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

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

FINAL AGENCY DECISION AND ORDER

JURISDICTION

This matter came before the Designated Director pursuant to an assignment of function filed with the Office of Secretary of State by Michael A. Annarummo, Director, R.I. Department of Environmental Management on October 1, 1990. Pursuant to this assignment of function the Designated Director is in receipt of and has reviewed a Recommended Decision and Order prepared by Patricia Byrnes, Esq. as Hearing Officer and which is dated September 21, 1990. The Designated Director is likewise in receipt of and has reviewed the entire documentary and testimonial record of this proceeding as maintained by the Hearing Officer.

This matter is before the Designated Director pursuant to the Freshwater Wetlands Act (the "Act")(Chapter 2-1 and specifically Sec. 2-1-11 of the Rhode Island General Laws, 1956 as amended); the Administrative Procedures Act (Chapter 35 of title 42 of the Rhode Island General Laws and specifically Sec. 42-35-9); the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act (the "Wetland Regulations"); the Administrative Rules of

Practice and Procedure for the Department of Environmental Management filed with the Secretary of State on December 11, 1989; and the Water Quality Regulations for Water Pollution Control filed with the Secretary of State on September 29, 1988.

#### AUTHORITY

The Administrative Hearing Officer is appointed by the Director and charged with the conduct of the administrative hearing and the preparation of a recommended Decision and Order whose substance is to reflect the reasoned application of the Department's rules and regulations to the facts placed in evidence at the hearing. In interpreting applicable rules and regulations the Hearing Officer, however, has a responsibility to give great weight to the meaning, purpose and intent of those rules and regulations as interpreted by the promulgating authority. Gryguc v. Bendick, 510 A.2d, 937,939(1986). Interpretations of such rules and regulations which are inconsistent with the meaning, purpose and/or intent articulated by the promulgating authority must be corrected and as appropriate, modified or overturned by the Director if the law and regulations are to be applied in a fair and consistent manner.

THE DEPARTMENT'S INTERPRETATION  
OF RULES 5.03(c)(7) AND 7.06(b)

At issue is this Department's interpretation of Rule 7.06(b), which sets forth regulatory standards for defining a "valuable [wetland] wildlife habitat" and/or a "valuable [wetland] recreational environment", either of which, in turn, constitutes a "valuable wetland" for regulatory purposes. Also at issue is the related Rule 5.03(c)(7) prohibition against wetlands alterations which result in a reduction in the value of such a "valuable wetland."

The Department's interpretation of these two rules, both generally and specifically as it relates to this application, is based on four essential tenets, each of which was testified to by either or both Martin Wencek and Brian Tefft for the Division of Groundwater and Freshwater Wetlands. These tenets have defined the Department's regulation of "valuable wetlands" in the past and fundamental fairness and regulatory consistency dictates that they be applied to this application as well. They are:

1. Biological wetlands and their associated natural wetland buffers (also referred to as "jurisdictional wetlands") are legally and functionally inseparable components of a single wetland complex; which is to say, they do not function and are consequently not regulated as

unrelated and/or independent features (7/17/90 Tr., pp.238-239, 254, 265-6). A "valuable wetland", defined as such pursuant to Rule 7.06(b), therefore, consists of equally "valuable" and ecologically important biological and jurisdictional (buffer) components. The protection of both such components of a "valuable wetland" from alterations which would reduce their value as either or both wildlife habitat and recreational environment is mandated by Rule 5.03(c)(7).

2. The functional contribution of an undisturbed and naturally vegetated jurisdictional wetland (buffer) to the overall wetland complex of which it is a part and, more particularly, to the biological wetland with which it is associated, is extensive and pervasive. Of paramount importance, however, is the ability of an undisturbed and naturally vegetated jurisdictional wetland (buffer) to deter human encroachment into the biological wetland and thereby protect wetland wildlife species and habitat from the various adverse consequences of such encroachment (7/17/90 Tr., pp. 198-199, 266, 275). Preservation of the jurisdictional wetland's ability to deter encroachment, therefore, has always been and must remain a central objective of the Freshwater Wetlands regulations generally and of Rule 5.03(c)(7) specifically.

3. Lawns are not wetland buffers in any sense of the word and by the very nature of their use, construction and

maintenance cannot be made to function as does a naturally vegetated and undisturbed wetland buffer. By purpose and function a lawn provides an avenue for wetlands encroachment, not an impediment to it; lawn construction requires destruction of naturally occurring vegetation and wildlife habitat as well as filling, grading and other permanent physical alterations of the natural jurisdictional wetland (buffer); and lawn maintenance requires feeding which provides an artificial and undesirable source of nutrient loadings to the wetland environment (7/17/90 Tr., pp. 197-199, 201-202, 205, 244, 267, 274-277, 279-282; 7/18/90 Tr., pp. 24-25). For these various reasons the Department does not interpret Rule 5.03(c)(7) as authorizing the construction of lawns generally, and the proposed lawns specifically, as an acceptable mitigation measure for alterations which will reduce the value of a "valuable wetland" since the lawns themselves contribute to this reduction in wetlands value.

4. The planting of woody vegetation and other native plants along the biological wetland edge as a means of replacing naturally occurring and undisturbed jurisdictional wetland (buffer) wildlife habitat lost to alteration and/or to mitigate against the adverse impacts of or encroachment on the biological wetland associated with such alteration is at best a stop-gap and inadequate measure (7/17/90 Tr., pp. 204-205, 233-236). Such

measures in no way compensate for nor do they justify the permanent alteration of valuable jurisdictional wetland (buffer). For these reasons, where the Department concludes that a proposed alteration is prohibited pursuant to Rule 5.03(c)(7), the proposed installation of a vegetative barrier provides insufficient mitigating value to overcome the regulatory prohibition.

THE HEARING OFFICER'S CONTRARY APPLICATION  
OF RULES 5.03(c)(7) AND 7.06(b)

The Hearing Officer has properly found as fact and concluded as law that the subject wetland is both a "valuable recreational environment" and a "valuable wildlife habitat" pursuant to Rule 7.06(b). By virtue of these findings, although not specifically noted by the Hearing Officer, the subject wetland is, therefore, a "valuable wetland" per Rule 7.06(b) and for purposes of Rule 5.03(c)(7).

The Hearing Officer has also acknowledged that "Unquestionably, the wetland buffer is an extremely important and sensitive part of the wetland". (Recommended Decision and Order, p. 15). Despite having acknowledged the importance and sensitivity of the wetland buffer, however, the Hearing Officer does not reject the premise that a lawn can function as a wetland buffer, but rather concludes simply that this applicant has proposed too much

lawn for it to function adequately as such (Id.; p.15). She then goes on to invite a revised application which among other proposed conditions reduces the conversion of naturally occurring wetland buffer to manicured lawn by half, from 20,000 square feet to 10,000 square feet.

The Hearing Officer's discussion of the testimony of Karen Dupont for the applicant and Brian Tefft for the Division suggests that her willingness to consider the conversion of naturally vegetated wetland buffer to manicured lawn, albeit in reduced but still substantial amounts, is based on two fundamental misapprehensions regarding this Department's interpretation and application of Rules 7.06(b) and 5.03(c)(7). The first of these is the misapprehension that the central issue in measuring the relative "buffering" capacities of naturally occurring and undisturbed wetland buffer versus lawn turf is their comparative abilities to control runoff and intercept waterborne nutrients. The second is the misapprehension that a single band of woody vegetation planted at the interface between a "valuable" biological wetland and a manicured residential lawn is sufficient to deter human encroachment on the biological wetland or mitigate against the loss of habitat associated with lawn construction.

This narrow focus on the runoff control and nutrient entrapment functions of the wetland buffer is inconsistent with the previously described and much broader range of

functions and values the Department attributes to a natural buffer and ignores the many negative impacts the Department finds to be associated with residential lawn construction in such sensitive areas, particularly those associated with "valuable" wetlands complexes. Misplaced reliance on a narrow band of woody plantings along the wetland edge to mitigate against the many negative impacts associated with lawn construction, use and maintenance within a valuable jurisdictional wetland (buffer) is also inconsistent with the Department's interpretation of Rules 7.06(b) and 5.03(c)(7) as testified to by its witnesses and would set a dangerous precedent for further incidental alteration of these extremely sensitive wetland features.

#### FINDINGS OF FACT

1. The Hearing Officer's Findings of Fact No.'s 1-30, 32-37, 39-40, 42-43, and 45-62 as contained in her Recommended Decision and Order are incorporated by reference in this, the Final Agency Decision and Order. In addition, I find as fact the following:
2. Construction of the proposed two single family residences and alterations incidental thereto, including grading, driveways and lawns, will preclude all recreational use of the biological and



jurisdictional wetland within the area of proposed disturbance, being approximately 21,150 square feet of regulated wetland, and will additionally reduce the recreational value and wildlife habitat value of a valuable recreational environment and valuable wildlife habitat in this wetland complex as a whole.

3. Landscaping proposed by the developer for screening and nesting of mammals and birds is proposed to be placed within biological and jurisdictional wetlands where it will displace natural and undisturbed wildlife habitat. It will additionally provide inadequate protection to wildlife inhabiting the biological wetland from the adverse impacts of residential intrusion into the jurisdictional wetland. As a consequence, the value of a valuable wetland wildlife habitat and recreational environment will be reduced.
4. The wetland buffer (jurisdictional wetland) in its natural and undisturbed state reduces sediment and storm water runoff and mitigates against direct and secondary encroachment into the biological wetland by upland residential development. These various beneficial contributions to the ecological integrity of the biological wetland are adversely impacted by permanent alteration and disturbance of the natural vegetation of the wetland buffer such as has been

proposed by this applicant.

5. The grasses and other plantings proposed by the applicant will not sufficiently reduce storm water runoff. The proposed planting of turf grasses as a lawn will additionally destroy existing natural and undisturbed vegetation and wildlife habitat in valuable biological and associated jurisdictional wetlands and will contribute to encroachment on these valuable wetland areas by residential development.

#### CONCLUSIONS OF LAW

1. The Hearing Officer's Conclusions of Law No.'s 1-9 and 11-14 as contained in her Recommended Decision and Order are incorporated by reference in this, the Final Agency Decision and Order. In addition, I conclude as a matter of law the following:
2. This wetland is a valuable wetland pursuant to Rule 7.06(b) by virtue of its being a valuable wildlife habitat and a valuable recreational environment.
3. The applicant was unable to show that his landscaping proposals would not destroy and displace naturally vegetated and valuable biological and/or jurisdictional wetlands, valuable wetland wildlife habitat and a valuable wetland recreational

environment, result in additional human encroachment into said wetland and habitat, and/or mitigate storm water runoff.

4. The applicant was unable to sustain his burden of proof that the proposed project would not reduce the value of a valuable wetland, which is prohibited by Rule 5.03(c)(7).


THEREFORE, it is

ORDERED

1. The Hearing Officer's DENIAL of Applications No. 89-0047F and 89-0048F by Kambiz Karbassi for a permit to alter a freshwater wetland is affirmed.
2. The Hearing Officer retains no further jurisdiction in this matter.
3. The Hearing Officer's order that the Freshwater Wetland Section conduct an expedited review of an amended application is overturned.

11/20/90

Date

  
Malcolm J. Grant In His  
Capacity As Designated  
Director

CERTIFICATION

I hereby certify that on this 20th day of November, 1990 a true and accurate copy of the within Final Agency Decision and Order has been mailed first class mail to Joseph M. Hall, Esq., Hall Associates, 114 Touro Street, Newport, Rhode Island 02840 and sent by inter-office mail to Stephen Burke, Office of Legal Services, 9 Hayes Street, Providence, Rhode Island 02908.

Marilyn Stone

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