

STATE OF RHODE ISLAND
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

IN RE: WARREN J. SLOAT, JOSEPH A., LAVENDUSKY,
DAVID W. SLOAT, and NICHOLAS MCCORMICK
FRESHWATER WETLANDS APPLICATION 87-1042F

DECISION and ORDER

This matter is before this Hearing Officer on the application of Warren J. Sloat, Joseph A. Lavendusky, David W. Sloat and Nicholas McCormick to alter freshwater wetlands by constructing a single family dwelling, driveway and installation of public utilities. The new house construction is to be located approximately thirty-two (32) feet of the edge of the Pawtuxet River and within a two hundred (200) foot riverbank wetland.

The location of the proposed alteration is described as southeasterly of Heath Avenue and Fourth Avenue, Assessor's Plat 4/2, Lot 444, Cranston, Rhode Island.

An Administrative hearing concerning the above-cited application was held on May 21, 1990 at Cranston City Hall and May 22, 1990, at the Department of Environmental Management ("DEM") pursuant to Public Notice. The hearing was conducted under the provisions of the Administrative Procedures Act (R.I.G.L. sec 42-35 et seq.) and the Administrative Rules of Practice and Procedure of the Department of Environmental Management.

The applicants were represented by Richard A. Sinapi, Esq., Morneau and Sinapi. The Department was represented by Catherine Robinson Hall, Esq. No requests to intervene were received.

The following exhibits were admitted into the record:

(Joint Exhibits)

J-1	Formal Application
J-2	Site Plan
J-3	Public Notice
J-4	Denial letter (4/26/89)
A-1	Document Depicting Subject Property
P-1	Notice of Adjudicatory Proceeding
P-3	Excerpt of Cranston Zoning Ordinance
P-4	Approval of Cranston Zoning Board
P-5	Certified Approval of Cranston Zoning Board
P-7	Qualifications J. Clifden O'Reilly, Jr.
P-8	Resume of Dr. Mark D. Gould
P-10	Site Photograph
P-11	Site Photograph
P-12	Site Photograph
P-13	Site Photograph
P-14	Site Photograph
DEM-1	Resume of Brian Tefft
DEM-2	Biological Evaluation
DEM-3	Hearing Notice (Amendment)
DEM-4	Biological Inspection Report

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

The applicant presented the testimony of Warren Sloat, J. Clifden O'Reilly, Jr., Mark Gould, PhD. and Carmine P. Asprinio.

Warren Sloat testified on behalf of the applicants. J. Clifden O'Reilly, Jr. testified as an expert in real estate appraisal, land use and value. Dr. Gould, a professor at Roger Williams College, holds a Bachelor of Science degree in Zoology, Master of Science degree in Aquatic Ecology and Nematology and a Doctorate in Biological Sciences all from the University of Rhode Island. He testified as an

expert in ecology and aquatic biology. The applicant also presented testimony of Carmine P. Asprinio, a civil engineer employed by DEM.

The Department presented the testimony of Brian Tefft, applications supervisor with the Division of Groundwater and Freshwater Wetlands. Mr. Tefft holds a Bachelor of Science degree in National Resource Management from the University of Rhode Island and a Master of Science degree from Frostbury State University, Frostbury, Maryland, in Wildlife Management. He testified as an expert in the areas of wetland ecology, wildlife habitat and recreational evaluation assessment and environmental impact assessment.

TRAVEL OF CASE

On July 3, 1988, the applicants filed their formal application with DEM Division of Groundwater and Freshwater Wetlands, Freshwater Wetlands section to alter the wetlands through construction of a single family dwelling (Exhibit J-1). The plan called for construction of a single structure, a driveway and installation of public utilities on an irregular shaped lot permanently altering approximately 2,860 square feet of a 200-foot riverbank wetland.

The application was evaluated by former DEM, biologist, Brian Lang, and recommended for denial on February 24, 1989 (Exhibit DEM-2). DEM denied the application based upon a finding that:

- "1. The proposed alteration will result in undesirable destruction of freshwater wetlands and described by Section 5.03(b)(c)7 of the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands.
2. The proposed project will result in loss, encroachment and permanent alteration of

wetland-wildlife habitat associated with the subject wetlands area. Encroachment from the proposed dwelling construction will occur within 32 feet of the edge of the channel of the Pawtuxet River.

3. The proposed project will reduce the value of a "Valuable" wetland recreational environment and will reduce and negatively impact the aesthetic and natural character of the undeveloped wetland and buffer zone."

Formal notification of the denial was sent to the applicants by certified letter dated April 26, 1989 (Exhibit J-4). In response to the denial of their application a notice of appeal was filed by the applicants on May 8, 1989 (Exhibit P-1).

A pre-hearing conference was held on May 11, 1990 and hearings commenced on May 21, 1990 and Cranston City Hall and concluded May 22, 1990 at the Department of Environmental Management.

Mr. Sloat testified that he and the other named applicants were partners in a joint venture to develop the proposed site (Tr. 5-21-90, p.10). He identified various photographs of the site taken a few days prior to the hearing (Id. p.12). Mr. Sloat testified that the best use of the property would be construction of the proposed single family dwelling which had been approved by the Cranston Zoning Board (Id. p.22).

Mr. Sloat also offered testimony over the objections of counsel for DEM on the efforts the applicants would take to mitigate damage to the wetland. Those changes, from the original site plan, call for the installation of a dry wall to collect roof run-off, a crushed stone driveway to reduce ground run-off and realignment of the hay bale dam to protect the river from run-off (Id. pp. 33-35). In his visits to the site, at least once a week, Mr. Sloat testified that

he has never observed recreational activities such as hunting, fishing, trapping, hiking, canoeing, ice skating or skiing (Id. p.38).

J. Clifden O'Reilly, Jr. was the next witness offered by the applicants. Mr. O'Reilly testified, over objection, as an expert in the area of real estate appraisal, land use and valuation (Id. pp. 50-54).

In his opinion the only use the subject land could be put to is the proposal to build a single family dwelling as filed for by the applicants (Id. pp. 58-59). He testified further that the irregular size of the lot would also limit any recreational usage for the land (Id. p.63). Over objection, Mr. O'Reilly testified that construction of the dwelling would improve the availability of affordable housing in "metropolitan Providence" and would deter the illegal dumping which has heretofore plagued the site (Id. pp. 65-68).

Dr. Gould next testified on behalf of the applicants. He described his observations during his on-site visits. He took note of the major disturbances to the area and the history of dumping along the riverbank (Id. pp. 94-95).

As to wildlife habitat, wetland flora and fauna, Dr. Gould opines that no adverse impact will result from the subject project (Id. p. 99). Nor does he foresee any undesirable destruction, encroachment or permanent alteration of freshwater wetlands or wetlands wildlife habitat (Id. 104-105). Turning to the Pawtuxet River proper, Dr. Gould testified that, in his opinion, people walking, hiking, fishing, trapping and birdwatching would have more of an adverse impact upon the riverbank than the project, as proposed, would have (Id. pp. 113-114).

On cross-examination, Dr. Gould testified that he inventoried plants and animals he encountered at the site (Id. p. 115-116). He also admitted, according to the definitions of freshwater wetlands as set forth in the Rhode Island General Laws, if the project went forward there would be a loss of wetland (Id. 126-127). Dr. Gould also noted the number of plant and wildlife species observed in the wetland area. He noted twenty (20) species of plant, eleven (11) species of birds (Id. pp. 129-130). No mammals were personally observed by Dr. Gould although the bank portion of the river was capable of supporting wildlife (Id. p. 131).

Dr. Gould also acknowledged that construction and human activity at the site would impact the wetlands area (Id. p. 133-135). Finally, Dr. Gould acknowledged that boating or canoeing could be enjoyed on the Pawtuxet River (Id. p. 139).

Carmine P. Asprinio testified that his role in evaluating applications to alter wetlands is limited to the engineering aspects of storm and surface run-off and have nothing to do with biological issues associated with wetlands (Tr. 5-22-90 p. 151).

The Department presented the testimony of Brian Tefft, supervisor for applications within the division of Groundwater and Freshwater Wetlands. He testified that he was responsible for the "management and supervision and implementation of the applications portion of the freshwater wetlands program" (Id. p. 158), that he has performed between 3,000 to 5,000 wildlife habitat and recreational assessments associated with wetlands (Id. pp. 159-160). He was permitted to testify as an expert in the areas of wetlands ecology, wildlife habitat and recreational evaluation and assessment and

environmental impact (Id. pp. 168).

Mr. Tefft described his role in this application as analysis and consultation with the application biologist and other staff members to formulate final recommendations on the application (Id. p. 177). In that capacity, Mr. Tefft testified that he reviewed the Biological Inspection Report prepared by application biologist, Brian Lang (Id. pp. 180-181). Various reports, documents and aerial photographs were reviewed and relied upon during the evaluation process.

Mr. Tefft described the many species of waterfowl, birds and mammals (Id. p. 196 - 197). He testified that the wetland complex has the capacity to provide for a great diversity of wildlife species (Id. p. 207). He opines the proposed alterations for this project would impact the wildlife habitat through construction activities, human habitation and attendant disturbances (Id. p. 208). The loss of this project area would contribute to what Mr. Tefft terms "cumulative loss" to overall wetlands. He opines that construction of this single family dwelling will have an adverse impact on the wildlife habitat and result in a loss, encroachment or permanent alteration of the wetland (Id. p. 216).

As it relates to land use, Mr. Tefft described the recreational use available to the general public such as boating, fishing, nature study and the like (Id. p. 224) in addition to the aesthetic and natural character of the river and adjacent areas. Mr. Tefft testified that construction associated with this project would reduce valuable wetland and result in an undesirable destruction of this freshwater wetland. He concluded that the project, as proposed,

was inconsistent with the act and the rules and regulations.

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

1. On July 3, 1988, Petitioners, Warren J. Sloat, Joseph A. Lavendusky and David W. Sloat, owners of the property located in Cranston, Rhode Island filed their formal application to alter freshwater wetlands in conjunction with their proposal to build a single family dwelling.
2. By a certified letter of April 26, 1989, the division notified the applicants that their application to alter freshwater wetlands had been denied.
3. On May 8, 1989 the applicants duly appealed the denial of their permit to alter freshwater wetlands.
4. Notice of the Pre-Hearing Conference and Public Hearing was published setting forth May 11, 1990 for pre-hearing conference and May 11, 1990 for hearing.
5. Public hearings were held in Cranston City Hall on May 21, 1990 and at the Department of Environmental Management of May 22, 1990. The hearings were held in accordance with Rhode Island General Laws Section 2-1-22, Section 42-35-9, Wetlands Regulation 11.00 and the Administrative Rules of Practice and Procedure For the Department of Environmental Management.
6. The application involves alteration of approximately 2,860 square feet of a 200-foot riverbank wetland in order to construct a single family dwelling.
7. That the proposed project will result in the loss, encroachment and permanent alteration of the wetland wildlife habitat included within the project site.
8. That the wetland in question is a valuable wetland described as a 200-foot riverbank wetland as defined in 2-1-20(g) of R.I.G.L.

9. That the proposed project will reduce the value of a valuable recreational environment and will have a negative impact on the aesthetic and natural character of the undeveloped wetland and buffer zone.
10. That the proposed alteration will result in the undesirable destruction of freshwater wetlands.

CONCLUSION OF LAW

1. Pursuant to Section 11.02 of the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act adopted June, 1981, the applicant bore the burden of proof that the subject proposal is not inconsistent with the Freshwater Wetlands Act and the Regulations adopted thereunder.

2. Notice of the Pre-Hearing Conference and Public Hearing was published in substantial compliance with R.I.G.L. Section 2-1-22.

3. Approval of this application will cause the undesirable destruction of a valuable freshwater wetland and pursuant to Section 5.03(a) of the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act, the application must be denied.

4. The proposed alteration is inconsistent with the public interest and public policy as set forth in Sections 2-1-18 and 2-1-19 of the Freshwater Wetlands Act and Section 1.00 of the Rules and must, therefore, be denied pursuant to Section 5.03(b) of the Rules.

5. The proposed alteration will cause the reduction of the value of a wetland determined to be "valuable" which is capable of supporting recreation by the general public pursuant to Section 7.06(b)(1) of the Rules and must, therefore, be denied pursuant to Section 5.03(c)(7) of the Rules.

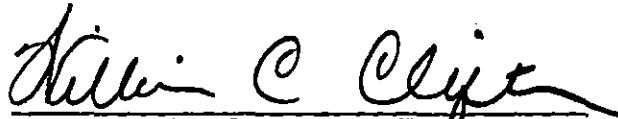
6. Approval of this application to alter a freshwater wetland would not be in the best public interest as set forth in Section 2-1-19 of the Rhode Island General Laws.

Therefore, it is

ORDERED

1. Application 87-0142F to alter freshwater wetlands is denied.

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



William C. Clifton, Esq.
In his capacity
as Hearing Officer

DATED: JULY 23, 1991

Warren Sloat

Entered as a Final Order on this 2ND day of August, 1991.

August 2, 1991
Date

Louise Durfee
Louise Durfee
Director
Department of Environmental Management
9 Hayes Street
Providence, Rhode Island 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within to be forwarded regular mail, postage pre-paid to Richard A. Sinapi, Esq., 1616 Cranston Street, Cranston, Rhode Island 02910; and via inter-office mail to Catherine Robinson Hall, Esq., Office of Legal Services, 9 Hayes Street, Providence, Rhode Island 02903 on this 2nd day of August, 1991.

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