

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

IN RE: Robert and Deborah Booth  
Freshwater Wetlands Application No. 88-0325F

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 on an appeal from a decision by the Division of Groundwater and Freshwater Wetlands which denied the applicants permission to alter a freshwater wetland.

Said appeal is properly before the Hearing Officer pursuant to the Freshwater Wetlands Act (R.I.G.L. § 2-1-18 et seq.), statutes governing the Administrative Adjudication Division (R.I.G.L. § 42-17.7-1 et seq.), the Administrative Procedures Act (R.I.G.L. § 42-35-1 et seq.), the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act, March 1981 ("Wetlands Regulations") and the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters. The hearing was conducted in accordance with the above-noted statutes and regulations.

Background

On April 14, 1988 Robert and Deborah Booth filed formal application #88-0325F (JF1) with the Wetlands Section. Applicants sought project approval for construction of a single family residence and I.S.D.S. (septic system) and installation of a driveway in an area which includes a wooded swamp an intermittent stream and perimeter wetlands. The location of the

proposed alteration is west of Cedar Avenue, north of Dalehill Road and west of the intersection of Pegwin Drive and Howland Road at Pole No. 91, Assessor's Plat 9A, Lot 248, in the town of East Greenwich, Rhode Island.

The proposed house site is located on an upland area but partially falls within the 100-foot riverbank wetland and the 50-foot setback of said swamp. In order to gain access to the site, applicants propose constructing 145 feet of the driveway within the swamp and associated 50-foot setback and diverting 30 feet of an intermittent stream in order to install a 30-inch culvert and riprap.

The application, as revised by applicants, was sent to public notice on October 17, 1988, commencing a forty-five day period for public comment. The Division of Groundwater and Freshwater Wetlands ("Division") received eight letters of objection (Full 15, (a) - (h)) which it determined to be substantive pursuant to § 5.05 (b) of the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act.

After evaluation of the wetland and review of the application, the Division issued a denial on February 15, 1989 (JT4). Applicants appealed the Division's decision (JT5).

#### Pre-Hearing Conference

A Pre-Hearing Conference was held on January 17, 1991. Louis F. Robbio appeared on behalf of applicants and Sandra J. Calvert, represented the Division of Groundwater and Freshwater Wetlands. There were no requests to intervene.

The parties identified the following stipulated facts and agreed to the submission of joint exhibits as full exhibits.

STIPULATED STATEMENTS 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 construction and installations are proposed within or adjacent to a 50 foot perimeter wetland associated with a wooded swamp wetland and a 100 foot riverbank wetland associated with a perennial river less than ten feet (10') wide.
5. The formal application, 88-0325F, was filed on April 14, 1988.
6. 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.
7. The above-entitled site plan was sent to public notice on October 17,

1988. The forty-five (45) day public notice period expired on December 1, 1988.

8. 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.

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

JOINT EXHIBITS

JT1 Application 88-0325F dated April 5, 1988.

JT2 Wetlands Submission Site Plan, dated April 1988, revised July 1988.

JT3 DEM Official Notice, dated October 17, 1988.

JT4 Letter to Mr. and Mrs. Booth from Brian C. Tefft, dated February 15, 1989 (Denial letter).

JT5 Letter to Mr. Tefft from the Scott F. Moorehead, dated March 3, 1989 (Request for Hearing).

JT6 Notice of Administrative Hearing and Pre-Hearing Conference, dated December 19, 1990 (Certification dated December 21, 1990).

JT7 Engineering Report on 100 Year Flood Computation and Culvert Design by Scott F. Moorehead, dated December, 1987.

JT8 Resume of Brian C. Tefft.

JT9 Resume of Carmine P. Asprinio. \*

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\* DEM did not call Mr. Asprinio as a witness though he was listed as such.

JT10 ISDS Inspection Report prepared by Vincent A. Mattera, dated April 12, 1990.

JT11 ISDS Inspection Report prepared by Brian Sullivan, dated March 14, 1990.

JT12 Resume of John L. Meyer. \*\*

JT13 Resume of Scott S. Hobson. \*\*\*

JT14 Resume of Scott F. Moorehead.

Other exhibits offered by the parties at the hearing were marked as indicated below:

DEM 1            Eight (8) letters of objection received by DEM during the public  
for ID            notice period which were determined to be substantive.  
(Full 15,  
(a)-(h),  
1/28/91)

DEM 2            Wetland Wildlife/Recreation Evaluation prepared by Brian K. Lang,  
for ID            dated December 12, 1988.  
(Full 16,  
1/28/91)

App 1            Summary Report of Findings prepared by the Environmental  
for ID            Scientific Corporation, April 1990.  
(Full 17,  
1/29/91)

App 2            Test Hole Map.  
for ID

JT18            Resume of Robert Erickson.

Full 19          DEM New Policy Guidance for Permitting Wetland Crossings in  
Rhode Island, dated May 31, 1990.

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\*\*            Mr. Meyer was not called or listed as a witness.

\*\*\*          Mr. Hobson was listed as applicant's witness but was not called to  
testify.

Burden of Proof

Pursuant to Section 11.03 (b) of the Wetlands Regulations as amended in April 1990, applicants bear the burden of proving through a 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 populace.

HEARING SUMMARY

Public hearings were held on January 28, 1991 at the Environmental Education Center, URI - Alton Jones Campus, in the town of West Greenwich and on January 29 and 30, 1991 at the Department of Administration Building, One Capitol Hill, Providence, Rhode Island. Post-Hearing Memoranda were filed by the parties on February 21, 1991.

Applicants presented three (3) witnesses: Scott F. Moorehead, a professional engineer and managing partner of S.F.M. Engineering Associates; Robert Erickson, currently an employee at HMM Associates, Inc., but formerly the senior wetlands wildlife biologist at the Environmental Scientific Corporation; and Robert J. Booth as applicant and owner of the subject property. The Division called Brian C. Tefft, Supervisor for Applications in the Freshwater Wetlands Section, as its biological and technical expert. Counsel stipulated to the expertise of all the expert witnesses.

Witnesses testified that Robert and Deborah Booth are the owners of two lots, lot 277 and the adjacent lot 248, the latter being the subject of this

application. The combined area, which is mostly wetland and buffer, has a line of houses at its southern edge, Howland Road to the west, and several more homes located at its southeastern, northwestern and eastern perimeters. The surrounding area is 40% urban.

While applicants did not stipulate that the 15 acre wetland complex was a valuable wetland, the testimony of Robert Erickson clearly indicates that the wetland meets the threshold requirements of Section 7.06 (b) as a valuable recreational environment. This conclusion was confirmed through the testimony of Brian Tefft.

Though Mr. Erickson's Wetland Evaluation Technique (WET) scored only a medium range on recreation values (transc. 2-27), he admitted that the site was capable of supporting such passive recreational activities as hiking, bird watching, nature photography, education, nature study and research (transc. 2-28, 32, 52, 53). Tefft, based on his site visits in December 1988, May 1990, and January 1991, further identified numerous walking trails and well-worn footpaths throughout lot 248 (transc. 2-134, 183).

Applicants' witnesses did not suggest physical inaccessibility to the site by the public, grounds previously recognized by the Director to determine a site is not a valuable recreational environment. Alice I. Wheeler, App. No. 87-0704F, issued October 31, 1989. Considering the proximity of homes and roadways to this site, it is not unreasonable for DEM to determine that this area has the potential to be used for the above activities by members of the public. Based on the evidence presented, this site is clearly capable of supporting recreation by the general public and is

found to be a valuable recreational environment.

The Division took the position that the proposed alteration was unnecessary because alternative sites were available, suggesting lot 277 or the southwestern portion of lot 248 as possibilities. According to Mr. Moorehead, these locations had been studied and rejected as unfeasible: the upland area in the southwest portion of lot 248 had been ruled out because it would not comply with ISDS Regulations regarding fill and water table elevation (JT10, JT11) and lot 277 was found unsuitable because of the presence of standing water during the spring (transc. 2-9). As a result, the small upland "island" of lot 248 remained the only viable site which could be developed as a single-family residence (transc. 1-87). Compare David Bamber, App. No. 89-0334F, issued March 8, 1991.

Mr. Tefft testified that these rejected sites might become suitable if sewers were to be installed, making the Booth's proposed construction on the upland island an unnecessary one (transc. 2-176). In rebuttal, Moorehead testified to his familiarity with the East Greenwich Sewer Facilities Plan through his participation on the Citizens Advisory Council in its preparation of the Comprehensive Community Plan required by statute, and stated that neither Plan foresaw a further extension of sewers in East Greenwich within the next 20 years (transc. 3-60).

Mr. Tefft may well be correct that an alteration will become unnecessary because at some unknown point in the future the necessity to meet ISDS Regulations is no longer an issue. Although unstated in statute or regulation, it is implicit that an "unnecessary" alteration, or its converse,



meet some standard of reasonableness. I cannot find that it is reasonable to require applicants to wait more than 20 years or to dig up almost a mile of roadway to connect to a public sewer in order to use an alternative site.

The two biologists, Erickson and Tefft, came to different conclusions on the impact of the proposed alteration on the valuable wetland. Mr. Erickson considered the extent of the alteration, the size of the wetland, the proximity to other residences, the precautions taken to minimize impacts, and the mitigation measures proposed and opined that, based on these factors, the project would not decrease the value of the existing wetland wildlife habitat. (transc. 2-33, 34, 36, 37, 72).

Brian Tefft, on the other hand, testified that the project would cause an undesirable reduction in value of a wildlife habitat: alteration of approximately .48 acres (21,000 sf) through installation and construction of a driveway, residence and septic system would cause displacement of wildlife within the physical limits of the disturbance as well as in an even broader area because of the introduction of increased human activity and the presence of domesticated animals (transc. 2-141).

Mr. Tefft conceded under cross examination that he had observed few of the species he identified as likely to be present in this wetland; that squirrels and rabbits would flee the immediate areas under construction and not be killed; that some other animals which might be destroyed, moles and voles for instance, are present in high populations on such a site; and that robins would return to the area (transc. 3-18, 21, 22, 23, 24). Attorney Robbio also elicited that the speculated presence of owls, which Mr. Tefft

had testified were sensitive to barking dogs, running cars, windows and doors slamming and artificial lights, were present near Mr. Tefft's own home (transc. 3-17, 19).

In weighing the testimony of the two experts, existing factors such as the proximity to other residences and the "human encroachment" by the very hikers and birdwatchers which make this wetland valuable, must be considered. The area already invites the presence of domesticated animals and supports substantial human activity, whether by neighbors or by members of the public enjoying the recreational environment. Further, the existing wildlife habitat is protected under the mitigation measures proposed by Mr. Erickson at the hearing. The planting of fruit-bearing shrubs, replanting of presently unvegetated areas, and the establishment of a vegetative screen to enhance the existing buffer area will not only have aesthetic value but, more importantly, they provide food and cover for wildlife, the loss of which was previously a concern of Mr. Tefft's.

The biologists also disputed whether or not the alteration would cause an undesirable destruction of freshwater wetlands through a reduction in the value of a recreational environment. Mr. Erickson testified that the wetland would provide the same recreational functions it now provides and that, as a result, the recreational value would not be adversely affected (transc. 2-32, 71, 76). Mr. Tefft stated that a man-made structure, such as the proposed residence, would detract from the aesthetic and natural character of the area and reduce its recreational value (transc. 3-33).

Both experts have valid points. Certainly the wetland will remain

capable of supporting recreation by the general public but it is not unlikely, for example, that the presence of the Booth residence could detract from the hiking experience in what is an otherwise natural setting. Unfortunately there are no guarantees that the surrounding wetland would continue in its undisturbed natural state even without this application. The owners could build the gaudiest, most disruptive building, machine, or monument right now, without DEM's approval and without the imposition of restrictions, if it were limited to the central portion of the upland area and did not require roadway access or a septic system. That narrow area is outside DEM's statutory jurisdiction.

It should be noted that while the septic system and conjectural drainage and flooding problems were the concern of several letters deemed substantive by the Division (Full 15) and the subject of some public comment, they did not form the bases of the Division's denial and are not issues before this Hearing Officer.

#### Conclusion

The evidence introduced by applicants clearly established that alternative sites were not feasible and that the proposed crossing was the shortest possible route from an upland access road to the upland island area. Applicants also substantiated that, with the proposed mitigation measures, the impact on wildlife would not serve to reduce the value of the wetland. Further, those very activities which make this particular wetland valuable can continue post-construction.

In consideration of all the evidence presented, I find that applicants have sustained their burden of proving through a preponderance of the evidence that, with additional mitigation measures, the proposed alteration is consistent with the policies, intent and purposes of the Act and the Rules and Regulations.

After considering the testimony and documentary evidence of record, I make the following

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 construction and installations are proposed within or adjacent to a 50 foot perimeter wetland associated with a wooded swamp wetland and a 100 foot riverbank wetland associated with a perennial river less than ten feet (10') wide.
5. The formal application, 88-0325F, was filed on April 14, 1988.
6. 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.

7. The above-entitled site plan was sent to public notice on October 17, 1988. The forty-five (45) day public notice period expired on December 1, 1988.

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

9. 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.

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

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

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

13. 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.

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

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

16. The subject wetlands is a valuable recreational environment.

17. The proposed alteration will not cause unnecessary destruction of freshwater wetlands.

18. The proposed alteration will not cause undesirable destruction of freshwater wetlands.

19. The proposed alteration is consistent with the public interest and public policy set forth in R.I.G.L. § 2-1-18 and § 2-1-19.

20. The proposed alteration complies with the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act.

Based on the foregoing facts and the documentary and testimonial evidence of record, I make the following:

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. G.L. § 2-1-22, a public hearing was held on the Alton Jones Campus, West Greenwich, Rhode Island.

3. This matter is properly before the Administrative Adjudication Division pursuant to R.I.G.L. § 2-1-22 and § 42-17.7-2.

4. The subject site contains state jurisdictional wetlands as defined

in R.I.G.L. § 2-1-10.

5. The subject freshwater wetlands is a valuable recreational environment as defined in Section 7.06 (b) of the Rules and Regulations Governing the Enforcement of Freshwater Wetlands Act.

6. Applicants have sustained their burden of proving that the proposed alteration will not cause unnecessary destruction of freshwater wetlands.

7. Applicants have sustained their burden of proving that the proposed alteration will not cause undesirable destruction of freshwater wetlands.

8. Applicants have sustained their burden of proving that the proposed alteration is consistent with the public interest and public policy set forth 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 the Freshwater Wetlands Act.

9. Applicants have sustained their burden of proving that the proposed alteration complies with the Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act.

Wherefore, it is hereby

ORDERED

That the Department of Environmental Management, Freshwater Wetlands Section shall grant a permit to alter a freshwater wetland to applicants subject to the following conditions:

1. Setback areas which were previously disturbed by cutting, shall be replanted with species indicative of the site.
2. The graded slopes of the driveway are to be planted with hydric

shrubs to create a natural transition into the wetland.

3. A vegetative screen of conifers shall be planted along the limits of disturbance to provide a visual and physical barrier between residence and wetland.

4. If DEM finds that further naturalistic plantings or vegetation are needed or that specific ones should be used in the area of the disturbed wetland, then applicants are to comply with the Department's planting scheme. All replanted areas shall be allowed to revert to a natural state.

5. A permanent deed restriction shall be recorded in the Land Evidence Records to restrict use of the adjacent wetlands on the Booth property to the purposes of natural areas for wildlife and recreational environment, suitable for use of the wetland in its natural state.

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

July 17, 1991  
Date

Mary F. McMahon  
Mary F. McMahon  
Hearing Officer

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

\_\_\_\_\_, 1991  
Date

\_\_\_\_\_  
Louise Durfee  
Director  
Department of Environmental Management



Page 1'  
Robert and Deborah Booth

CERTIFICATION

I hereby certify that I caused a true copy of the within to be forwarded regular mail, postage pre-paid to Louis T. Robbio, Esq., Robbio and Nottie, P.O. Box 2595, Providence, Rhode Island 02906 and via inter-office mail to Sandra J. Calvert, Esq., Office of Legal Services, 9 Hayes Street, Providence, Rhode Island 02908 on this \_\_\_\_\_ day of \_\_\_\_\_, 1991.

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