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

IN RE: FERLAND CORPORATION AND VILLAGE PARK PARTNERSHIP II
FRESHWATER WETLANDS APPLICATION NO. 87-160F AND 88-709F

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

MAY 29 1990

This matter is before the Hearing Officer on the application of Ferland Corporation and Village Park Partnership II, Freshwater Wetlands Application No. 87-160F and 88-709F to alter a freshwater wetlands on real property commonly known as Village Green South, in the City of East Providence, and described as Tax Assessors Plat 4-10, Block 1, Lot 1. An administrative hearing concerning application number 88-709F was held on January 11, 1990, January 23, 1990, January 30, 1990, February 6, 1990, and February 22, 1990. All hearings were held at City Hall, East Providence. The Hearing Officer was in receipt of a completed transcript as of March 9, 1990. The hearing officer was in receipt of post-hearing memorandum from the parties as of March 28, 1990. The hearing was conducted pursuant to the Administrative Procedures Act (R.I.G.L. 42-35-1 et seq.) and the Administrative Rules of Practice and Procedure of the Department of Environmental Management. Adler, Pollock and Sheehan, by Patricia K. Rocha, represented the applicant. Gregory Dias represented the City of East Providence, Rhode Island. Sandra

EXHIBIT
A

Calvert and Mark W. Siegars represented the Department of Environmental Management.

Prior to the commencement of the hearing, the parties and the Hearing Officer discussed the marking of documents, possible stipulations and expert testimony. As a result of those discussions, the following documents were entered by agreement of the parties:

Exhibit Number	Description
1	Formal Application to Alteration a Wetland, July 29, 1988
2	Letter of Department of Environmental Management to Ferland Corporation dated June 30, 1988
3	Letter of Department of Environmental Management to Village Park Partnership II c/o Ferland Corporation dated March 13, 1989
4	Letter of Ferland Corporation to Brian C. Tefft, Supervisor for Applications dated March 23, 1989
5	Letter from John B. Webster of Adler, Pollock & Sheehan Incorporated to Mr. Brian Tefft dated March 28, 1989
6	Wetland Wildlife/Recreation Evaluation dated January 31, 1989
7	Site Plans
8	Notice of Administrative Hearing and Pre-Hearing Conference dated November 2, 1989

9	Resumes of: Martin D. Wencek, Stephen G. Morin, Brian C. Tefft, Jonathan L. Feinstein
10	Rhode Island Fresh Water Wetlands Act enacted on July 16, 1971.
11	Rules and Regulations Governing the Enforcement of the Fresh Water Wetlands Act, March, 1981
12	Freshwater Wetland - Wildlife Evaluation Method, June 1985

During the course of the hearing, the following additional exhibits were entered into evidence by the parties:

DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Exhibit Number	Description
1 (for I.D.)	April 26, 1988, letter from Stephen Morin from James Ferland
2 (for I.D.)	Map of Project Site
3 (for I.D.)	Subdivision Ordinance of East Providence

APPLICANT

A (full)	Map of Project Site
B (full)	Modified Golet Evaluation (VHB)
C (full)	Map of Project Site
D (full)	Map of Project Site
E (I.D.)	Telephone/meeting notes
F (full)	Binder of documents 1-13
G	July 27, 1988, Letter of Transmittal - Dean Albro

H (I.D. - not admitted)	Initial draft of second application

Further, the Hearing Officer has re-read the transcript and finds such fraught with not only typographical errors and spelling errors, but also misidentification of counsel and an inappropriate designation of the Hearing Officer. For purposes of the record, and without unnecessarily burdening this decision and order, the Hearing Officer orders that all typographical and spelling errors shall be deemed corrected; that any references to "Mr. Walsh" (whomever this is supposed to be) shall be corrected to indicate "Ms. Rocha"; that Mr. Siegars name shall be properly reflected; that any designation of the Hearing Officer as "Ms. Sullivan" shall be deemed to read "Hearing Officer"; that any reference to the "Army Core of Engineers" shall be deemed to be read "Army Corps of Engineers."

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 burde of proof that the subject proposal is not inconsistent with the Freshwater Wetlands Act and the Regulations adopted thereunder.

The witnesses were as follows:

1.	Applicant By Roland James Ferland	Applicant
2.	Vanasse Hangen Brustlin, Inc. by Jonathon Feinstein	Applicant
3.	Department of Environmental Management by Martin Wencek	Applicant and Departmen

4. Department of Environmental Management by Stephen Morin — Applicant

5. City of East Providence by George Caldow — Applicant

6. City of East Providence by Captain Robert McManus — Applicant

7. Department of Environmental Management by Dean Albro — Applicant

8. Vanasse Hangen Brustlin, Inc. by Jeffrey Bridge — Applicant

All witnesses were cross-examined by either the applicant's counsel or the department's counsel, as applicable.

On October 16, 1987, the Ferland Corporation filed with the Department of Environmental Management a formal application to alter the wetland which is the subject of the hearing. Application No. 87-0160F was assigned. Throughout the course of the hearing, this application was referenced as the "First Application." This application is also designated as Joint Exhibit 2. On June 30, 1988, the department issued a denial of the first application. The Ferland Corporation filed a timely appeal thereof. However, that appeal was not heard by this Hearing Officer.

On July 12, 1988, representatives of the Ferland Corporation Representatives of Vanasse Hangen Brustlin, Inc. (VHB) (private consultants engaged by the applicant), and department representatives, Stephen Morin and Martin Wancek, met to discuss

the grounds listed in the denial letter as support for the first denial. At this meeting, the department representatives offered alternatives to the alteration which was proposed in the first application. These alternatives were known throughout the course of the hearing as "mitigative recommendations" or words of similar characteristics. During this meeting, the department representatives did not state any objections to the alteration based upon the assertion that such was "unnecessary," in the sense of random, unnecessary and/or undesirable.

On July 29, 1988, Village Park Partnership II submitted revised plans for the alteration. These plans incorporated the mitigative recommendations identified in the meeting just two weeks prior. In conformance with departmental procedures, the revised plans were assigned a new application number, to wit, 88-0709F. Throughout the course of the hearing, this application was referenced as the second application. This is also known as Joint Exhibit 3. (For purposes of identification, Village Park Partnership II is an affiliate of the Ferland Corporation).

On March 13, 1989, the department issued a denial of the second application. Again, the applicant filed a timely appeal of the denial.

This matter is before the Hearing Officer based upon the appeal of the denial dated March 13, 1989 (that is, the second application).

The denial of the first application declared that the subject wetland was ranked as a "valuable" wetland pursuant to section 7.06(b) of the Regulations. The denial of the second application declared that the subject wetland was ranked as "unique" and "valuable."

If the department prepared a modified Golet evaluation to support the first application denial, such is not now in the department's file. There is conflicting testimony that no such evaluation was prepared or that one was prepared and it is inexplicably missing. There was a suggestion by the applicant's counsel, during the hearing, and within the post-hearing memorandum, that the first modified Golet evaluation was surrepititiously removed from file. Although I would agree that a) it is unusual that no such evaluation was prepared, and/or b) that it is unusual that if such was prepared, that it is now missing, I cannot find any evidence in the record, and, therefore, I decline to find, that the evaluation was removed or otherwise improperly tampered with so as to destroy this record.

It is clear, however, that there is a distinction in ranking in the first application and the second application (that is, valuable vs. valuable and unique).

The second denial, which is before the Hearing Officer, listed the following in support thereof:

1. The proposed alterations will result in unnecessary and undesirable destruction of freshwater wetlands as described in

sections 5.03(b)(c), 6 and 7 of the Rules and Regulations governing the enforcement of the Freshwater Wetlands Act;

2. The proposed project will result in loss, encroachment, and permanent alteration of a "unique" and "valuable" wetland wildlife habitat associated with the subject wetland (approximately 1.0 acres);

3. The proposed alterations and project will reduce the value of a "valuable" wetland recreational environment reducing and negatively impacting the esthetic and natural character of the undeveloped wetland areas.

In rendering this decision and order, I will address the findings supporting the denial and the respective arguments of the parties relating to each finding.

FINDING I — THE PROPOSED ALTERATION WILL RESULT IN UNNECESSARY AND UNDESIRABLE DESTRUCTION OF A FRESHWATER WETLAND.

The department contends that the proposed alterations cannot be approved based upon public safety or public need. In support thereof, the department correctly postures that the applicant obtained a conditional final subdivision approval from the City of East Providence. The condition is obtaining the permit to alter the wetland to facilitate construction of the proposed road. Further, the department correctly asserts, that the city

cannot compel the department to issue the permit although the city may issue a preliminary or final subdivision approval subject to the issuance of the wetlands permit.

The department continues that the fact that the city issued its final subdivision approval subject to the freshwater wetlands permit, carries no weight, in terms of the burden of proof, and as pertains to the issues of health, safety or need.

The department asserts that the denial must be upheld because the city solicitor presented no testimony.

In a blanket assertion, without the benefit of the development of argument, the department states that the evidence "clearly demonstrates that there is adequate fire protection, water service, sewer service, police service, travel lanes and the delivery of all other services of the City to the property and the residents" (post-hearing memorandum of the Division of Groundwater and Freshwater Wetlands at page 16).

In a flailing and unsubstantiated assertion, the department next asserts that the applicant must demonstrate, to sustain its burden of proof, that there is a "public nuisance," or "somethin akin to a public nuisance" created by the existence of a cul-de-sac at the end of Village Green North and South. The department then concludes, that should the applicant fail to demonstrate a "public nuisance" there is no public interest to be promoted or injury to be abated.

(There is, finally, some type of non sequitur argument about "private nuisances," which I decline to address as such is not subject to common understanding regarding the fact that the applicant constructed existing housing adjacent to the proposed alteration site, and, therefore, the applicant has beneficial use of the property, and therefore, there is no private nuisance. Further, if I did understand this argument, it would not be a controlling factor in the decision).

There is no prejudice to the City or to the applicant because the City failed to present testimony. It is clear from my pre-hearing orders, as well as, the record, that I will not accept cumulative or repetitious testimony. There would be no need for the applicant to elicit testimony from city witnesses (the city planner and the fire marshall) and then the City Solicitor to elicit the same or similar testimony from these witnesses.

I would disagree that the alteration cannot be approved based upon the issues of public safety or public need. How can this assertion be reconciled with the explicit language of R.I.G.L. 2-1-19? ". . . The health, welfare, and general well-being of the populace and the protection of life and property require that the state restrict the uses of wetlands and, therefore, in the exercise of the police power the wetlands must be regulated hereunder." Restrict yes. Prohibit no. Accordingly, if the health, welfare and general well-being of the populace are serve

by the alteration, then the police power permits such, literally and figuratively.

I would also disagree that the final subdivision approval, conditioned upon the receipt of the permit to alter, does not address the issue of public health, safety or need. It clearly does so. Although it is not my intention to be argumentative, I can think of no better way than to reply with questions, to wit, 1) why does the city enact a master plan for land use? or 2) why does the city adopt ordinances relating to subdivisions? The record addresses the issue of the conditional approval. Public health. Public safety. Public need. Public good. Public welfare.

I will defer the address of the argument relating to the provisions of public services e.g. police, fire and emergency. However, this public service provision argument is somewhat entwined with the public nuisance argument. The term "public nuisance" as used herein is a misnomer. However, what I believe the department to be arguing is that there is no specific demonstration of injury to the public with the road (dead-end, cul-de-sac) in its present state. In a limited sense, this is true. For example, there is no demonstration that during a violent thunderstorm, several people were injured when trees fell and emergency vehicles were hindered in their rescue efforts. However, as the applicant and the city later explain, this is

exactly the type of tragic scenario that the master plan and subdivision ordinances seek to avoid through regulation.

The applicant proposes that the alteration is both necessary and desirable. The applicant argues against the finding that the alteration will degrade the natural character of a unique wetland and/or reduce the value of a valuable wetland.

Further, the applicant contends that the alteration will not degrade or reduce the value of a "unique" and "valuable" wetland wildlife habitat and valuable recreational environment.

The General Assembly, by statute, enables individual cities or towns to establish street and highway systems and to make necessary additions and/or changes to such systems. Accordingly, this legislative permissive allows each city or town to enact subdivision ordinances. East Providence has enacted a subdivision ordinance which, in part, regulates a street and highway system and the design thereof. This subdivision ordinance does, in fact, address dead-end streets. As a generality, such are impermissible in the city, save on a temporary basis.

Testimony elicited from city officials explained the rationale for regulation of the street and highway system and the design thereof. The city promotes a well-articulated street and highway system; the establishment of adequate and safe streets and highways; the facilitation of an adequate and efficient transportation system.

Dead-end streets, in particular, are discouraged because of access problems in the event of emergency and because of problems with the placement of utilities, water service, and sewer service. Thus, where the department argues that the evidence "clearly" demonstrates that there are adequate emergency services and utility services, I tend to disagree, in part, because this assertion ignores the testimony relating to the rationale behind the city master plan and ordinances relating to subdivisions and the highway system, and, in part, because the evidence does not "clearly" demonstrate this. To support this is the testimony of the city planner, Mr. Caldow, and the city fire marshall, Captain McManus, who contend that the emergency services and utility services all not adequate based upon the directives of the master plan, the ordinance, and their opinions as experts on this issue.

I am persuaded by the applicant's argument that the first finding is in error. The master plan for land use and the city ordinance pertaining to subdivisions, the street and highway system, the design thereof, as well as, the testimony of the city planner and the city fire marshall establish that the connection of Village Green North and South, the elimination of the dead-end, the provision of emergency access, and the provision of utilities is necessary and desirable and in the interest of the public.

FINDING II — THE PROPOSED ALTERATIONS WILL RESULT IN LOSS, ENCROACHMENT, AND PERMANENT ALTERATION OF A "UNIQUE" AND "VALUABLE" WETLAND WILDLIFE HABITAT (APPROXIMATELY 1.0 ACRES)

The department contends that the subject wetland meets the definition of valuable and that the impacts of the proposed alteration will reduce the value of this valuable wetland. Further, the department asserts that the modified Golet evaluation establishes that the subject wetland is classified as a valuable wildlife habitat.

The parties focus on the size of the wetland unit. The department contends that the appropriate size of the wetland for purposes of the modified Golet evaluation is 98.0 acres. The department argues that a 98.0 acre evaluation properly accounts for buffer areas perimeter wetlands, associated hydrological areas, and other contiguous areas and that all must be analyzed for anticipated impacts from the proposed alteration. The department, without benefit of citation, relies upon the act and the rules and regulations in support of this assertion.

The applicant contends that the appropriate size of the wetland, for purposes of the modified Golet evaluation, is 11.6 acres. The department argues that the applicant's findings are

in error due to a misapplication of the guidance documents in the modified Golet evaluation and the failure to incorporate proper data into the modified Golet evaluation. These failures, by the applicant, allegedly purport to establish that the wetland is valuable and that the department is correct in its second finding.

The applicant argues that the department may properly deny an application to alter a freshwater wetland only if the project will result in the degradation of the natural character of a "unique" wetland or the reduction in value of a "valuable" wildlife habitat. The applicant contends that there shall be no such degradation nor reduction. The applicant's expert, Vanasse Hangan Brustlin, Inc., through its Director of Environmental Services, Jonathon Feinstein, conducted an independent Golet evaluation. Mr. Feinstein was duly qualified as an expert based upon his educational background, work-related experiences, and professional affilitations. Mr. Feinstein rendered the opinion that the wetland is neither valuable nor unique nor is there any degradation or reduction anticipated from this alteration.

Mr. Feinstein testified that the modified Golet evaluation includes photo-interpretation of the wetland and adjacent wetland habitat, and field verification of available geologic soils, surface and hydrology data, as well as, review of existing plant and animal communities and surrounding land use patterns.

Available baseline information is compiled and field verified, a vegetative cover map of wetlands is produced from aerial photo-interpretation (according to Golet). For evaluation purposes, the minimum wetland class size should be 2.5 acres and the minimum sub-class size should be .5 acres. The wetland evaluation unit is evaluated for maximum wetland wildlife production and diversity. A freshwater wetland form is completed for each evaluation unit addressing nine (9) resource variables. Each wetland unit is evaluated with regard to the variables as described in the methodology. Based upon this evaluation, a rank value is assigned to each variable. This rank value is multiplied by each resource variable significance coefficient value of one through five and totalled to achieve a overall numerical rating. The total numerical rating or value, which may range from 35 to 105 is the wetland evaluation unit's rating as to its potential to provide for maximum wildlife production and diversity.

The parties agree that there is a numerical rating system employed by the department to evaluate a wetland, to wit:

35-50	low
50.5 - 60	medium
60.5 - 70	high
70.5 - 105	outstanding

A score of 60.5 or greater will result in a wetland being designated as valuable and unique.

This referenced conversion table is not published in department literature, the act or the rules and regulations. To this, the applicant argues that it was deprived of due process of law by the failure of the state to give notice of the manner in which the application is reviewed. I reply to this argument by stating that I will not address a constitutional law question which is not the subject of full-briefing, further, as a general rule, constitutional questions are avoided if the matter may be determined on other grounds which, in this case, is so. However, it is my belief, both in hearing the testimony of Mr. Feinstein, and, generally, in hearing these administrative appeals in this and other cases, that this conversion table is well-known in the environmental community and, particularly, the wetlands environmental community. There was no prejudice to the applicant that this table was not published by the department.

As previously indicated, the applicant's expert employed a different methodology from the department's methodology in evaluating the size of the wetland. A smaller size category impacts the other resource variables and decreases the points scored; a larger size category impacts the resource variables and increases the points scored. The point differential is 57.0 (medium or moderate) versus 80.5 (outstanding).

Mr. Feinstein stated that the size category was determined as a result of field inspection which included identification of a

wetland evaluation unit looking west upstream which constriction measured thirty-eight feet (38'). The Freshwater Wetland Wildlife Evaluation Method, Guidelines for Wetland Delineation and Evaluation state that for mapping purposes, where the wetland narrows to less than 50 feet, a boundary should be drawn dividing the segments into two evaluation units, unless the entire wetland is that narrow. The wetland constriction herein is less than fifty feet (50') and the entire wetland is not that narrow.

Therefore, a boundary was drawn and the size category included that area in which the proposed alteration is located, namely 11.6 acres. In examination of the departments biologist, Martin Wencek, by the applicants counsel, there was no dispute as to the constriction point, the guidelines, or the placement of the boundary.

The applicant argues that it is irrational to use a 98.0 acre tract to evaluate impacts when the alteration is 32,000 square feet (permanent) and ~~10,000~~ square feet (temporary). The applicant offers that the emphasis of the evaluation should be in those areas primarily impacted by the alteration and not areas miles away.

Mr. Wencek and Mr. Feinstein again conflict in the designation of the soil located around the area subject to alteration. Mr. Wencek determined that such is bottomland isolated. Mr. Feinstein, through independent test borings,

determined that the soil is upland isolated (till) although Mr. Feinstein conceded that bottomland isolated soil is located within the 98.0 acre tract.

Mr. Wencek conceded that independent test boring findings would be more reliable and would not be disputed by him. The department did not conduct independent test borings at the subject site.

The applicant submits, and again, I must agree, that the ranking obtained by the department is not reliable due to the usage of inappropriate size category. The department, quite simply, did not sustain through competent evidence the election of the methodology in designating the evaluation unit. Mr. Wencek was more than once successfully challenged in terms of the evaluation conducted on behalf of the department, e.g. the soil. The record is replete with Mr. Feinstein being asked the proper foundational questions for an opinion followed by his answers in the form of an opinion based upon scientific certainties rather than on speculation. Further, attempts to discredit these opinions fell far short, especially because the challenge questions were based upon supposition and rarely, if ever, substantially linked to the subject wetland. Mr. Wencek admitted that data in the department evaluation was based upon scientific speculation. This may be appropriate in a laboratory but it is not appropriate in a legal forum. Further,

Mr. Wencek's findings were shaken particularly when challenged about partying teenagers flocking to the alteration site when street lights were installed. Under no circumstances is any of the above to be interpreted as a criticism of Mr. Wencek, who is credible and sincere in his testimony. Rather, such is to predicate the findings hereafter.

I find that the proper score for this wetland is 57.0 based upon the testimony of the applicant's expert which is based upon scientific certainties and not speculation.

Further, and perhaps more importantly, the applicant contends that the facts herein sustain that there will be no degradation or reduction in the value of a unique or valuable wetland in light of the mitigative recommendations proposed by the department and incorporated into the second application.

In the July 12, 1988, meeting, the department offered the mitigative measures. The applicant acted upon such by abandoning the initial proposal to construct a sewerline. Further, the second application proposed the installation of culverts to address the concerns of nutrient flow and surface water flow.

There are two other mitigative measures which are a part of the record. Mr. Wencek expressed concern that illumination from the street lights causes disturbance to the wetland wildlife habitat.

A mitigative measure to such is a deflector shield. In my decision and recommendation, I will order this as a further mitigative measure.

Further, Mr. Wencek indicated that the planting scheme proposed by the applicant, in mitigation, was not satisfactory to him in terms of minimizing impacts. Accordingly, in my decision and recommendation, I will order the parties to confer to find a planting scheme which is acceptable to the department, and which is reasonable. If the parties are unable to reach accord on the planting scheme, I will accept further testimony and decide this issue.

Thus, I agree with the applicant that the alteration, as proposed, although subject to the further mitigation of deflector shields and planting schemes, will not result in the loss, encroachment, and permanent alteration of a "unique" and "valuable" wetland wildlife habitat in that I find that the proper Golet score was 57.0 and because I find that the mitigative measures are acceptable, as modified.

FINDING 3 THIS PROPOSAL WILL REDUCE THE VALUE OF A VALUABLE RECREATIONAL ENVIRONMENT.

The department's memorandum does not particularly address this issue. The applicant contends that there will be no reduction in the value of a valuable wetland recreational environment.

The applicant, as a threshold, argues that this property is private property and not the subject of public use for recreational purposes. The applicant opines, through its experts, that the wetland, despite alteration, will still allow recreational activity such as hiking, cross-country skiing, education, bird-watching, etc. I agree. The proposed alteration will not reduce the value of a valuable recreational environment.

Prior to concluding this decision and order with the findings of fact and the conclusions of law, I wish to address the applicant and the department relating to the subject of what was termed throughout the hearing as my deferred ruling on the evidence. In a bench conference with counsel, at the conclusion of the hearing, I suggested to counsel that I was able to decide this matter regardless of the disputed evidence and that I did not believe it necessary for counsel to spend hours researching this issue and, therefore, spend hours creating a written argument to support that research. I did, however, relate to counsel that, if they wished, I would render a decision on the disputed evidence. Counsel retained their respective rights to argue, in post-hearing memorandum, the disputed evidence. But, by agreement, counsel did not argue the actual issue.

The deferred ruling involved the question of whether or not the meetings, negotiations, discussions, etc., between the applicant and the department staff pertaining to the mitigative

measures ultimately incorporated into the second application were admissions against the department of the feasibility and appropriateness of the proposal or were, simply, settlement negotiations. Settlement negotiations are not competent evidence and, accordingly, not admissible.

As I shared with counsel, I believe that members of the public are rightfully entitled to approach government servants for reliable information. However, I do not believe that a government servant should be required to answer, "This is off the record," or should be required to think, "If I answer this question, will it be used against me in court?" To create this type of "chilling effect" is a disservice to the public and to the government. However, I believe that there must be some type of accountability between the public and the government.

The applicant argues that the decision in denial on the second application was arbitrary and capricious. The department argues ~~that this~~ denial was consistent with the act and the rule and regulations, despite the meetings, etc., involving mitigation.

Each party presents its version of the factual history of this matter. As I see it, and as I have related to counsel in conferences, the applicant submitted the first application which was pervasive in content, as far as the department was concerned and as far as the Army Corps of Engineers was concerned. The

applicant learned, during the public comment period, that the Army Corps of Engineers would require an individual permit for this proposal. The applicant did not want to meet the requirements of the individual permit, for various reasons, including time constraints and cash expenditures. I also get the impression that the applicant suspected that the department was going to deny the first application because the proposal was overbroad, inter alia.

On behalf of the applicant, Mr. R. James Ferland, essentially testified that [he] wanted to get this project through and was willing to make compromises to do so. Thus, it is my belief, that Mr. Ferland and Mr. Morin agreed to circumvent the usual procedures followed by the department during an application process knowing that a second "scaled-down" project would be forthcoming from the applicant. In my opinion, this was an exercise of sound business judgment on behalf of both parties.

In furtherance of the applicant's purposes, a meeting was scheduled to discuss the mitigative measures. The department prepared and rendered the proposals in mitigation. The applicant, armed with its experts, accepted the mitigation proposals and, some two weeks later, submitted the second application which incorporated such. Some months later, the second denial occurred and, in my opinion, the applicant rightfully cried foul.

Arbitrary and capricious carry very specific legal meanings. I cannot decide this type of issue without more testimony and full briefs -- although I do not really believe that this is what the applicant seeks for me to do in terms of my decision. However, in a general sense (not a legal sense), these terms do apply to the second denial. I simply cannot understand how a thoughtful decisionmaker could ignore the factual history of the first application, the mitigative recommendations, and the second application resulting therefrom.

In light of Mr. Wencek's modified Golet evaluation, perhaps the department representatives believed that the second denial was proper. However, under the circumstances, a form letter denial probably was not an appropriate response. An explanation, at the very least, was required. Accordingly, although I do not and cannot presently find that the second denial was arbitrary and capricious, I do feel that there was bad judgment exercised in handling such.

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

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

1. A prehearing conference was held on November 20, 1989.

2. Public hearings were held on January 11, 1990, January 23, 1990, January 30, 1990, February 6, 1990, and February 22, 1990.

3. All hearings were held at sites as convenient as reasonably possible to the site of the proposed project.

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 Section 42-35-9) and the "Fresh Water Wetlands Act" (R.I.G.L. Section 2-1-18 et. seq.)

5. The Department of Environmental Management has jurisdiction over this application.

6. The applicant seeks approval to alter a fresh water wetland on a parcel of real property commonly known as Village Green South, in the City of East Providence, and described as Tax Assessor's Plat 4-10, Block 1, Lot 1.

7. The applicant proposes to extend the road on existing Village Green South to connect such to the road on existing Village Green North. There will also be utilities installed, particularly street lights.

8. The road is to be constructed through regulated wetlands, buffer zone, and over a stream less than 10 feet in width.

9. On October 16, 1987, the Ferland Corporation filed a formal application to alter a wetland, Application No. 87-0160F.

10. On June 30, 1988, the Department of Environmental Management (the "Department") denied Application No. 87-0160F.

11. A Department review of Application No. 87-0160F included an evaluation of the subject wetland which resulted in the

finding that the wetland was valuable as defined by the Freshwater Wetlands Act, Rhode Island General Laws, section 2-1-22 et. seq. and the Administrative Rules of Practice and Procedure for the Department of Environmental Management. This finding was confirmed by the Department's denial which referenced the wetland as a valuable one.

12. The Ferland Corporation duly appealed the Department's denial of Application No. 87-0160F.

13. On July 12, 1988, representatives of the Ferland Corporation met with Department officials, including Stephen Morin and Martin Wencek to discuss the reasons for the denial.

14. At the July 12, 1988, meeting, Mr. Wencek was directed by his superior, Mr. Morin to bring mitigative recommendations to the Applicant in light of the concerns of the Department identified in the June 30, 1988, denial letter.

15. On July 29, 1988, Village Park Partnership II, an affiliate of Ferland Corporation (hereinafter collectively the "Applicants") submitted the revised plans for Department review. The revised plans incorporated the mitigative recommendations from the July 12, 1988 meeting. In accordance with Department practice, the revised plans were given a new Application No. 88-0709F.

16. On March 13, 1989, the Department denied Application No. 88-0709F.

17. The Department's review of Application No. 88-0709F included in the evaluation of the wetland which resulted in the finding of a unique wetland is defined by the Freshwater Wetlands Act, Rhode Island General Laws Section 2-1-22 et. seg. and the Administrative Rules of Practice and Procedure for the Department of Environmental Management (Rules and Regulations).

18. The Applicant duly appealed the Department's denial of Application No. 88-0709F.

19. The City of East Providence is empowered by State statute and local ordinance to regulate the subdivision of land, Rhode Island General Laws, section 45-23-1 et. seg. and East Providence Revised Ordinance, Chapter 15, section 15-1 et. seg.

20. The City of East Providence on February 17, 1987, in granting the subdivision and approval for the property which is the subject of Application No. 87-0160F and 88-0709F required that the Applicant construct a road to connect the deadend streets which is the subject of and necessitated the Applications.

21. The City's requirement that a connector road be constructed dates back to the original approval prior to the Applicant's ownership of the property in 1971.

22. The Director of Planning for the City of East Providence and the Captain of the Fire Department testified as to the need for the connector road and provided testimonial support in the form of opinions, for such requirement.

23. The Modified Golet Evaluation conducted by the Vanasse Hangen Brustlin, Inc., which included the proper resource categories, including a study area of approximately 11.6 acres in light of the wetland unit constriction which is less than 50 feet, ranks the wetland as moderate and, therefore, it carries neither a valuable nor unique ranking.

24. The Department's ranking of the wetland as a unique and valuable wetland is an error.

25. There is no competent evidence in the record to support the Department's position that the proposal will result in the degradation of a unique wetland. (emphasis provided)

26. There is no competent evidence in the record to support the Department's position that the proposal will result in the reduction of a valuable wetland. (emphasis provided)

27. The proposed project as constructed will have no demonstrated adverse affect on the wildlife that inhabits the wetland.

28. Construction of the proposed project will not reduce the value of a valuable recreational wetland. The property which is the subject matter of the Application is private property, not open to the public, and even if the public were allowed the construction of the road will not prohibit any potential recreational activities as defined in the Rules and Regulations.

29. The proposed alterations will not result in unnecessary and undesirable destruction of freshwater wetlands.

30. The proposed project will not result in the loss, encroachment and permanent alteration of a unique and valuable wetland wildlife habitat.

31. The proposed alteration and project will not reduce the value of a valuable wetland recreational environment.

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

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

1. All of said public hearings were held in appropriate places at locations as conveniently as reasonably possible to the site of the proposed project.

2. All hearings were held in accordance with Rhode Island General Laws, the Administrative Rules for Practice and Procedure for the Department of Environmental Management (the "Department"), Department Rules and Regulations governing the enforcement of the Freshwater Wetlands Act.

3. The denial of Application Number 88-709F to alter a freshwater wetlands is an error as a matter of law.

4. The Department's finding that the proposed alterations will result in unnecessary and undesirable destruction of freshwater wetlands as described in Sections 5.03(b)(c), 6 and 7 of the Rules and Regulations governing the enforcement of the Freshwater Wetlands Act is an error of law.

5. The City of East Providence is empowered to enact ordinances for the prupose of managing the development of the city as evidenced by the subdivision ordinance, to wit, East Providence Revised Ordinances, Chapter 15, Article 1, Section 15.2. The City is authorized to require the connection of deadend streets in connection with its governance of the subdivision of land and the relation of its street and highway systems to such subdivision.

6. The proposed alteration is necessary inasmuch as the City of East Providence requires a connection of the existing deadend streets in accordance with its subdivision ordinance as authorized by law.

7. The Department's finding that the proposed project will result in a loss, encroachment and permanent alteration of a "unique" and "valuable" wetland wildlife habitat (approximately one acre) associated with the subject wetlands is an error.

8. The Department's finding that the proposed alteration will reduce the value of a "valuable" wetland recreational environment reducing and negatively imparting the aesthetic and natural character of the undeveloped wetland areas is an error.

9. The applicant has met its burden of proof pursuant to Rules and Regulations 11.02(b) that the proposal is not inconsistent with the provisions of the Freshwater Wetlands Act in the Rules and Regulations.

THEREFORE, IT IS

O R D E R E D

1. Application No. 88-709F to alter a freshwater wetland is granted, subject to the following:

a. In the installation of any street lights, deflector shields shall be required;

b. The Department shall make recommendations with regard to the planting scheme proposed by the applicant and shall reasonably modify the proposed planting scheme so as to satisfy the Department's concerns as expressed by Mr. Wencek during the course of the hearing. If the applicant and the Deparment shall not be able to agree as to this planting scheme, the parties shall be required to move the hearing officer to reopen the hearing on this issue and for decision and order thereof.

2. I hereby recommend the foregoing Decision to the Director for issuance as a final ORDER.

DATE: April 17, 1990

PATRICIA A. SULLIVAN, in my capacity as ~~Hearing Officer~~

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

ROBERT L. BENDICK, JR.
DIRECTOR, DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT