

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT  
DIVISION OF FRESHWATER WETLANDS  
AND GROUNDWATER PROTECTION

IN RE: JOHN, ROSE AND RICHARD CONTI No. 4964  
Mutual Motors, Inc.  
and  
Washington Highway Development, Inc. No. 86-17F

DECISION AND ORDER

These matters are before the hearing officer upon two applications to alter freshwater wetlands in the Town of Smithfield. The application of John, Rose and Richard Conti, Mutual Motors, Inc. originates from litigation commenced in 1979 as a result of a Notice of Violation and Order to Restore issued by the Department of Environmental Management (DEM). A Consent Agreement was entered into between the parties which required the respondents to file an amended application to alter freshwater wetlands. The applicant/respondent filed an amended application and on July 27, 1984 the Wetlands Section of the DEM denied the application. A hearing was requested. The hearing commenced on October 22, 1984. The testimony of one witness was taken and the hearing was recessed to a future date. The applicant failed to appear on December 5, 1984, the date established for continuance of the proceeding. The DEM moved for Summary Decision on December 6, 1984 and renewed its Motion on two occasions. The present hearing officer was appointed to hear this matter on October 30, 1986. Arguments were heard with respect to the Motion for Summary Decision.

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An Order was entered granting summary decision with respect to the violation enumerated in the Notice of Violation and Order but summary decision was denied with respect to the application to alter freshwater wetlands.

The parties agreed that applications numbered 4964 and 86-17F be consolidated and one hearing was held with respect to both. Accordingly, on September 28, 1987 the hearing, originally commenced on October 22, 1984, was reconvened. The hearing was held at Smithfield Town Hall, a location reasonably convenient to the site of the proposed or accomplished alterations. A second day of testimony was heard on October 5, 1987. The hearing concluded on that date. The transcript of the October 22, 1984 hearing was received by the hearing officer on December 29, 1987.

Robert A. Shawver, Esq. represented the Department of Environmental Management, Division of Freshwater Wetlands and Groundwater Protection. Gregory Benik, Esq. and Michael Meagher represented the applicants. Edmund Alves, Town Solicitor represented the Town of Smithfield which was granted intervenor status in the proceedings.

Richard J. Conti testified on behalf of the applicant. Mr. Conti is the owner, general manager and President of Mutual Volkswagen located on Washington Highway in Smithfield, Rhode Island. The Mutual Volkswagen franchise is the subject of Application 4964 and is leased from John and Rose Conti.

The Mutual Isuzu franchise is the subject of Application 86-17F and is leased from Washington Highway Development, Inc. Mr. Conti testified that the present franchises (Dodge, Volkswagen and Isuzu) are meeting only fifty percent of expected sales due to a lack of space for proper storage and display of vehicles. He further testified that Chrysler is proceeding to terminate the franchise due to the business' failure to meet its expected market penetration. Approximately seventy (70) employees are employed by the company. Approval of the application would facilitate the daily loading and unloading of vehicles.

Mr. Conti next testified that the nature of the properties in the general area is industrial. Several exhibits were introduced to buttress this testimony. (Applicant's Exhibits 2, 3, and 4).

On cross examination, Mr. Conti testified that in order to remain in business, approval of the application is necessary. According to this witness, space is required for a ninety (90) day car supply, servicing of automobiles, employee and customer parking.

Paul F. Sommer next testified on behalf of the applicant. Mr. Sommer holds a B.A. and an M.A. in Biology from Boston University. Mr. Sommer was qualified as an expert in Freshwater Wetlands.

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Mr. Sommer visited the site on three occasions spending approximately twelve to fifteen hours there. He reviewed the plans on file with DEM for the proposed alterations contemplated by Application 4964 and 86-17F. Briefly stated, the applicant through Mr. Sommers, challenged the evaluation method employed by the Division, asserted an alternative method as the method of choice, and concluded, using its method, that the wetland in question is not valuable and hence the alterations, accomplished and proposed are not inconsistent with the Freshwater Wetlands Act or Regulations promulgated thereunder.

Based upon his opinion that there is not a hydrological connection, Mr. Sommer recalculated the model and concluded that the wetland has a value of 59.0, below the 60.0 cutoff employed by the DEM. Ultimately, Mr. Sommer opined that the two applications are consistent with the Freshwater Wetlands Act and the Regulations adopted pursuant thereto.

Cross examination elicited from Mr. Sommer revealed that he had used the Golet method to evaluate wetlands on only four or five occasions. Mr. Sommer learned the Golet model from the model itself and had no formal training. Mr. Sommer also stated that he did not size the bog contained in the subject wetland prior to 1981.

The Division of Freshwater Wetlands and Groundwater Protection presented two witnesses. First, Dean Albro, Supervisor of the Wetland Protection Program testified that the DEM did modify some of the criteria used by Golet in 1977 but other criteria, including wetland juxtaposition, were modified by Dr. Golet.

The first issue centered upon wetland class richness. In the Division's review the wetland received a score of 10.0 in this category. This was based upon the size of the bog contained within the wetland (estimated by the Division to be approximately 2.5 acres). Mr. Sommer identified, flagged and delineated the bog and determined that it was less than 0.2 acres in size. Using this figure, wetland class richness receives a reduced score of 7.5. Adjusting the total score for this "error", the applicant arrives at a total score of 59.5, less than the cutoff of 60.0 by which the Director determines that a wetland is valuable.

Secondly, the applicant takes issue with the Division's conclusions and evaluation regarding wetland juxtaposition. There was testimony that the Division's ranking of this attribute was too high due in part to Mr. Sommer's assessment that the Department incorrectly accords juxtaposition value to this wetland although, in Mr. Sommer's opinion, it is not hydrologically connected to a water body.

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Harold K. Ellis was the second witness called by the Division. Mr. Ellis is employed by the DEM as a Principal Natural Resource Specialist. His responsibilities include administration and enforcement of the Freshwater Wetlands Act through the evaluation of proposed projects, assessment of impacts on wetlands and the issuance of cease and desist orders. Mr. Ellis holds a Bachelor of Science degree and a Masters degree in Natural Resource Science from the University of Rhode Island. Mr. Ellis worked under the supervision of Dr. Golet in the preparation of his Masters thesis and was taught the Golet Method by Dr. Golet. He has performed over one hundred (100) Golet evaluations in assessing impacts on wetlands. Mr. Ellis was qualified without objection as an expert in the identification of wetlands and the impact of alterations on wetlands and wildlife habitat. He was also qualified as an expert in the application of the modified Golet system.

Mr. Ellis determined that the actual size of the bog was 2.52 acres prior to alteration. He based his conclusion upon aerial photographs and an on-site inspection. Mr. Ellis stated that the bog is presently .2 acres in size. Mr. Ellis testified unequivocally that the bog delineation offered by Mr. Sommer did not accurately represent the bog. Mr. Ellis further testified that Application 86-17F and Application 4964 impact the same wetland and therefore, the Golet score and

evaluation for Application 4964 applies to Application 86-17F. Mr. Ellis also disagreed with Mr. Sommer's conclusion that no hydrologic connection existed between the wetlands.

With respect to wildlife habitat, Mr. Ellis stated that there has already been an adverse impact to wildlife due to the elimination of habitat for work already accomplished on Application 4964. In Mr. Ellis' opinion, the alterations proposed by Application 86-17F would similarly remove and destroy existing habitat and would further disturb remaining wildlife within the wetland.

In conclusion, it was Mr. Ellis' opinion that the proposed alterations would cause the undesirable destruction of a freshwater wetland habitat with respect to wildlife. Mr. Ellis also opined that the wetland is valuable as defined in Regulation 5.03(c)(7).

The Town of Smithfield called Linda Steere as its only witness. Ms. Steere holds a Bachelor of Science degree in Zoology and a Masters degree in Wildlife Management from the University of Rhode Island. Prior to becoming an independent consultant, Ms. Steere was employed by the DEM as a wildlife biologist and served as a staff biologist for the Coastal Resources Management Council and reviewed coastal and freshwater wetland applications. She was qualified as an expert in Freshwater Wetlands.

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Ms. Steere prepared a report which was marked Town Exhibit 2 and entered in full. This report references only Application 86-17F and has been viewed in that limited capacity. Ms. Steere disagreed with Mr. Sommer's delineation of the bog and stated her belief that it is 2.5-2.8 acres in size. She stated that the proposal would adversely affect wildlife through the loss of vegetative habitat which provides cover, nesting and food for wildlife.

In reviewing the conflicting testimony of the expert witnesses presented, I have found that of Mr. Ellis to be the most credible and have accorded his testimony more weight in these matters.

#### FINDINGS OF FACT

Based upon review of all the testimonial and documentary evidence of record, I find the following as fact:

1. A hearing was commenced on Application 4964 on October 22, 1984 and reconvened on September 28, 1987. The hearing concluded on October 5, 1987.
2. Applications 4964 and 86-17F were consolidated by agreement of the parties and each was the subject of these proceedings.
3. All hearings were held at the Smithfield Town Hall, Smithfield, Rhode Island.



4. Notice of the hearing was published in the Providence Journal and Evening Bulletin on July 13, and July 20, 1987 and in Observer Publications on July 23 and July 30, 1987.
5. The applications seek approval to alter a freshwater wetland located north of the George Washington Highway in the town of Smithfield. Jointly, the alterations include filling in and within fifty feet (50') of a swamp and bog on Assessor's Plat #49, Lots 102C and 103.
6. The surrounding areas contain relatively few wetlands.
7. The wetland was evaluated using the modified Golet method referenced in the Regulations.
8. The bog located on the subject properties was approximately 2.5 acres in size. The total wetland is approximately 24.4 acres in size. The size of the bog presently (after filling) is only .2 acres.
9. Wetland juxtaposition refers to the presence of differing types of wetlands in an area and how they are connected. Wetland juxtaposition is significant for wildlife.
10. A hydrologic connection exists between the subject wetland and an adjacent wetland. It is a means by which wildlife can move between varying wetlands.
11. Due to fill already placed in the wetland, wildlife has been adversely impacted through the elimination of wildlife habitat.

12. Continued progress on Application 4964 and the proposed plans contemplated by Application 86-17F will remove and destroy valuable wildlife habitat and cause disturbance of existing and remaining wildlife.
13. The bog located within the subject properties is characterized as having high diversity and production of wildlife using the Golet Wetland-Wildlife Evaluation Model.

CONCLUSIONS OF LAW

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

1. Public hearings were held at the Smithfield Town Hall, a location reasonably convenient to the site of the proposed alterations.
2. Publication of the Notice of Hearing was in substantial compliance with R.I.G.L. §2-1-22(b).
3. The proposed alterations contained in Application 4694 will cause the undesirable destruction of a valuable freshwater wetland.
4. The proposed alterations contained in Application 86-17F will cause the undesirable destruction of a valuable freshwater wetland.

- 5. The applicant has failed to sustain its burden of proof that Application 4964 will not cause random, unnecessary and/or undesirable destruction of freshwater wetlands.
- 6. The applicant has failed to sustain its burden of proof that Application 86-17F will not cause random, unnecessary and/or undesirable destruction of freshwater wetlands.

Therefore, it is

ORDERED

- 1. Application 4964 to alter freshwater wetlands is denied.
- 2. Application 86-17F to alter freshwater wetlands is denied.

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

5-26-88  
Date

Kathleen M. Lanphear  
Kathleen M. Lanphear in her capacity as Hearing Officer

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

5/26/88  
Date

Robert L. Bendick, Jr.  
Robert L. Bendick, Jr. in his capacity as Director, Department of Environmental Management

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CERTIFICATION

I hereby certify that a true and accurate copy of the within DECISION AND ORDER has been sent first class mail, postage prepaid to Gregory Benik, Esq., 1500 Fleet Center, Providence, R. I. 02903 and Michael Meagher, Esq., One Boston Place, Boston, MA 02108 and by interoffice mail to Robert A. Shawver, Esq., 9 Hayes Street, Providence, R. I 02908 on this 26<sup>th</sup> day of May, 1988.

Barbara Mann

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