe would significantly reduce the intrusion into the wetland area (JT5). These alternatives are as follows:

1. Achieving access to the proposed construction site via the existing gravel road along the easterly side of the subject property.
2. Incorporation of a bridge design crossing of the water course area to eliminate and/or limit stream filling and channelization from this proposal.

DEM specifically stated in their denial letter issued on June 5, 1990 that the existing gravel roadway if incorporated into the project redesign would substantially reduce the impact to the wetland. For this reason, the Department deemed the proposal as designed unnecessary.

Applicant presented Robert Smith, a registered engineer who testified as to the impossibility of these alterations. Mr. Smith holds a Bachelor of Arts from City College in New York in Civil Engineering and a Master of Science from Brown University. He belongs to various professional organizations and has been qualified as an expert in engineering on many occasions. The parties stipulated to his qualifications as an expert civil engineer.

Since the Department presented no engineering testimony or any other witnesses to rebut Mr. Smith's contentions, the hearing officer accorded great weight to his testimony.

Mr. Smith testified to the advisability of placing box culverts over the intermittent stream as opposed to bridging suggested by the Division

of Groundwater and Freshwater Wetlands. Mr. Smith gave succinct, credible, and uncontroverted testimony. It became clear as he testified that the use of box culverts, riprap and a ten foot retaining wall would allow unrestricted water flow to continue in the channel. Due to the high degree of erosion on both sides of the bank, bridging the stream would inevitably lead to more erosion of the river bank and cause the bridge to wash out (transcript page 7). In his opinion, bridging is not a sound engineering design for this project. Mr. Smith believes placing box culverts at the narrowest part of the stream (the site already chosen by the applicant) using a silt fence and hay bales will control sedimentation.

Next Mr. Smith addressed the probability of using the existing gravel road and stone culvert located on the easterly side of the applicant's property. This land is an easement owned by Algonquin Gas and used to service its gas lines in the community. Clearly this road does not offer any alternative access to the applicant's property.

On cross examination by Mr. DeCelles it was revealed that a paper street (Scott Street) exists on the site map. The Department contends if applicant built this road no need would exist to cross the stream. However, further testimony revealed that any use of this road is purely speculative. The road would need to be approved by the Town of Cumberland and built to town specifications. Biologists for the Department and the applicant have already testified that placing culverts into the stream would have no detrimental effect on the wetland.

Use of this paper road will also eliminate any direct access from applicant's home to his barn off Rawson Road.

Some discussion ensued concerning the cost of street construction versus culvert construction. Applicant's attorney did not object to this line of questioning but the hearing officer found this testimony not germane to the issues.

Mr. Ruggieri and Mr. Albro were questioned by applicant's attorney about the alternatives proposed by the Department. Both experts stated they had no engineering experience and were unfamiliar with the engineering feasibilities of the Division's suggestions. Although the Department has partially based the denial of this application on those proposals, no department engineer reviewed or assessed the practicality of the alternatives.

I find no viable alternative access exists to this site and that applicant has sustained his burden of showing the proposal is proper and necessary.

The legislative specifically recognizes the value and integrity of freshwater wetlands. Since the applicant has met his burden on each of the issues stated in the denial letter, the hearing officer finds this proposal is not inconsistent with the best public interest and public policy stated in R.I.G.L. §2-1-18 and 2-1-19 and applicable Freshwater Wetlands Rules and Regulations.

After carefully considering all testimony and documentary evidence and assessing the credibility of each witness the hearing officer makes the following finds of fact and conclusions of law:

Findings of Fact:

1. The applicant has filed all necessary documents and paid all necessary fees to be properly before the Hearing Officer in the above-entitled matter.
2. The site is owned by applicant and is located at the south side of Rawson Road, A.P. 23, Lot 30, utility pole number 2, Town of Cumberland, Rhode Island.
3. The applicant proposes the construction of one single family house, a well, an ISDS system, and a driveway leading to Rawson Road.
4. The wetlands proposed to be altered and subject to the Department's jurisdiction are that area of land within one hundred (100) feet of a flowing body of water less than ten (10) feet wide and intermittent stream for the purpose of driveway installation and house construction.
5. The formal application was filed May 12, 1989.
6. The application was sent to public notice on February 21, 1990; the forty-five (45) day public notice period expired April 7, 1990.
7. The Department denied this application on June 5, 1990 in a letter to applicant by Brian C. Tefft.
8. A Pre-hearing conference was held on August 24, 1990.
9. A pre-hearing record was compiled by the hearing officer and made part of the record on August 28, 1990.
10. A public hearing was held on September 4, 1990 at the Cumberland Town Hall, Cumberland, Rhode Island.
11. No comment letter objecting to or supporting the project were received.
12. A view of the site was taken by the hearing officer and all parties on September 4, 1990.

13. No brief or memoranda were required by the hearing officer or submitted by the parties.
14. The hearing was closed on September 18, 1990, the date the stenographer notes were received.
15. Pursuant to rule 11.02 of the Regulations the applicant bears the burden of proof by preponderance of the evidence.
16. This site is not a valuable recreational wetland.
17. Passerine birds, ducks and racoon tracks have been sighted in the wetland.
18. The proposed project will not cause a undesirable reduction of the wetland/wildlife habitat.
19. The site has limited aesthetic value.
20. The only surface water in the channel comes from the Lonesome Pine and Fieldside Drive Developments holding ponds which overflow and discharge into the stream.
21. The channel has no hydrophytic vegetation.
22. No indigenous vegetation exists in the jurisdictional wetland.
23. The proposed culverts will not have a detrimental effect on the wetland.
24. The proposed culverts will not restrict waterflow in the channel.
25. Two stone culverts presently exist in the stream.
26. A horse corral has been built to the right of the upland area.
27. A barn is located in the lowland area within the jurisdictional wetland.
28. The existing gravel roadway along the easterly side of the project is an easement owned by Algonquin Gas.
29. Achieving access to the proposed construction site via the Algonquin Gas easement is not a possible alternative to the proposed alterations.

30. Incorporation of a bridge design crossing of the water course area is not a sound engineering alternative to the proposed alteration.
31. The proposed project will not cause unnecessary encroachment into the wetland.
32. The proposed alterations are not against the public interest.

CONCLUSIONS OF LAW

1. The public hearing held at the Cumberland Town Hall, 45 Broad Street, Cumberland, Rhode Island for application No. 89-0140F was reasonably convenient to the site and in compliance with the statutory requirements cited in R.I.G.L. 2-1-22 (b).
2. Notice of the public hearing was published in a newspaper of state circulation and a local paper. This notice was in compliance with the requirements outlined in R.I.G.L. 2-1-22(b).
3. This matter was properly before the Administrative Adjudication Hearing Officer pursuant to R.I.G.L. 42-17-1, 42-17-7.2.
4. Applicant filed a timely request to appeal DEM's decision to deny an alteration to a freshwater wetland.
5. Area in question is a wetland as defined in R.I.G.L. 2-1-20 (g).
6. This area is not a valuable wetland recreational environment as defined in section 7.06 of the Rules and Regulations governing the enforcement of the Act.
7. The subject proposal will not cause undesirable reduction of the Wetland/Wildlife habitat as defined in Section 7.06 of the Rules and Regulations governing the enforcement of the Act.
8. The project will not reduce or negatively impact the aesthetic and natural character of the undeveloped wetland.
9. There is no viable alternative to the proposed crossing.
10. The proposal as designed is not an unnecessary alteration.
11. The proposed alterations are not inconsistent with the best public interest and public policy stated in section 2-1-18 and 2-1-19 of the R.I.G.L. and Section 1.00 of the Rules and Regulations governing the Freshwater Wetlands Act.
12. The proposed project will not cause unnecessary destruction of a freshwater wetland.
13. The applicant has sustained his burden of proof on each and every issue raised by the Department in its denial letter.

ORDERED

That the Department of Environmental Management, Freshwater Wetlands Section shall grant a permit to alter a freshwater wetland to the applicant subject to the following conditions:

1. A permanent deed restriction shall be recorded in the Land Evidence Records which restricts the driveway to a previous gravel driveway no more than three hundred feet long and fourteen feet wide.
2. The culverts placed in the channel shall be concrete box culverts and shall not exceed three hundred and twenty feet in length.
3. Hay bales and a silt fence are to be used during construction.
4. The hay bales are not to be removed and allowed to create a natural mulch.
5. That the number and position of hay bales shall be done to satisfaction of the Department of Environmental Management, Freshwater Wetlands Section.
6. If DEM finds any naturalistic plantings or vegetation are needed in the area of the disturbed wetland, applicant is to comply with the Department's planting scheme.

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

10/11/90
Date

Patricia Byrnes
Patricia Byrnes
Administrative Adjudication
Hearing Officer

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

Date

Signed by Director
Michael Annarumo
Director, Department of
Environmental Management

CERTIFICATION

I hereby certify that I caused a true copy of the within to be
forwarded regular mail, postage pre-paid to Francis A. Gaschen, Esq.,
255 Main Street, Pawtucket, Rhode Island 02860 and via inter-office mail
to Gerald DeCelles, Esq., Office of Legal Services, 9 Hayes Street,
Providence, Rhode Island 02908 on this 2nd day of October, 1990.

Lita Pinto