

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

In Re: Clyde Woods Limited Partnership

AAD No. 91-002/FWA

DECISION AND ORDER

This matter is before the Hearing Officer on the application of Clyde Woods Limited Partnership to alter freshwater wetlands located southeast of Industrial Lane, south of Simon Street and Wightman Street, northwest of Pawtuxet River, near utility pole no. 7, further described as West Warwick Tax Assessor's Plat 18, Lots 65, 67, 75, 98, 138-148, 235-237 and 246.

The applicant requested permission to alter freshwater wetlands consisting of the Pawtuxet River, the 200 foot riverbank wetland, that area within 200 feet of a flowing water body greater than 10 feet wide, and the 100 year flood plain associated with Pawtuxet River.

The proposed alterations consist of clearing, grading, filling, construction, activities and discharge of drainage into the aforementioned wetlands area.

The purpose of said proposed alterations for development of a 118 unit mobile home park including road construction, drainage and utility installations.

The application was denied by the Freshwater Wetlands Division ("Division") of the Department of Environmental Management ("DEM") and a hearing was requested.

Sean O. Coffey, Esq. represented the applicant and Michael K. Marran, Esq. represented the Division of Groundwater and Freshwater Wetlands of the Department of Environmental Management.

Prehearing conferences were held on July 15 and 25, 1991. No requests to intervene were received.

The Pre-Hearing Conference record was prepared by the Hearing Officer and the following stipulations were entered by agreement of the parties:

1. The Applicant filed all necessary documents and paid all necessary fees to be properly before the Hearing Officer in the above-referenced matter.
2. The formal application, No. 89-0755F was filed with the Department on October 11, 1989.
3. The site plan subject to this hearing was received by the Department on July 11, 1990, entitled "Clyde Woods Adult Mobile Home Park", etc. (11 sheets).
4. The site plan was sent out to public notice on July 27, 1990, commencing a forty-five (45) day notice period which ended September 10, 1990.
5. The Department received one public comment during the public comment period, which was not deemed to be of substantive nature pursuant to Section 5.05 (b) of the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act.
6. The Department denied this application on January 11, 1991.
7. Applicant timely filed its request for hearing on or about January 18, 1991.
8. Clyde Woods Limited Partnership is the owner of the property which is the subject of the Application.

The issues to be considered at the Hearing (per stipulation of the parties in the Prehearing Conference record are the following:

1. Whether the proposed project will result in unnecessary or undesirable disturbance and destruction of freshwater wetlands as described by Section 5.03 (a) (b) (c) (7) of the Rules and Regulations Governing the Enforcement of the Rhode Island Freshwater Wetlands Act.
2. Whether the proposed project will result in loss, encroachment and permanent alteration of wetland wildlife habitat (320,000 square

feet) (7.35 ± acres) associated with the subject wetlands area. Whether the subject proposal will cause undesirable reduction of the wildlife habitat values provided by this wetlands.

3. Whether the proposed project will reduce the value of a "valuable" wetlands-recreation environment (Section 7.06 (b)), causing a reduction and negative impact on aesthetic and natural character of the undeveloped wetland and adjacent areas which serve as a buffer zone.
4. Whether any reasonable alternatives exist which would reduce and/or eliminate any demonstrated wetlands impacts.

An adjudicatory hearing concerning this application was held on August 26 and 27, 1991. 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 view of the site was conducted on August 23, 1991.

In accordance with the Pre-Hearing Conference Record, the following documents were admitted into evidence as joint exhibits:

- JT1. Formal Application.
- JT2. Evaluation of Application by Martin Wencek (25 pp.)
- JT3. Site Plan, received stamped July 11, 1990.
- JT4. Official Public Notice of pending application.
- JT5. Denial of Application, 1/11/91.
- JT6. Applicant's request for Hearing.
- JT7. Notice of Administrative Hearing.

Clyde Woods Limited Partnership

JT8. Curriculum vita, Martin Wencek.

JT9. Curriculum vita, Brian Tefft.

JT10. Curriculum vita, John Kuppa.

The following were admitted as full exhibits for the Applicant:

Applic 1. Photograph of Pit.

Applic 2. Photograph of Profile of Pit.

Applic 3. Photograph of Profile of Pit.

Applic 4. Results of Avian Census August 1 to 16, 1991, Clyde Woods Property - Riverfront Park, West Warwick, Rhode Island.

Applic 6. DEM required layout for walkover for Clyde Woods Limited Partnership, West Warwick, Rhode Island dated April 29, 1991. (1 page).

Applicant's Exhibit No. 5 was introduced for identification purposes only and was not admitted as a full exhibit.

The following were admitted as full exhibits for the Division:

Div. 1. Notes of observations of ecological associates, Inc., August 1 through 16, 1991 (22 pages).

Div. 2. Report entitled "Songbird Diversity along an urban powerline right-of-way in Rhode Island by Edward H. Gerbert (9 pages).

Div. 3. Aerial photograph of site (1985).

Div. 4. Three (3) photographs of site (No. 1, 2 and 3).

Div. 5. Three (3) photographs of site (No. 4, 5 and 6).

Div. 6. Three (3) photographs of site (No. 7, 8 and 9).

Div. 7. Three (3) photographs of site (No. 10, 11 and 12).

Div. 8. Freshwater wetlands section "Site Inspection Report" for Clyde Woods dated August 23, 1991. (4 pages).

The applicant bears the burden of proving by a preponderance of the

evidence that the subject proposal is not inconsistent with the provisions of the Rhode Island General Laws and the Rules and Regulations of DEM.

Robert B. Boyer, a registered land surveyor by the State of Rhode Island was the first witness to testify for the applicant. He testified that the property being developed had been utilized formerly as a mill manufacturing complex. The buildings, consisting of over twenty brick and wooden structures, had been demolished in the mid-sixties, and demolition material and cinders resulting from the operation of the mill (as well as material from the West Warwick sewer project) were deposited on the site. The area was continually graded and the site is relatively level at the present time, with the exception of slightly elevated strip of land (sometimes referred to as a "berm") which follows the edge of the Pawtuxet River.

Mr. Boyer testified that he surveyed the various boundaries and placed stakes in the ground demarking the roads and lots (pursuant to the plans for this property that were submitted with the application) and that thirty-six of the proposed lots run along the river.

Roland J. Coutu testified next for the applicant. He is the general partner for Clyde Woods Limited Partnership, which was formed to own and operate a mobile home park. Mr. Coutu explained that the project for the development of applicant's property was originally planned in three phases, consisting of a total of 164 mobile home sites. Phase I consisted of approximately fifty-five sites which have already been developed (outside of state jurisdictional wetlands). Phase III was withdrawn without prejudice prior to the instant hearing. Phase II consists of sixty-two sites and is

the subject of the instant hearing. The property for the proposed development of Phase II is entirely within two hundred feet of the Pawtuxet River. Phase II proposes a thirty-five foot wide roadway running parallel to the river with lots (approximately 40 feet by 80 feet) on either side of the roadway.

Mr. Coutu testified that applicant examined the alternative suggested by the Division in its denial notice as to the reduction of the extent and scope of the proposed development at and along the channel of the Pawtuxet River riverbank wetland. He stated that applicant would not be able to comply with said alternative because a reduction in the number of lots being developed would not be cost effective. Applicant felt that the cost of putting in the road is so great that applicant needed to be able to generate the income from the lots once they are in operation to offset all of their construction costs.

It was elicited in cross examination of Mr. Coutu that the roads already located on applicant's property (in Phase I) were constructed prior to submission of the instant application.

Dr. John J. Kuppa, president of Ecological Associates, and a Professor of Environmental Planning at the University of Rhode Island was the next witness called by the applicant. He was qualified as an expert in wetlands, ecology, wildlife habitat, recreational environmental evaluation and assessment and environmental impact assessment.

Dr. Kuppa testified that his firm began an analysis of this project in February of 1991. The initial work involved a site inspection, attendance at several hearings and an examination of the property and the

salient ecological parts of the property itself. Thereafter, this witness undertook a more intensive analysis of the 200 foot area by evaluating the vegetation complex present in the area by walking the site and listing the vegetation present, in terms of species, heights and diameter of trees. Additionally they examined the complex of shrub and sapling vegetation present on the Clyde Woods property itself and also they looked at the herbaceous, annual and perennial grasses and herbaceous material.

Dr. Kuppa stated that after his firm assembled the aforesaid data, they concluded that the areas present were in the earliest stages of secondary forest succession and that the site was highly disturbed by previously used activities. He examined the profiles of fillings in the area (from a large pit that had been dug into the surface of the ground) and determined that there was no organic horizon present. The fillings on the site were indicative of cinder and spoil materials, and the plants growing in this area were typical of the kinds of plants that grow in these disturbed or filled type soils.

It was brought out by Dr. Kuppa that his firm dug several shallow examination pits along either side of the berm that ran along the river and they examined the soils present on the site. This soil investigation showed that the filling had occurred only on the landward side of the berm but not on the river side of the berm. This witness stated that the vegetation changed as the distance from the river increased and that the number and size of the trees decreased as you got further away from the river (within the 200 foot area). He pointed out that beyond the berm towards the river, there were a number of plants associated with the river's edge that were wetland plants and an emergent vegetation that was indicative of wetlands factors; however, within the 200 foot zone on the landward side of the berm there were no factors that indicated the presence of a wetlands.

Dr. Kuppa described what his firm did to evaluate the wildlife potential of the subject 200 foot zone. They walked the landward side of the berm on the Clyde Woods property on scheduled visits on eleven different occasions and followed the same procedure on the other side of the river, where forest was clearly present. They documented that there were between twelve and fifteen of the same bird species present in each habitat which birds were identical to those commonly found in Rhode Island's residential areas. Dr. Kuppa testified that although one can expect fifty-eight species of birds in a naturally unbroken woodlands, in his professional judgment there will never be more than seventeen bird species in the subject area studied because the habitat is not adequate to allow an expansion of bird population. It was this witness's opinion that the proposed project would not have any impact on the wetland wildlife in the area and that the number of species of birds would not change regardless of whether or not the project was approved. He stated that he evaluated, as a comparison, that area of the West Warwick River Front Park directly across the river from the fifteen hundred foot section of Clyde Woods project under consideration; and although the River Point Park area has been allowed to remain in natural vegetation, their transect through that habitat produced very nearly identical speciation for that site as was found on the Clyde Woods site. This lead him to conclude that the two populations separated by the width of the river were one and the same.

Dr. Kuppa further opined that the proposed project would not result in unnecessary and/or undesirable disturbance and destruction of freshwater wetlands, that the proposed project would not result in a loss, encroachment

and permanent alteration of wetlands and wildlife habitat, that the proposed project would not cause undesirable reduction of wildlife habitat values provided by the wetlands and that the proposed project would not reduce the value of a valuable recreational environment and not cause reduction and negative impact on the aesthetic and natural character of the undeveloped wetland and the adjacent areas which serve as a buffer zone.

It was this witness's opinion that these values can be preserved in this case by strictly limiting the disturbance upland of the berm and not disturbing the area between the berm and the wetland and the river, and that reducing the extent and scope of the proposed development at and along approximately 1500 linear feet and within the Pawtuxet River riverbank wetlands (as cited by the Division as one of the alternatives) would not have any appreciable impact on preserving wetlands associated values. Dr. Kuppala stated that applicant could comply with the Division's recommendations concerning incorporation of a naturalistic vegetative planting plant to provide adequate screening by providing an increased number of different plant species along the edge of the river, which would directly enhance the shelter and food resources for wildlife. He felt that in his judgment a vegetative planting screen consisting primarily of food bearing shrubs and cover species would directly enhance the shelter and food resources for wildlife, but that this would only serve to increase the total number of birds and not the total number of species of birds. It was his opinion that approval of the proposed project is consistent with the public's interest and the maintenance and preservation of the state's wetlands as he interpreted

those to be.

It was elicited in cross examination of Dr. Kuppa that the view expressed by him, that the 200 foot riverbank area does not contain hydric soils or vegetation that would be suitable for a swamp or what might be called a wetlands proper, this did not take into account such factors as water fowl birds and mammals.

Martin Wencek, a Principal Natural Resource Specialist with the Division, was the first witness called by the Division. He was qualified as an expert in wetland ecology, wildlife habitat, recreational environmental evaluation and assessment and environmental impact assessment. He stated that he conducted a wildlife and recreational evaluation of the subject wetland area to determine whether or not the proposal for that area will significantly impact upon the values associated with those wetlands.

This Witness testified that the site contained a branch of the Pawtuxet River (a perennial river greater than ten feet wide), and a riverbank wetland (that area of land within 200 feet of a flowing water body greater than ten feet wide), and also that the land contained both emergent plant vegetation and woody vegetation. He stated that he observed certain wildlife species during his site visits, mainly bird species, fish in the river, and mammal tracks along the river.

Mr. Wencek testified that the site in its present condition is capable of supporting several varieties of recreation, which would be of benefit to the general public. These activities consist of bird watching, nature studies,

education research, trapping, photography, cross country skiing, hiking and canoeing. It was this witness's opinion that the proposed installation of thirty units adjacent to the river would disrupt and lessen the quality of the wildlife habitat that exists on the site now. He also opined that the development of lawns, driveways and homes, associated with the proposed mobile home park, would decrease the value of this site as a valuable recreational environment.

Brian C. Tefft was the next witness called by the Division. He is a Supervisor of Applications within the Division and is responsible for the carrying out of all biological evaluations and the assessments performed on applications and the decisions made on applications in regard to its impact on freshwater wetlands. He was qualified as an expert in wetlands ecology, wildlife habitat, recreational environmental evaluation and assessment, and environmental impact assessment.

Mr. Tefft conducted four site visits during the period from February 1991 to August 1991. He described the site as a large open area which borders the north branch of the Pawtuxet River, which is a fairly substantial channel that confluences with the south branch of the Pawtuxet River. He stated that the two hundred foot area adjacent to the river is the recognized jurisdictional wetland associated with the Pawtuxet River, (a flowing body of water greater than ten feet wide).

It was Mr. Tefft's testimony that the 200 foot riverbank was vegetated with various habitat cover types consisting of trees, saplings, small trees and brushes, various shrubs, herbaceous and other succulent plants and

grasses. There are no structures located on the site and the area forms an integral part of an essentially undeveloped riverbank system. There is a public park (known as the River Point Park) on the other side of the Pawtuxet River opposite the site, which has been developed by the Town of West Warwick into both active and passive areas of recreation.

Mr. Tefft testified that the proposed project will utilize virtually the entire 200 foot zone along 1700 feet of the river and that some of the 118 lots proposed will be developed within ten or fifteen feet from the actual channel of the river and that the physical replacement of the herbaceous and shrub vegetation with lawns, roadways and associated structures will result in approximately 7.35 acres (340,000 square feet) of physical disturbance to the riverbank habitat. This will destroy the nesting sites and the breeding cover for various birds and mammals, and the food generated by the existing vegetative material will no longer be available for said wildlife. The project would have a significant impact on the wildlife's use of the Pawtuxet River as a travel corridor as the small fringe of undisturbed vegetation along the river would be totally insufficient for the needs of wildlife.

It was Mr. Tefft's opinion that the proposed project will negatively impact the wildlife habitat site and reduce the value of the wildlife habitat associated with the Pawtuxet River wetlands complex, including the riverbank wetland. He also opined that the site is considered to be a valuable recreational environment because it is capable of supporting recreation by the general public, and it is therefore a valuable wetland.

Mr. Tefft explained the factors taken into consideration by him in

rendering his opinion that the project would reduce the value of a valuable recreational environment, namely (1) that the decrease of diversity of wildlife resulting from the removal of vegetation from the site would have a negative effect on the ability to observe wildlife in that area, and (2) that the replacement of the vegetated partly forested area of riverbank with trailer units and lawns will destroy and adversely impact the aesthetic and natural character of the subject riverbank. He further opined that the project would result in unnecessary and/or undesirable disturbance and destruction of freshwater wetlands.

This witness identified the alternatives to applicant's proposal that were mentioned by the Division in its decisional letter. He stated that it was the Division's opinion that a reduction of the size or scope of the project would have a far lesser impact on the riverbank wetland and that the project as it was configured on the project plans was unnecessary. Mr. Tefft testified that lawns absolutely do not constitute any type of naturalistic vegetative planting and vehemently denied that they would serve as substitute food and/or cover for wildlife.

The testimony of Mr. Tefft left no doubt whatsoever that he disagreed with Dr. Kupa's statement that there will never be more than seventeen species of birds on the site. Mr. Tefft explained that the community which is present on the site reflects a development of vegetation, which according to the principles of plant succession will tend to increase in terms of time, and that there are already more than seventeen species using the site.

Although there was little genuine dispute as to any existing factual matters,

find the testimony of Mr. Wencek and Mr. Tefft as to the detrimental effect the proposed project will have on wildlife on the site is clearly more credible. It is abundantly clear that roads, buildings and lawns do not provide adequate cover or food for wildlife. It appears unlikely that the total number of bird species utilizing the premises would not increase if the property is left in its current state, despite the fact that the property may have had a certain amount of fill added by prior activities. Retention of a narrow strip of vegetation along the river's edge (if the proposed project were allowed) could hardly suffice to maintain the diversity of species of wildlife that presently inhabit the wetland, much less any increase thereof. The elimination of the existing vegetation (and its replacement with asphalt, homes and lawns) would certainly adversely affect the wildlife habitat and the recreational environment value of the site.

The Applicant offered no specifics concerning its rejection of the alternatives suggested by the Division, and Mr. Coutu's assertion that these alternatives were not effective in terms of cost was totally unsubstantiated. Applicant supplied no details or itemization as to the cost involved in reducing the scope and extent of the project. Indeed, Applicant totally failed to explain how it determined that the alternatives suggested by the Division would not be cost effective, and no competent evidence was presented to substantiate any valid consideration of any specific alternatives by the applicant.

Although the site obviously had been subjected to filling in the past, it has now reverted to a somewhat natural state. It is presently fairly

vegetated and provides significant cover and food for what should be an increasing wildlife population. It's importance as part of the overall wetland complex along the Pawtuxet River was clearly established by the Division.

FINDINGS OF FACT

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

1. Prehearing Conferences were held on July 15 and 25, 1991 and a Prehearing Conference Record was issued on July 26, 1991 and made part of the file.

2. Administrative Adjudicatory Hearings were held on August 26 and 27, 1991 at the Administration Building, One Capitol Hill, Providence, Rhode Island 02908.

3. All parties and the Hearing Officer viewed the site on August 23, 1991.

4. All hearings were conducted in accordance with the provisions of the "Administrative Procedures Act" (Chapter 42-35 of the General Laws of Rhode Island, and specifically § 42-35-9) and the "Freshwater Wetlands Act" (Rhode Island General Laws Sections 2-1-18 et seq.).

5. The formal application No. 89-0775F was filed with the Department on October 11, 1989.

6. The site plan subject to this hearing was received by the Department on July 11, 1990 and is entitled "Clyde Woods Adult Mobile Home Park", etc. (11 sheets).

installation within a state regulated freshwater wetland.

16. The applicant's property is relatively level with the exception of a slightly elevated small strip which follows along the edge of the Pawtuxet River.

17. The portion of applicant's property involved in the subject proposal extends along the Pawtuxet River for a distance of approximately 1,700 feet and is almost entirely within 200 feet of a flowing body of water greater than ten (10) feet wide.

18. The proposed project will result in the alteration and disturbance of approximately 7.35 acres (340,000 square feet) of state regulated wetland.

19. The subject wetland is a "valuable" wetland.

20. The existing vegetation in the subject wetland provides habitat for wildlife.

21. There are numerous species of wildlife that inhabit and utilize said subject wetland complex.

22. The subject wetland (with its proximity to the Pawtuxet River) is in a relatively natural and undeveloped state, provides cover and food for wildlife, has aesthetic appeal, and is capable of supporting recreational activities by the general public.

23. The alterations proposed will cause a reduction in value and a permanent encroachment and loss of a valuable wetland wildlife habitat.

24. The proposed project will adversely affect the wildlife habitat and the recreational environment and reduce the value of a "valuable" wetland.

25. Reasonable alternatives exist which would reduce or eliminate the

demonstrated impacts to the subject wetlands, such as reducing the scope and extent of the project.

26. The proposed alterations will cause an unnecessary and undesirable destruction of freshwater wetlands.

27. The proposed alterations are inconsistent with the policies, intents and purposes of the Act and the Rules and Regulations.

CONCLUSIONS OF LAW

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

1. All of the hearings in this matter were held in appropriate places and locations.
2. All hearings were held in accordance with Rhode Island General Laws, the Administrative Rules for Practice and Procedure for DEM, DEM Rules and Regulations governing the enforcement of the Fresh Water Wetland Act.
3. The matter is properly before the Administrative Adjudication Officer.
4. The area in question is a "valuable" wetland pursuant to the definition provided in § 7.06 (b) of the Rules and Regulations.
5. The proposed alterations will result in the loss, encroachment and permanent alteration of a wetland wildlife habitat (320,000 square feet or ± 7.35 acres) associated with the subject wetlands area.
6. The subject proposal will cause undesirable reduction of the wildlife habitat values provided by this wetland.
7. The proposed project will result in random, unnecessary and/or undesirable disturbance or destruction of freshwater wetlands as described by Section 5.03 (c) 7 of the Rules and Regulations Governing the Enforcement of the Rhode Island Freshwater Wetlands Act.
8. The proposed alterations will reduce the value of a "valuable" wetlands-recreational environment causing a reduction and negative impact on aesthetic and natural character of an undeveloped wetland.

9. The proposed alterations are inconsistent with the best public interest and public policy as stated in § 2-1-18 and 2-1-19 of the Rhode Island General Laws and § 1:00 of the Rules and Regulations governing the Freshwater Wetlands Act and must be denied pursuant to Section 5.03 (b) of said Rules.
10. The applicant has not sustained its burden of proof that the application will not cause random, unnecessary and/or undesirable destruction of freshwater wetlands.

THEREFORE, IT IS

ORDERED

1. Application No. 89-0775F to alter freshwater wetlands be and is hereby DENIED.

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

FEBRUARY 7, 1992
Date

Joseph F. Baffoni
Joseph F. Baffoni
Hearing Officer

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

February 14, 1992
Date

Louise Durfee
Louise Durfee
Director
Department of Environmental Management

CERTIFICATION

I hereby certify that I sent a true copy of the within Decision and Order via registered mail, postage prepaid to Clyde Woods Limited Partnership, Clyde Woods Adult Mobile Home Park, 90 Industrial Lane, West Warwick, RI 02893 and via regular mail, postage prepaid to Sean O.Coffey, Esq., Licht & Semonoff, One Park Row, Providence, RI 02903 and to Michael Marran, Esq., Two Charles Street Providence, RI 02904-2269 on this 18th day of FEBRUARY, 1992.

Bruce L. Stewart