

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

IN RE: Dennis Grillo  
Freshwater Wetlands Application No. 87-527F

DECISION AND ORDER

This matter is before the Hearing Officer on the application of Dennis Grillo, d/b/a Centennial Realty and Development to alter freshwater wetlands located in the Town of Burrillville, Rhode Island, further described as Burrillville Tax Assessor's Plat Block 10, Lot 36 (hereinafter "Grillo").

The applicant requested permission to alter Freshwater Wetlands by clearing, grading, filling, road construction, drainage discharge, lawn installation and associated work at the above site.

The purpose of said alterations is for creation of a five (5) lot subdivision and installation of Clear River Road with associated drainage discharges for a subdivision to be known as "Walnut Hill Estates".

The application was denied by the Wetlands Section of the Department of Environmental Management on February 23, 1990 and a hearing was requested.

John B. Webster, Esq. represented the applicant and Sandra Calvert, Esq. represented the Division of Groundwater and Freshwater Wetland Protection of the Department of Environmental Management (hereinafter "Division").

The Prehearing conference was held on June 26, 1990 at One Capitol Hill, Providence, Rhode Island 02908. No requests to intervene were received.

At the Pre-Hearing Conference, the following documents were admitted into evidence by agreement as joint exhibits:

JOINT EXHIBITS

JT1. Formal application form filed by Dennis Grillo, d/b/a Centennial Realty and Development received by the Department of Environmental

Management on July 18, 1987.

- JT2. Site plan sent to public notice, and entitled Grading Plan of Walnut Hill Estates, subdivision of land for Centennial Realty and Development, Inc. Burrillville, Rhode Island. The plan set is seven sheets, sheet one revised 1/89, sheet two revised 3/88, and sheet three revised 9/87, and sheets four and five revised 2/89, sheet six revised 10/87 and sheet seven revised 8/88. All sheets received by DEM on March 2, 1989.
- JT3. Official notice regarding public notice period dated November 30, 1989, signed by Brian C. Tefft.
- JT4. Evaluation of application for permission to alter freshwater wetlands, by Charles Horbert, dated January 16, 1989, thirteen pages.
- JT5. A letter dated February 23, 1990 to Dennis Grillo from Brian C. Tefft on behalf of the Department, denying Application Number 87-0527F, three pages.
- JT6. Letter dated March 19, 1990 to Sandra Calvert, legal counsel, from John B. Webster, Esquire, requesting a hearing, two pages.
- JT7. Notice of administrative hearing and pre-hearing conference signed by Dean H. Albro on behalf of the Department, on June 8, 1990, four pages.
- JT8. Resume of Charles Allen Horbert, two pages.
- JT9. Resume of Brian C. Tefft, three pages.
- JT10. Resume of Dean H. Albro, three pages.
- JT11. Resume of Henry Sardelli, four pages.
- JT12. Consists of five letters received by the Department from members of the public during the public notice period.
- JT12A. Letter of Carol C. Lariviere, received on January 13, 1990, one page.
- JT12B. Letter of Netty M. Cotter, received on January 8, 1990, one page.
- JT12C. Letter of Brenda S. Lee, received on January 8, 1990, one page.
- JT12D. Letter of Virginia Cardone, received on January 8, 1990, one page.

- JT12E. Letter of Wilfred P. Normandin, received on January 16, 1990, two pages.
- JT13. Panel Review Sheet of the Department assessing the substantive nature of the letters received during the public comment period as listed in Joint Exhibit 12, two pages.
- JT14. Revised drainage calculations for Walnut Hill Estates, Warner Lane, Burrillville.
- JT15. Notice of Rescheduled Administrative Hearing dated June 28, 1990.
- JT16. Applicant's wetlands issue checklist.
- JT17. Division's Wetlands Issue checklist.
- JT18. Resume of Scott Hobson.
- JT19. Resume of Franklin S. Pond.
- JT20. Resume of John L. Meyer.
- JT21. Deed from Centennial Realty and Development, Inc. to R.I. Boyd, Inc.

APPLICANT'S EXHIBITS

In addition to said Joint Exhibits, the following were admitted as

Applicant's exhibits:

- Applic 1. Rule 5.03 and Rule 7.06 of the Regulations.
- Applic 2. Resume of John Meyer (duplicates JT20).
- Applic 3. R.I.G.L. §11-44-4.
- Applic 4. R.I.G.L. §11-44-26.
- Applic 5. R.I.G.L. §11-44-30.

At the pre-hearing the parties also submitted a list of stipulated facts, which are as follows:

1. The Applicant filed all necessary documents and paid all necessary

fees to be properly before the Hearing Officer in the above entitled matter.

2. The proposed work is located west of Warner Lane, north of East Wallum Lake Road, approximately 700 feet northeast of the intersection of Warner Lane and East Wallum Lake Road, Burrillville, Rhode Island.

3. The site plan subject to this hearing is entitled Grading Plan of Walnut Hill Estate Subdivision of Land for Centennial Realty and Development, Inc., Burrillville, Rhode Island. Plan set of seven sheets, sheet one revised 1/89, sheet two revised 3/88, sheet three revised 9/87, sheets four and five revised 2/89, sheet six revised 10/87 and sheet seven revised 8/88. All sheets received by DEM on March 2, 1989.

4. The formal application 87-0527F was filed on July 3, 1987.

5. The site plan was sent out to public notice on November 30, 1989, commencing a 45-day notice period, which ended on January 14, 1990.

6. The Department received five public comments during the public comment period, which were not deemed substantive by the Department.

7. The Department denied this application on February 23, 1990.

8. The Applicant, through their attorney, John B. Webster, filed a timely request for an adjudicatory hearing on March 22, 1990.

The parties also agreed at the pre-hearing and hearing that the following issues are issues that are in dispute and are to be decided by the Hearing Officer.

1. Whether the proposed alterations will cause unnecessary and/or undesirable destruction of the freshwater wetland pursuant to Section 5.03 (c) (7) of the Rules and Regulations Governing the Enforcement of the

Freshwater Wetlands Act.

2. Whether the proposed alterations will result in the loss, encroachment and permanent alteration of the wetland wildlife habitat.
3. Whether the proposed alterations will cause the undesirable reduction of the wildlife habitat values provided by this wetland.
4. Whether the proposed alterations will reduce the value of a valuable wetland recreational environment pursuant to Section 7.06 (b) of the Rules and Regulations.
5. Whether the proposed alterations will reduce and negatively impact the aesthetic and natural character of the undeveloped wetland and adjacent areas which serve as a buffer zone.

The parties agreed to witness qualifications as follows:

Brian C. Tefft qualified as an expert in wetlands biology.

Franklin S. Pond was qualified as an expert professional engineer.

John L. Meyer was qualified as an expert in water quality.

The Hearing Officer, with the agreement of the parties, has taken administrative notice of the Freshwater Wetlands Act and the Rules and Regulations Governing the Enforcement of the Act (hereinafter "Regulations").

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 Freshwater Wetlands Act and the Rules and Regulations promulgated thereunder.

Public hearings were held on July 16, 1990 at Burrillville Town Hall, Burrillville, Rhode Island and on July 17, 18, 19 at One Capitol Hill,

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Providence, Rhode Island in accordance with the public notice and legal advertisement.

The applicant called several witnesses. The first witness Dennis, Grillo testified that Centennial Realty is the owner of the property which is the subject of the present Application. Initially Mr. Grillo planned thirteen house lots but due to local planning restrictions the plan was reduced to the presently proposed five (5) buildable lots. Under direct questioning Mr. Grillo stated that any plan continuing less than five lots would cause a financial loss for him on this property and would, in his opinion, constitute hardship.

Franklin S. Pond, qualified without objection as an expert professional engineer testified on behalf of the applicant. Mr. Pond explained the development plan for the subject application. The total area is 8.72 acres with five residential lots of varied size proposed. Mr. Pond indicated that the proposed road, Clear River Road, could not be moved in any manner which would take it out of the wetland. Mr. Pond stated that the lower portion of the road could not be moved further west because that property is not owned by the applicant. [Mr. Grillo's testimony indicated that he did own this property at one time but sold it to a Mr. Boyd before he had the wetlands determined]. Clear River Road is approximately five hundred feet (500') in length with a fifty foot (50') radius cul-de-sac. There are public sewer and water services available on the property negating the need for an ISDS system.

John Meyer testified on behalf of the applicant and his qualifications as an expert in water quality were agreed to by the parties. Very briefly

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stated, Mr. Meyer discussed the effects of the proposed project on the Clear River and associated wetlands. It was his uncontradicted testimony that the pollutant loads in stormwater discharged from the proposed project will not have an adverse impact on the freshwater wetlands or the Clear River.

Scott S. Hobson, employed as a Wetlands Wildlife Biologist with Environmental Scientific Corporation, testified on behalf of the applicant. Mr. Hobson was qualified without objection as an expert wetland wildlife biologist. Mr. Hobson testified extensively concerning his familiarity with the proposed project and his evaluation of whether the proposed project would have any adverse impacts on or cause the reduction in value of wetlands wildlife and wetlands recreation associated with the Clear River and its contiguous wetlands. Mr. Hobson offered his opinion on a number of issues. For the sake of brevity in summarizing his testimony, Mr. Hobson concluded that the proposed project would not reduce the value of the wetland wildlife habitat, or the values provided by the Clear River nor reduce the present recreational value of the wetland.

The Division presented two witnesses. Mr. Charles Horbert was qualified over the strong objection of applicant's counsel and after a lengthy voir dire. The qualification of an expert by the hearing officer is discretionary. The standards by which qualifications are measured include evidence of a witness's education, training, employment or prior experiences. State v. Villani, 491 A.2d 976 (R.I. 1985). After careful consideration of Mr. Horbert's education, training and employment experience, the Hearing Officer qualified Mr. Horbert as an expert in wetland ecology, wetland wildlife

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habitat assessment and evaluation, and impact assessment and evaluation upon wetlands.

Mr. Horbert testified at length concerning his evaluation of the subject property per se and the wetland complex of which it forms a part (Clear River complex). The evaluation of the subject property per se as well as the relationship of the subject wetlands to other wetlands are proper factors for consideration in assessing the value of the subject wetland. Downing Corporation v. Bendick, Rescript Opinion C.A. No. PC-88-3513, filed November 16, 1989, cert. denied, June 29, 1990 No. 89-607-M.P. In this case in particular the state's biologist testified that the scope of the wetland evaluation extended beyond the Grillo property by necessity since alteration to the recreational environment on the Grillo property would have an effect on the entire Clear River wetland complex.

Mr. Horbert indicated that the vegetation within the area to be altered presently provides food, water, cover and living space for mammals. Mr. Horbert either observed or detected the presence of woodchucks, deer, opossum, rabbit and microtus. If altered as proposed, this wetland vegetation would be eliminated.

This vegetated wetland area also provides habitat for many species of birds, including game birds. Since the site includes a large variety of vegetation it is especially suited for a variety of bird species, a number of which were actually observed on site. This witness further testified, that the biological wetland contiguous to the Clear River and the 200" riverbank wetland provides cover, food and living habitat for reptiles and amphibians.

With regard to the recreational value of the wetland, the witness found a potential for swimming, fishing, hunting, hiking, education, research, nature study, bird watching, trapping and canoeing. The potential for water dependent recreational activities was determined as part of the Clear River complex of which the Grillo property is a part. Mr. Horbert observed existing hiking trails within the wetland and testified that the site is easily accessible and is presently in a natural and relatively undisturbed state suitable for nature education and research. Ultimately Mr. Horbert opined that the wetland provides a valuable recreational environment.

Brian C. Tefft, Supervisor for Applications for the Division of Groundwater and Freshwater Wetlands was qualified by agreement as an expert in wetlands biology. In the course of his duties Mr. Tefft reviewed all material submitted by the applicant including site plans and environmental assessments and the review prepared by Mr. Horbert. Mr. Tefft subsequently made an independent judgement as to whether or not the application was approvable. Ultimately, Mr. Tefft instructed his technical staff to prepare a denial letter outlining the bases for denial and that letter is in the record as Joint Exhibit 5. Mr. Tefft opined that the proposed alterations constituted an unnecessary and undesirable alteration of a freshwater wetland due to the direct loss of wildlife habitat and the reduction in the value of a valuable recreational environment.

A critical issue is whether the wetland is a valuable recreational environment under Rule 7.06 (b) of the Regulations. Regarding the issue of recreational value, Mr. Hobson opined that based upon his Golet analysis, WET

analysis and field investigation, the subject wetland was not a valuable recreational environment pursuant to Rule 7.06 (b) of the Rules and Regulations. Mr. Hobson testified that on his visits to the site he observed no educational activity, fishing, trapping, hunting, hiking, canoeing, bird-watching, nature photography or any other kind of recreational activity taking place on the property. Mr. Hobson also testified that the Grillo property was "posted" and consequently prohibited public access. With regard to the wetland's classification as "valuable" under Section 5.03 of the Regulations, it was this expert's opinion that the subject wetland scored only a 59.0 on the Golet evaluation thereby placing it in the medium range for diversity and production of wildlife and not the "high" diversity range indicated by Section 7.06 of the Rules. In this case, as in The Downing Corporation, supra, it proper to consider factors other than the numerical system of evaluation. Accordingly, this Hearing Officer has considered the relationship of the jurisdictional wetlands on the Grillo property to the entire Clear River wetland complex and the effects of alteration to the Grillo property wetlands on surrounding habitat and wetlands generally. This Hearing Officer has also considered the WET method employed by applicant's expert in evaluating the wetland's value.

The Division and the Applicant clearly differ on the interpretation and application of Section 7.06 (b) of the Regulations pertaining to "valuable recreational environment". Section 7.06 (b) of the Regulations states in pertinent part:

.....  
(b) Valuable Wetland - the term "valuable wetland"

as used herein shall mean any wetland providing valuable wildlife habitat or valuable recreational environment;

.....  
.....

Valuable Recreational Environment shall mean a relatively natural or undeveloped area which, in its natural state, is capable of supporting recreation by the general public. Typical recreational activities would include, but not be limited to: education, hunting, fishing, trapping, biking, canoeing, ice skating, skiing, birdwatching and nature photography.

The Applicant's interpretation of 7.06 (b) as it relates to the ownership aspect of the Rule is that because the property is privately owned and posted it is not capable of supporting recreation to the general public. Applicant's position is that present private ownership coupled with posting of the property effectively precludes use by the general public for recreational purposes. Accordingly, the site is not a "valuable recreational environment" as defined in 7.06 (b).

The Division's interpretation is nearly the polar opposite. But for physical inaccessibility, the Division's witness testified that virtually all wetlands are recreationally valuable.

The Director, in at least two previous wetland application final decisions, has interpreted and applied Rule 7.06 (b) as it relates to valuable recreational environments. In Alice Wheeler, Application No. 87-0704F issued October 31, 1989, and Moorehead Brothers, Inc., Application No. 88-0932F issued February 21, 1991, the Director has found that private ownership does not preclude the wetland from classification as a valuable recreational environment. To paraphrase Wheeler and Moorehead, if private ownership were

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a basis for preclusion, nearly all wetlands proposed for alteration would be incapable of supporting recreational activities to the general public. The Director has found that private ownership per se is not a bar to classification as a valuable recreational environment under Rule 7.06 (b).

Wheeler and Moorehead do however, apply a standard of reasonable probability to 7.06 (b). In those previous cases reasonableness has been determined after consideration of physical accessibility to the site, the size of the site, the proximity of the site to other wetlands, the recreational potential of the site and whether the site is relatively natural and undisturbed. The present matter is clearly distinguishable from Wheeler and Moorehead.

With regard to accessibility, Mr. Horbert testified that the Grillo property is easily accessible due to its frontage on Warner Lane. The site is easy to traverse and there presently exist hiking trails on the property. Unlike the sites in Wheeler ( $\pm$  10,800 sq. ft) and Moorehead, ( $\pm$  .16 acres or  $\pm$  7,000 sq. ft) this jurisdictional wetland proposed for alteration is much larger in size ( $\pm$  1.12 acres or  $\pm$  48,950 sq. ft). The Subject property is adjacent to the Clear River which is a Class B trout stream and which supports recreational activities. Mr. Horbert clearly outlined the recreational activities which the Grillo property is capable of supporting in its present state (inter alia, education, research, hiking, birdwatching, nature study, trapping). Although Mr. Hobson testified that he observed no such use on his visits to the site, 7.06 (b) does not require that the site be presently supporting such recreational activities but rather that it is capable of

supporting such activities.

Based upon the testimony of Mr. Horbert, including that regarding the presence of hiking trails, proximity to Clear River, presence of game birds and various species of wildlife and avian species establishes that this site is a valuable recreational environment under Rule 7.06 (b).

FINDINGS OF FACT

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

1. The Applicant filed all necessary documents and paid all necessary fees to be properly before the Hearing Officer in the above entitled matter.
2. The proposed work is located west of Warner Lane, north of East Wallum Lake Road, approximately 700 feet northeast of the intersection of Warner Lane and East Wallum Lake Road, Burrillville, Rhode Island.
3. The site plan subject to this hearing is entitled Grading Plan of Walnut Hill Estate Subdivision of Land for Centennial Realty and Development, Inc., Burrillville, Rhode Island. Plan set of seven sheets, sheet one revised 1/89, sheet two revised 3/88, sheet three revised 9/87, sheets four and five revised 2/89, sheet six revised 10/87 and sheet seven revised 8/88. All sheets received by DEM on March 2, 1989.
4. The formal application 87-0527F was filed on July 3, 1987.
5. The site plan was sent out to public notice on November 30, 1989, commencing a 45-day notice period, which ended on January 14, 1990.
6. The Department received five public comments during the public

comment period, which were not deemed substantive by the Department.

7. The Department denied this application on February 23, 1990.

8. The Applicant, through their attorney, John B. Webster, filed a timely request for an adjudicatory hearing on March 22, 1990.

9. A Prehearing Conference was held on June 26, 1990.

10. Public Hearings were held on July 16, 17, 18, 19, 1990.

11. All hearings were held in appropriate places and locations.

12. 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 Section 2-1-18 et seq.) and the Rules of Practice and Procedure of the Administrative Adjudication Division for Environmental Matters.

13. The wetlands proposed to be altered consist of a wooded swamp, its fifty foot (50') perimeter wetland and a portion of the 200" riverbank wetland associated with the Clear River.

14. The purpose of said alterations is for construction of a five (5) lot subdivision and installation of Clear River Road with its associated drainage plans.

15. The physical disturbance to the wetland by the proposed alteration totals approximately 48,950 square feet ( $\pm$  1.12 acres).

16. The pollutant loads in stormwater discharged from the proposed project will not have an adverse impact on the freshwater wetlands of the Clear River.

17. The wetlands located on the Grillo property are part of a larger wetland complex which includes the Clear River.

18. The Clear River is a Class B trout stream and supports various recreational activities.

19. The wetlands on the Grillo property presently provide food, cover, nesting and habitat for rabbit, deer, woodchuck and game birds.

20. The existence of rabbit, deer, woodchuck and game birds is an integral part of the wetland's recreational value for hunting and trapping, education, research and birdwatching.

21. The proposed alterations would cause the direct loss of wildlife habitat.

22. The direct loss of wildlife habitat will cause a reduction in wildlife populations directly attributable to the loss of 1.12 acres of wetland.

23. Loss of wildlife populations (i.e. rabbit, deer, grouse, etc.) directly reduces the recreational value of the wetland.

24. Hiking trails exist on the Grillo property.

25. The Grillo property is easily accessible and presently provides a relatively natural undeveloped area and is adjacent to the Clear River.

26. A large variety of songbirds frequent and utilize the habitat on the Grillo property.

27. The proposed reduction/elimination of wildlife habitat will reduce the numbers and variety of animals in the remaining wetland, therefore the value of the recreational environment, which is dependent upon the presence

and quantity of these species, will be reduced.

28. The open field/upland shrub habitat would be eliminated and as a direct result the educational value of the wetland would be reduced.

CONCLUSIONS OF LAW

Based upon careful review of 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 § 42-35 et seq., the Administrative Rules for Practice and Procedure for the Administrative Adjudication Division for Environmental Matters, DEM Rules and Regulations Governing the Enforcement of the Freshwater Wetland Act.
3. The matter is properly before the Hearing 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 reduce the value of a valuable recreational environment.
6. The proposed alterations will reduce or negatively impact the aesthetic and natural character of an undeveloped wetland and buffer zone.
7. The proposed alterations will cause unnecessary and undesirable destruction of freshwater wetlands pursuant to § 5.03 (c) (7) of the Rules and Regulations.
8. The applicant has not sustained his burden of proof that the application will not cause unnecessary and/or undesirable destruction of a freshwater wetland pursuant to § 5.03 (c) (7).
9. The proposed alterations will result in loss, disturbance, encroachment and permanent alteration of wetland wildlife habitat values associated with the subject wetland area.
10. The proposed alterations are inconsistent with the best public interest and public policy as stated in § 2-1-18 and 2-1-18 of the Rhode Island General Laws and § 1:00 of the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act.

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THEREFORE, IT IS

ORDERED

1. Application No. 87-527F to alter freshwater wetlands be and is hereby DENIED.

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

June 18, 1991, 1991  
Date

Kathleen M. Lanphear  
Kathleen M. Lanphear  
Chief Hearing Officer

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

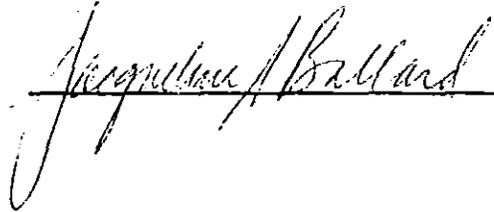
June 20, 1991, 1991  
Date

Louise Durfee  
Louise Durfee  
Director  
Department of Environmental Management

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CERTIFICATION

I hereby certify that I caused a true copy of the within to be forwarded regular mail, postage pre-paid to John Webster, Esq., Adler, Pollock & Sheehan Incorporated, 2300 Hospital Trust Tower, Providence, Rhode Island 02903; and via inter-office mail to Sandra Calvert, Esq., Office of Legal Services, 9 Hayes Street, Providence, Rhode Island 02908; Kendra Beaver, Esq., Office of Legal Services, 9 Hayes Street, Providence, Rhode Island 02908 and Dean Albrow, 291 Promenade Street, Providence, Rhode Island 02903 on this 21<sup>st</sup> day of June, 1991.

  
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The signature is written in cursive and appears to read 'Jacqueline Ballard'.