

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

IN RE: ROBERT AND DEBORAH BOOTH
Freshwater Wetlands Application
No. 88-0325F

FINAL DECISION AND ORDER

This matter was heard before the Department of Environmental Management Administrative Adjudication Division for Environmental Matters on January 28, 29, and 30, 1991. A recommended decision and order was rendered on July 17, 1991. After careful review and consideration of the within matter and prior final agency decisions, I find that the Recommended Decision and Order ignores two recent controlling final agency decisions on this issue.

In the Booth recommended Decision and Order the wetland that the applicant proposed to alter is within the one hundred (100') foot riverbank wetland and the fifty (50') foot setback of a wooded swamp. As noted by the hearing officer, in order to gain access to the site applicants sought to construct one-hundred forty-five (145') feet of the driveway within the swamp and associated fifty (50') foot setback and to divert thirty (30') feet of an intermittent stream in order to install a thirty (30") inch culvert and riprap. The testimony of both the Applicants' biologist, Mr. Robert Erickson, and Mr. Brian Tefft, DEM's biological and technical expert demonstrated that the wetland meets the threshold requirements of Section 7.06(b) of the Rules and

Regulations Governing the Enforcement of the Freshwater Wetlands Act (the "Regulations") as a valuable recreational environment. The site is capable of supporting recreational activities such as hiking on the numerous well worn footpaths throughout lot 248, bird watching, nature photography, nature study and research. The hearing officer also properly concluded that the site is clearly capable of supporting recreation by the general public and determined that it is a valuable recreational environment as defined by regulation.

Regulation 5.03 (c)(7) requires the Director to deny a proposed wetland alteration if such a proposal would reduce the value of any "valuable wetland." A valuable wetland is defined as one providing a valuable wildlife habitat or a valuable recreational environment per Regulation 7.06(b). The proposed alteration would permanently alter and/or displace approximately 0.48 acres, or twenty-one thousand (21,000) square feet of a "valuable" wetland and its associated upland buffer. There is no dispute between the parties in this regard. Moreover, in defending his expert opinion that the proposed alterations would not reduce the value of this "valuable" wetland, applicants' witness, Mr. Erickson, relied on proposed mitigation measures which have been specifically rejected in recent and controlling Final Agency Decisions as inadequate to overcome the Regulation 5.03(c)(7) prohibition. See Profile Construction Co., Application No. 89-0555F, Kambiz Karbassi, Application Nos. 89-004F, 89-0048F. Therefore, it was improper for the

hearing officer to rely on Mr. Erickson's opinion that the project would not decrease the value of the existing wildlife habitat based on proposed mitigation measures such as the planting of vegetative screens.

FINDINGS OF FACT

1. The applicants have filed all necessary documents and paid all necessary fees to be properly before the Hearing Officer in the above-entitled matter.

2. The subject site is located west of Cedar Avenue, north of Dalehill Road and east of the intersection of Pegwin Drive and Howland Road at Pole #91, Assessor's Plat 9A, Lot 248, East Greenwich, Rhode Island.

3. The proposed alterations are for the purpose of constructing a driveway and a single family dwelling and installing an individual sewage disposal system.

4. The proposed house site is located within or adjacent to a fifty (50') foot perimeter wetland associated with a wooded swamp wetland and a one hundred (100') foot riverbank wetland associated with a perennial river less than ten (10') feet wide.

5. The application proposes construction of one hundred forty-five (145') feet of the driveway within the swamp and associated fifty (50') foot setback and diverting thirty (30') feet of an intermittent stream in order to install a thirty (30") inch culvert and riprap.

6. The formal application, 88-0325F, was filed on April 14, 1988.

7. The site plan subject of this hearing is entitled "wetlands Submissions Site Plan. Robert and Deborah Booth, Plat 9A, Lot 248, East Greenwich, Rhode Island", sheets 2 of 2, prepared April, 1988, revised July, 1988 (sheet 1) and August, 1988 (sheet 2) and received by the Division on August 26, 1988. 8. The above-entitled site plan was sent to public notice on October 17, 1988. The forty-five day public notice period expired on December 1, 1988.

9. The Division received eight (8) letters of objection during the public notice period which it determined to be substantive.

10. The Division denied this application in a letter dated February 15, 1989 to Robert and Deborah Booth signed by Brian C. Tefft on behalf of the Division.

11. The Applicants, through their engineer, filed a timely request for a hearing on March 3, 1989.

12. The Prehearing Conference was held on January 17, 1991 at One Capitol Hill, Providence, Rhode Island.

13. No requests to intervene were received at or prior to the Prehearing Conference.

14. A public hearing was held on January 28, 1991 at the Environmental Education Center, University of Rhode

Island - Alton Jones Campus, West Greenwich, Rhode Island, and on January 29 and 30, 1991 at One Capitol Hill, Providence, Rhode Island.

15. The Division conducted an ecological field survey and evaluation of the area.

16. The subject wetlands is capable of supporting recreational activity by the general public.

17. The subject wetlands complex is a valuable wetland and meets the threshold requirements of Regulation 7.06(b) providing wildlife habitat and valuable recreational environment.

18. The Applicants are the owners of two (2) adjacent lots, one of which is the subject of this application.

19. This site is capable of supporting recreation by the general public and is a valuable recreational environment.

CONCLUSIONS OF LAW

1. Notice of the hearing and prehearing conference was duly provided in accordance with the Administrative Procedures Act and the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters.

2. In compliance with R. I. Gen. Law § 2-1-22, a public hearing was held on the Alton Jones Campus, West Greenwich, Rhode Island.

3. This matter was properly before the Administrative Adjudication Division pursuant to R. I. Gen. Laws § 2-1-22 and § 42-17.7-2.

4. The subject site contains state jurisdictional wetlands as defined in R. I. Gen. Laws § 2-1-10.

6. The subject wetland is a valuable recreational environment as defined in Section 7.06(b) of the Rules and Regulations.

7. Regulation 5.03(c) requires the director to deny approval of a proposed alteration if, in her opinion, it will cause "random, unnecessary and/or undesirable destruction of freshwater wetlands" which includes a prohibition on reduction of the value of a "valuable" wetland.

8. The final agency decisions and orders of In Re: Kambiz Karbassi, Freshwater Wetlands Applications Nos. 89-0047F and 89-0048F, and Profile Construction Company, Freshwater Application No. 89-0555F, are controlling: The decisions hold that Rule 5.03(c)(7) prohibits the alteration of an undisturbed and naturally vegetated wildlife habitat within either the biological or upland buffer components of a "valuable" wetland.

9. Karbassi and Profile Construction also clearly hold that planting vegetative "screens" and other measures to mitigate against the adverse impacts of or encroachment on a wetland are not sufficient to overcome the clear prohibition set forth in Rule 5.03(c) against destruction and/or displacement of undisturbed and naturally vegetated wetland and/or upland buffer associated with "valuable" wetlands.

10. The proposed alteration will reduce the value of a "valuable" wetland capable of supporting recreation by the general public pursuant to Rule 7.06(b). Such a reduction in the value of that wetland is undesirable and prohibited by Rule 5.03(c)(7).

11. Approval of the proposed alteration will cause undesirable destruction of freshwater wetlands by reducing the value of a valuable wetland.

12. Approval of the proposed alteration is inconsistent with the public interest and public policy set forth in R. I. Gen. Laws §§ 2-1-18, 2-1-19 and Section 1:00 of the Regulations.

13. The Applicants have failed to demonstrate by a clear preponderance of the evidence that the application is consistent with the purposes of the Freshwater Wetlands Act, complies with the wetlands regulations, and is protective of the environment and the health, welfare and general well being of the public.

ORDERED

That the application of Robert and Deborah Booth to alter a Freshwater Wetlands is hereby denied.

This constitutes the Final Agency Decision and Order in this matter.

Date

August 8, 1991

Louise Durfee
LOUISE DURFEE
Director, Department of
Environmental Management

CERTIFICATION

I hereby certify that I caused a true copy of the within Final Decision and Order to Louis T. Robbio, Esquire, Robbio and Nottie, P. O. Box 2595, Providence, Rhode Island 02906 and to Sandra J. Calvert, Esquire, 9 Hayes Street, Providence, RI 02903 via interoffice mail this 9th day of August 1991.

Augustine Ballard