

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

IN RE: Kambiz Karbassi  
Freshwater Wetland Application No. 89-0047F, 89-0048F

DECISION AND ORDER

This matter came before the Administrative Adjudication Hearing Officer as an appeal from the Department of Environmental Management's denial of applicant's request to alter a freshwater wetland. Prospect Hill Farm Associates, owners of the property, had sought approval to build two single family dwellings and driveways within a 4.71 acre freshwater wetland and fifty foot perimeter buffer. These modifications consist of filling, grading, house construction and landscaping on two separate house lots (lots 1A and 2A). This wetland sits within a new suburban housing subdivision of twenty four homes on River Run in Prospect Hill Farms, Middletown, Rhode Island. Large well-maintained homes are situated to the south, west and across the street from the wetland. A three and a half acre mobile home park runs along the back of the site.

Joseph M. Hall represented the applicant. Stephen Burke appeared on behalf of the Division of Groundwater and Freshwater Wetlands and Joseph Palumbo represented the intervener Francis Pimental.

An adjudicatory hearing concerning these applications was conducted on Monday, July 16, 199, at the Middletown Senior Center, 650 Green End Ave., Middletown, Rhode Island, and July 17 and 18, 1990, at the Administration Building, One Capitol Hill, Providence, Rhode Island. A view of the site was taken by the hearing officer and the parties on July 24, 1990. The hearing was conducted pursuant to the Administrative

Procedures Act (R.I.G.L. 42-35 et seq.) and the Administrative Rules of Practice and Procedure of the Department of Environmental Management.

At the pre-hearing conference held July 2, 1990, Mr. Francis Pimental, a mobile home park owner and abutter, filed an appropriate motion requesting to intervene. The motion was granted by the hearing officer without objection from the applicant or DEM. In order to avoid duplicitous testimony and to facilitate a speedy hearing, the hearing officer sua sponte consolidated the two applications into one hearing.

The parties agreed to enter the following thirty-one joint exhibits which were marked and entered as full exhibits on July 2, 1990.

Joint Exhibits

- JT1. Formal Application to alter a Wetland filed on January 3, 1989, No. 89-0047F.
- JT2. Two hundred feet radius map of lot A1 Prospect Hill Farm.
- JT3. Freshwater Wetland Review Sheet dated April 3, 1989.
- JT4. Freshwater Wetland Review Sheet dated August 17, 1989.
- JT5. Certificate of notice on 90-0047F.
- JT6. Evaluation of application to alter a Freshwater Wetland.
- JT7. Denial letter dated January 2, 1989, 89-0047F.
- JT8. Notice of Appeal 89-0047F and 89-0048F dated February 9, 1990.
- JT9. Notice of hearing.
- JT10. Application to alter a Freshwater Wetland 89-0048F
- JT11. Two hundred feet radius map of lot A2 Prospect Hill Farm.
- JT12. Freshwater Wetland Review Sheet received April 6, 1990, 89-0048F.
- JT13. Freshwater Wetland Review Sheet received April 6, 1990, 89-0048F.
- JT14. Certificate of Notice 89-0047F.

- JT15. Evaluation of Application to alter a Freshwater Wetland.
- JT16. Letter of objection from Paul and Maria Sisson.
- JT17. Letter of objection from Paul and Renee Talewsky.
- JT18. Letter of objection from Anthony and Elaine Ruggiero.
- JT19. Letter of objection from Philip and Victoria Sherman.
- JT20. Letter of objection from Steven and Cynthia Kay.
- JT21. Letter of objection from Michael Ennis.
- JT22. Letter of objection from Stephen DeAssentis.
- JT23. Letter of objection from Save the Bay.
- JT24. Letter of objection from the Town of Middletown.
- JT25. Town of Middletown's denial of Application.
- JT26. Letter from Joseph Palumbo to Brian Tefft.
- JT27. Denial letter 89-0048F.
- JT28. Appeal letter dated February 8, 1990 for 89-0048F.
- JT29. Notice of Hearing 89-0048F.
- JT30. Curriculum Vitae of Martin Daniel Wencsek
- JT31. Curriculum Vitae of Brian C. Tefft.

All other exhibits were introduced during the hearing. The applicant presented a colored diagram of lots A1 and A2 showing proposed drainage patterns and house locations relative to the wetland which was admitted and marked as Applicant's full exhibit No. 1, July 16, 1990.

DEM offered the following five exhibits:

- DEM 1 July 17, 1990 Prospect Hill Farms Purpose of Project
- DEM 2 July 17, 1990 Soil Survey of Rhode Island

- DEM 3 July 17, 1990 Aerial map from 1981 depicting the sites and area
- DEM 4 July 18, 1990 Natural Buffer Area Study
- DEM 5 July 18, 1990 Natural Buffer Area Annotated Bibliography.

These exhibits were all admitted in full without objection.

Mr. Pimental, the intervener, presented a video tape depicting rainfall and water-runoff on his property and the adjoining wetland, the resume of Raymond Schwab and two engineering maps showing pre-development area drainage and post development flow conditions on the Pimental property. All these exhibits were admitted without objection and marked intervener's full exhibits, No. 1-4, July 18, 1990.

Prior to the hearing the parties agreed to these stipulations:

1. That the applicant's application to alter a freshwater wetland was denied and a timely notice of appeal was filed.
2. That the matter is properly before the Administrative Adjudication hearing officer pursuant to R.I.G.L. 42-17-1, 42-17-7.2.
3. That the area in question is a wetland as defined in R.I.G.L. 2-1-20.
4. That the area in question is marsh as defined in R.I.G.L. 2-1-20.
5. That the site is north of Prospect Avenue, west of River Run Plat number 120, Part of lot A (subdivides lot A1 and A2) Middletown, Rhode Island.
6. The proposed alteration consists of filling, grading and house construction landscaping within a freshwater marsh and fifty feet perimeter wetland for a single family dwelling and driveway on lot A1 of 9,150 square feet of total impact area (89-0047F) and on lot A2 12,000 square feet of total impact area (89-0048F).

The disputed issues include the Division's rejection of the proposed projects listed in the denial notice (JT 7 and 27) and the Intervener's position. These issues are as follows:

1. Whether the proposed alterations will cause undesirable destruction of freshwater wetlands as described by Section 5.03 (c)(5) and (c)(7) of the Rules and Regulations Governing the Enforcement of Rhode Island Freshwater Wetlands Act.
2. Whether the proposed project will result in loss, encroachment and permanent alteration of a wetland - wildlife habitat (9,150 square feet - application 89-0047 and 12,000 square feet - application 89-0048) associated with the subject wetland area. The subject proposal will cause undesirable reduction of the wildlife habitat values provided by this wetland.
3. Whether the proposed project will reduce the value of a valuable wetland recreational environment 7.06 (b) and will reduce and negatively impact the aesthetic and natural character of the undeveloped wetland and adjacent areas which serve as a buffer zone.
4. Whether the proposed project will reduce the ability of a wetland tributary to a public water supply to remove pollutants from surface water.
5. Whether the proposed alteration is inconsistent with the best public interest and public policy stated in R.I.G.L. 2-1-18 and 2-1-19 and Section 1.00 of the Rules and Regulations Governing the Enforcement of Freshwater Wetlands Act.
6. Whether the proposed alteration will lead to flooding and excessive storm water run off on the intervener's property.

Pursuant to section 11.02 of the Rules and Regulations governing the enforcement of Freshwater Wetlands Act adopted June 1981, the applicant bears the burden of proof by preponderance of the evidence that the subject proposal is not inconsistent with the Freshwater Wetlands Act and the adopted regulations.

In his case-in-chief applicant presented four witnesses. Charles Ficke, partner in Prospect Hill Farm Associates, who testified that this parcel is privately owned, that underground utilities were placed at the site when the other house lots were developed in anticipation of building, the original plans suggested four house sites and these plans were revised to two sites to limit the environmental impact to the area.

Kevin Fetzer, principal biologist for Ecotones, Inc. was the applicant's next witnesses. Mr. Fetzer holds a Bachelor of Science degree in Natural Resources Science from the University of Rhode Island. DEM stipulated that Mr. Fetzer was qualified as a wetland flagger. He was also qualified in the assessment and determination of the impact of such a development on wildlife habitat over DEM's objection.

A registered landscape architect in Rhode Island and Massachusetts, Karen Dupont was qualified to testify as a landscape architect to discuss the planting scheme and mitigation that scheme will have on the proposed project. Ms. Dupont, an employee of Commonwealth engineers, received her Bachelor of Science in landscape design from the University of Rhode Island in 1984. She has taken additional courses in site planning, advanced landscape design, construction, plant design and environmental impact assessment at the University of Rhode Island, Rhode Island School of Design and Harvard Graduate School. Ms. Dupont has previously been employed for Rhode Island Department of Transportation as an assistant landscape architect.

Lastly, Michael Perrault testified. Mr. Perrault received his civil engineering degree from Tufts University and attended the masters degree program at Northeastern University. He is registered as an engineer in Massachusetts, Rhode Island, New Hampshire and the District of Columbia. Presently Mr. Perrault is principal partner in Commonwealth Engineering & Consultants, Inc. His principal job responsibility at Commonwealth Engineers is in the environmental aspects of civil engineering relating to water supply, drainage, waste water disposal and land development. His past experiences include employment as lead engineer to design the sewer and storm water drainage irrigation system for the University of Baghdad and developed site drainage design for the Smithsonian Institute. He has also lectured on storm drainage and storm drainage control. Without objection, Mr. Perrault was qualified as an expert in civil engineering.

Mr. Burke, the Department's attorney, called two witnesses; Martin Wencek, a principal natural resource specialist at the Department of Environmental Management (DEM) and Brian Tefft, supervising biologist for the Division of Groundwater and Freshwater Wetlands. Mr. Wencek has been employed by the wetlands section of the Department for the past ten years. In this capacity he performs advanced biological wetland field work, prepares evaluations and recommendations, supervises and coordinates compliance with the Freshwater Wetlands Act, trains junior personnel and participates in administrative and policy formulation. He graduated from the University of Rhode Island with a Bachelor of Science degree in Resource Development in 1981. Mr. Wencek has authored

publication dealing with wetlands delineation in Rhode Island and has written for various outdoor journals. It was stipulated that Mr. Wencsek was qualified to evaluate wetlands. He was also qualified by the hearing officer as a natural resource specialist expert in evaluating wetland impact assessments.

The Division's next witness, Brian Tefft, was qualified as an expert in wetland evaluation including wildlife, biological and water quality impact. This witness holds a Bachelor of Science in Natural Resource Management from the University of Rhode Island and received a Masters of Science degree in Wildlife Management in 1987 from Frostburg State College, Frostburg, Maryland. As supervising biologist for the wetland division, Mr. Tefft has management and supervisory responsibilities for the state's wetland regulatory programs, supervises advanced field work, technical evaluations and impact assessments. He has also written on wildlife and published a master's thesis on the behavior of the New England cottontail.

Mr. Pimental's attorney, Joseph Palumbo, called Francis Pimental who introduced a video tape which depicted flooding conditions on his property and presented Raymond S. Schwab who was qualified as an expert in civil engineering. Mr. Schwab is president and principal engineer of his own engineering company.

Hearing Summary

Unless specifically mentioned or referred to separately by number this decision and order applies equally to lots 1A and 2A.

The central issue to be resolved in this case is whether the direct encroachment and permanent alteration of the freshwater wetland caused by these two homes can be alleviated by the mitigations proposed by the applicant. It is undisputed that this proposal will cause a disturbance to the wetland. DEM contends this project will cause detrimental modifications to the natural vegetation, soil and wildlife. Applicant contests these assertions and proposes special landscaping, grasses, grading and drainage for the site.

An ecological field study and evaluation of the wetland were conducted by Martin Wencek. Based upon this analysis, Mr. Wencek determined the area to be a valuable recreation and wildlife habitat. He suggested the wetland can sustain such passive recreational activities as hiking, photography, education, trapping, research and birdwatching. Section 7.06 of the Freshwater Wetlands Act defines a valuable recreational area as one which is "capable" of sustaining recreational activities. This term is neither defined or explained in the regulations, thus leaving the value determination of an area to subjective review. In cross-examination, Mr. Wencek conceded that it is extremely rare not to conclude a wetland has recreational value. He could recall only one wetland area in the state he would not attribute any recreational value. The applicant's expert, Kevin Fetzer also testified this wetland in its present state has the ability to provide a

recreational environment (transcript page 62). Since a consensus by the experts exist on this issue, I find this site to be a valuable recreational wetland.

Although Mr. Fetzer agrees this site is a valuable recreational wetland he contends the applicant's proposal will not adversely affect the site. Mr. Wencek concedes the wetland may still be classified as a valuable recreational area if the homes are built, but he disagrees that the recreational value would not be greatly diminished. Mr. Wencek testified that added human activities including noise, children playing, and domestic pets will cause wildlife to vacate the area which reduces its overall recreational importance. Mr. Wencek is a well trained and dedicated professional and as such, I would normally be inclined to give great weight to his testimony. However, in this instance, I can not agree with his hypothesis. The recreational activities he enumerated which define the wetland as valuable, such as hiking, birdwatching, photography, trapping, etc. are no different and cause no more disturbance than the human activities associated with home backyard use, which already exist in this suburban area. Therefore, I find the proposed houses would cause no substantial detriment to the recreational value of this wetland.

To determine if the area was a valuable wildlife habitat, Mr. Wencek employed the use of the revised Wetland-Wildlife evaluation model known as the modified Golet analysis completed on February 14, 1989 (JT 6 & 15). This analysis is a numerical system which determines if the site has high wildlife diversity and productivity. In this particular case,

the Golet system classified the wetland as a shallow marsh and assessed to it a value of fifty-seven. This score is within the moderate range of values but does not raise the wetland to a valuable class.

This model is not the sole criteria for judging the value of a wildlife habitat. DEM Freshwater Wetlands Regulation 7.06 indicates evaluation must include an assessment of soil, ground and surface water and existing plant and animal communities. In the recent case of the Downing Corporation v. Robert L. Bendick, Jr. (Supreme Court No. 89-607mp) the court found that section 7.06 does not restrict evaluation of a wetland to a numerically based rating system. Testimony from Messrs. Fetzer, Wencek and Tefft showed that the area is used by various birds such as passerines, yellow throats, cardinals, finches and redwing hawk. The redwing hawk is a species which needs the marsh to survive. Mr. Wencek has spent considerable time at the site dating back to 1985. (transcript page 241). During his two most recent visits, he observed blackbirds, passerines and a cottontail rabbit which was also documented by Mr. Fetzer in his June 1990 visit. Mr. Wencek over time has observed a red fox, pheasants, pheasant nests, mice and rabbit trails. (transcript page 177).

Based on Mr. Wencek's numerous on-site visits and specific sittings, I find applicant has not met his burden of showing this is not a valuable wildlife habitat.

Applicant also argues the planting scheme proposed will not only mitigate but enhance the existing wildlife habitat. Karen Dupont,

applicant's expert landscape architect developed a planting scheme designed to diffuse noise and produced a feeding and nesting areas for wetland animals. DEM's expert, Mr. Wencek, agrees this planting scheme has some mitigating characteristics (transcript page 233). Ms. Dupont testified, and it was uncontrived, that prior to developing this design she met with Mr. Wencek who suggested a planting scheme be employed in the area and that she used plants which are commonly recommended by DEM (transcript page 96). Ms. Dupont proposes to place forty-two plants and shrubs including green American arborvitae for screening and shelter for nesting birds, winterberry, deciduous holly which can be used as winter food, and high bush blueberries which provide sustenance in late Summer and Fall. These plants are woody stem plants which are important to a wetland area and will be planted at half their eventual height. I found the planting scheme as proposed by the applicant will adequately protect wildlife and is a sufficient screen to mitigate any intrusion into the biological wetland.

Since this area is known to intermittently flood and has a high water table, a great deal of testimony was devoted to storm water runoff, drainage and filtering.

Mr. Pimental's documentary evidence (Intervenors No. 1) and the testimony of civil engineer Raymond Schwab crystallized the serious flooding and surface water problems existing in this development. Originally, this area was agricultural fields which experienced periodic sheet flow flooding (transcript page 84) but there is no question that drainage and surface water runoff problems increased decidedly after the

Prospect Hill Farm subdivision was developed.

As an intervener, Mr. Pimental has the burden of showing an "injury in fact" East Greenwich Yacht Club vs. Coastal Resource Management Council, 376 A2d. 682 (1977). Although I find there is no question Mr. Pimental has a significant and pervasive water problem at his mobile home park which if not caused at least exacerbated by the Prospect Hill Farm development drainage system outfall, the intervener has not sustained his burden of showing how this proposed project will specifically and adversely affect his property.

Applicant contends their planting scheme, grading and drainage proposals for the site will reduce existing surface water run off and help filter pollutants. Michael Perrault, a highly qualified civil engineer, testified about drainage. He gave the opinion that reducing the slope of the area will direct water around the houses and control water run off by making water travel longer over the flattened slope. He believes this plan would not adversely affect the wetland. However, cross examination revealed that this proposal will direct the water down the middle of the two house lots, requiring the wetland to be pushed back twenty feet (transcript page 137). Mr. Perrault further contends the water which runs into River Run, the existing run off area, will be contained by cape cod berms. These berms are specially raised curbing which would need to be maintained in the street and used at the end of the driveways. It became clear as testimony continued that to control erosion and sediment into the wetland optimum conditions are needed. The buildings, grading, loam, turf and berms would have to be carefully

balanced and maintained. Therefore, I can not find that this drainage proposal will have a mitigating effect on the wetland.

Applicant proposes to replace twenty thousand square feet of natural buffer with ten thousand square feet of grass around each house. Ms. Dupont testified that installing turf grasses which have a dense root system in the buffer zone will function as the natural vegetation the grass replaced. She also stated the proposed grasses will slow down water flow and help remove nitrogen (transcript page 61). She further pointed out the planting scheme proposed as a screen between the wetland and houses contain woody stem plants which will take up greater nutrients and water than the vegetation presently existing on the site.

Supervising biologist for the division, Brian Tefft's testimony was diametrically opposed to Ms. Dupont's contentions. He testified that grass can not filter or trap nutrients as well as the naturally vegetated buffer (transcript page 416). He stated that in very wet years, the saturation of the ground can be so great that the surface water would sheet across the grass and directly into the wetland. He felt this was an important consideration and pointed out the soil in the wetland proper was poorly draining stissing soil (DEM exhibit No. 2). He believes without a working buffer, that is one in its natural state, the grading proposal of the applicant will have no effect.

Mr. Tefft and Ms. Dupont were both informative and credible expert witnesses. Before determining whose testimony deserved greater weight, I reviewed the documentary evidence presented by each witness. I found, reading DEM exhibit Nos. 4 and 5, the Natural Buffer Area Study and

Natural Buffer Areas: Annotated Bibliography to be very instructive.

The articles did not specifically state that grasses can not resist flooding or trap sediment, but did support Mr. Tefft's contention that when grasses are submerged, its efficiency to filter declines. Testimony also revealed if grass is short, such as mowed lawn, its ability to trap sediment and affect run off is reduced.

Unquestionably, the wetland buffer is an extremely important and sensitive part of the wetland. Based upon a review of each expert's testimony and the documents they presented I have given greater weight to Mr. Tefft's testimony and find the grass area proposed by the applicant is too extensive to work as an adequate buffer.

Evidence clearly established the development of both these homes causes a significant encroachment into a valuable wetland area. This project will require removing 31,150 square feet of wetland soil and natural vegetation. As designed house lot 1A the smaller of the dwellings, will protrude into the wetland proper 1,850 square feet and encumber 7,300 square feet of buffer totally impacting 9,160 square feet of the area. Lot 2A impacts 12,000 square feet of space absorbing 4,500 square feet of buffer and 7,500 square feet of wetland proper. Over half of this home and the entire garage is situated in the wetland proper. I find the extent of this project will eliminate the natural character of the area.

After carefully considering the applicant's right to utilize its own property and reviewing the public policies expresses in R.I.G.L. 2-1-18 and 2-1-19 and embodied in J.M. Mills Inc. et al. v. Dennis Murphy, Director, Department of Natural Resources 116 RI 54, 352 A2d 661 (1976),

I find this project is not in the best interest as it is contrary to the legislative intent of preserving freshwater wetland.

However, the hearing officer would be favorably disposed to re-open this hearing to consider an amended application at the request of the applicant if the developer could devise a plan which would continue to protect the wetland area, eliminate any encroachment into the wetland proper and reduce the extent of the buffer area impacted to no more than 10,000 square feet.

Kambiz Karbassi

After carefully reviewing all the testimony, exhibits presented, and assessing the credibility of each witness, the hearing officer makes the following specific findings of fact and conclusions of law:

FINDINGS OF FACT

1. Notice of the public hearing for both applications (89-0047F and 89-0048F) were published in the Providence Journal on June 14, 1990 and June 18, 1990 and the Newport Daily News on June 14, 1990 and June 18, 1990.
2. Pre-hearing conferences for both parcels were held on July 2, 1990 at the Administration Building, One Capitol Hill, Providence, Rhode Island.
3. The original pre-hearing on 89-0047F was scheduled for June 25, 1990 and continued to July 2, 1990 at the request of the applicant. The applicant sent all appropriate notices.
4. At the pre-hearing, the hearing officer consolidated the two applications into one hearing.
5. A pre-hearing conference record was issued on July 8, 1990 and made a part of the file.
6. A public hearing was held on both applications on July 16, 1990 at the Senior Citizen Center, 650 Green End Avenue, Middletown, Rhode Island, and July 17 and 18, 1990, at the Administration Building, One Capitol Hill, Providence, Rhode Island.
7. A view of the site was taken on July 24, 1990.
8. The Town of Middletown denied applicant's permission to alter the wetland on October 16, 1989.
9. A formal application to alter the wetland was submitted to DEM by the applicant on January 19, 1989.
10. DEM denied applicant's request to modify the wetland (89-0047F and 89-0048F) on January 22, 1990. (See JT 7 and 27).

11. Applicant made a timely request for an appeal on February 1, 1990 (JT 8) and February 7, 1990.
12. This hearing formally closed the day all stenographer notes were received by the hearing officer September 18, 1990.
13. No brief or memoranda were requested by the hearing officer or submitted by the parties.
14. Pursuant to Rule 11.02 of the regulations, the burden of proof and persuasion is upon the applicant to show by preponderance of the evidence that these proposals are not inconsistent with the provisions of the Freshwater Wetlands Act and the accompanying regulations.
15. Francis Pimental is a valid intervener.
16. Twelve letters objecting to the project were received during the comment period.
17. Three abutters, Mr. Pedro, Mr. Ruggerio and Mrs. Sisson, testified at the hearing and objected to the proposal.
18. Save the Bay testified at the hearing and objected to the project.
19. The site in question is a wetland.
20. The site in question is a marsh.
21. This project will cause an alteration to a freshwater wetland.
22. The wetland area was appropriately flagged.
23. That the total proper wetland area is 4.71 acres and is surrounded by a fifty foot buffer area.
24. This area is privately owned by Prospect Hill Farm Associates.
25. That the alterations requested consist of two single family homes with impervious driveways.
26. Lot 1A (89-0047F) will impact 9,150 feet of total wetland area, 1,850 square feet (.21 acres) of a wetland proper and 7,300 square feet of buffer.
27. Lot 2A (89-0048F) will impact 12,000 square feet of the total wetland (.28 acres), 7,500 square feet of wetland proper and 4,500 square feet of buffer area.
28. DEM conducted an ecological field study and evaluation of the area.

29. This wetland area is capable of supporting recreational activity.
30. The site is a valuable recreational habitat as defined in Freshwater Wetlands Rules and Regulations Section 7.06.
31. Individual homeowner use of the area would not be inconsistent with the area's uses as a recreational facility.
32. That a Golet Analysis was completed.
33. That this analysis did not find the area to be one of high wildlife diversity and production.
34. That the Golet Analysis is not the sole criteria for determining the value of a wildlife habitat.
35. Mammals and birds such as passerines, finches, yellow throats, rabbits, fox and pheasants have been sighted in the wetland over a five year period.
36. These mammals and birds use this area for nesting and as a food source.
37. The area is a valuable wildlife habitat as defined in the rules and regulations governing Freshwater Wetlands Section 7.06.
38. Landscaping proposed by the developer for screening and nesting of mammals and birds adequately protects the wildlife in the biological wetland.
39. That the area is intermittently flooded during rainstorms and periods of high water table.
40. The buffer is biologically significant.
41. The wetland buffer reduces sediment and storm water runoff.
42. Developer proposes to replace 20,000 square feet of natural buffer with turf grass.
43. Each home will be surrounded by 10,000 square feet of grass.
44. The grasses and other plantings will not sufficiently reduce storm water runoff.
45. That the soil on the site consists of pittsdown silt loam in the buffer and stissing silt loam in the wetland proper.
46. Stissing silt loam is poorly drained soil.

47. Both lots are sewered and will not require individual sewage disposal systems.
48. Developer proposes to grade the land slope.
49. Grading the slope will not be sufficient to mitigate area flooding.
50. Proposed drainage plan would direct water around both houses.
51. The proposed drainage plan would push the wetland back twenty feet between the two houses.
52. The proposed project will not reduce the ability of the wetland tributary to filter pollutants from the surface water.
53. The Pimentals' property abuts the wetland.
54. The Pimentals' property is intermittently flooded.
55. The Pimentals have a drainage and surface water problem severely aggravated by the Prospect Hill Farm development.
56. Mr. Pimental did not establish an injury in fact.
57. Project will reduce the size of the freshwater wetland.
58. Building lots 1A and 2A will encroach into the wetland proper.
59. Building lots 1A and 2A as designed cause an unnecessary encroachment into the wetland.
60. That the project is not consistent with the legislative intent in R.I.G.L. 2-1-18 and 2-1-19.
61. That the project will not preserve the integrity of the wetland.
62. The project is not in the best interest of the public.

CONCLUSIONS OF LAW

1. The public hearing was held at Middletown Senior Citizens Center, Middletown, Rhode Island, a location reasonably convenient to the site of the proposed alteration and was in compliance with the statutory requirements regarding the locus of the hearing stated on R.I.G.L. 2-1-22.
2. Publication of the Notice of Hearing was in substantial compliance with R.I.G.L. 2-1-22(b). This statute requires that publication of the Notice of Hearing be in a newspaper of statewide circulation and in a local newspaper.
3. That this matter is properly before the Administrative Adjudication hearing officer as required by R.I.G.L. 42-17-1, 42-17-7.2.
4. That DEM filed a timely denial letter of applicant's request to alter a Freshwater Wetland (89-0047F and 89-0048F).
5. That applicant filed an appropriate and timely request for hearing and paid all necessary fees.
6. That the area in question is a wetland pursuant to R.I.G.L. 2-1-20.
7. This wetland is a valuable recreational environment pursuant to section 7.06 (b) of the Rules and Regulations governing Rhode Island Freshwater Wetlands Act.
8. This wetland is a valuable wildlife habitat pursuant to section 7.06 (b)(1) of the Rules and Regulations governing the enforcement of the Rhode Island Freshwater Wetlands Act.
9. The applicant was unable to sustain his burden that the proposed drainage plan would control storm flowage and flowing in the wetland as defined in Section 7.02 and 7.03 of the Rules and Regulations governing the enforcement of the Rhode Island Freshwater Wetlands Act.
10. The applicant was unable to show the landscaping proposals would mitigate storm water runoff.
11. The applicant was unable to sustain the burden of proof that the proposed project would not reduce the ability of any wetland tributary to a water supply to remove pollutant from the surface water as defined in (503 (c)(5) of the Rules and Regulations governing the enforcement of the Rhode Island Freshwater Wetlands Act.

12. The applicant did not sustain his burden of proof that the proposed alteration would not result in random, unnecessary, or undesirable destruction of a Freshwater Wetland as defined in R.I.G.L. 2-1-20 and Section 5.03 (c) of the Rules and Regulations governing the enforcement of the Rhode Island Freshwater Wetlands Act.
13. The proposal is not consistent with the best public interest and public policy stated in R.I.G.L. 2-1-18 and 2-1-19 and Section 1.00 of the Rules and Regulations governing the Rhode Island Freshwater Wetlands Act.
14. The intervener did not sustain his burden of showing he had an injury in fact.

ORDER

1. Approval of application No. 89-0047F and 89-0048F by Kambiz Karbassi for a permit to alter a freshwater wetland is DENIED.
2. The hearing officer would be favorably disposed to reopening this hearing to consider an amended application which protects the wetland, does not encroach into the wetland proper, and disturbs no more than 10,000 square feet of buffer.
3. The Freshwater Wetland Section is ordered to review an amended application as promptly as possible.

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

9/24/90  
Date

Patricia Byrnes  
Patricia Byrnes  
Administrative Adjudication  
Hearing Officer

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

See attached D+O by

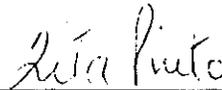
~~4/26/90~~  
Date

~~Michael Annarumo~~ Mal Grant  
Michael Annarumo  
Director, Department of  
Environmental Management

Reused

CERTIFICATION

I hereby certify that on this 28th day of September, 1990 a true and accurate copy of the within DECISION AND ORDER has been mailed first class mail to Joseph M. Hall, Esq., Hall Associates, Old Beach Professional Building, 15 Old Beach Road, Newport, Rhode Island 02840; Joseph R. Palumbo, Jr., Esq., Palumbo, Galvin & Boyle, 294 Valley Road, Middletown, Rhode Island 02840 and sent by inter office mail to Stephen Burke, Esq., Office of Legal Services, 9 Hayes Street, Providence, Rhode Island 02908.

  
\_\_\_\_\_